

EXPLANATORY MEMORANDUM TO
THE INSOLVENCY ACT 1986 PART A1 MORATORIUM (ELIGIBILITY OF
PRIVATE REGISTERED PROVIDERS) REGULATIONS 2020

2020 No. 652

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Housing, Communities and Local Government (“the Department”) and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 These Regulations amend the Insolvency Act 1986 to ensure that the provision enabling a moratorium set out in Part A1 of that Act (the “Part A1 moratorium”) does not apply to companies which are private registered providers of social housing. That provision was inserted into the Insolvency Act 1986 by the Corporate Insolvency and Governance Act 2020, but is deemed inappropriate at this time for private registered providers given housing legislation already contains measures to deal with businesses that get into financial difficulty – including a moratorium. A consequential amendment is made to secondary legislation in relation to private registered providers of social housing which are charitable incorporated organisations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument has been brought into force immediately after it was made. This was done prior to the laying of the instrument in Parliament. This instrument is subject to the made affirmative parliamentary procedure by virtue of section 43 of the Corporate Insolvency and Governance Act 2020.
- 3.2 The instrument has been brought into force prior to being laid because the Department views it as essential for the instrument to come into force as soon as practicable after Royal Assent of the Corporate Insolvency and Governance Act 2020. As outlined at paragraphs 2.1, 6.1 and 7.1 of this Memorandum, that Act introduces a new Part A1 moratorium for companies in financial distress. Where a company is a private registered provider of social housing, this would sit alongside the special housing insolvency regime set out in housing legislation, as described below at paragraphs 6.3 – 6.7 and 7.3. The Department takes the view that applying the new Part A1 moratorium to such companies would complicate attempts to rescue them from financial distress and might create uncertainty about the relationship between the two insolvency regimes, with the potential for conflict between them leading to negative consequences for private registered providers and their tenants and stakeholders.
- 3.3 In consequence, this instrument disapplies the Part A1 moratorium as soon as practicable after Royal Assent, subject to approval by resolutions of both Houses of Parliament within 40 days of it being made (as extended by dissolution, prorogation or

prolonged adjournment). The Speakers of both Houses of Parliament were notified by letter on Monday 29 June 2020 that this instrument will come into force before it is laid before Parliament in accordance with section 4(1) of the Statutory Instruments Act 1946. Those letters also contained explanations as to why this was necessary.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.4 The territorial application of this instrument includes Scotland.
- 3.5 The powers under which this instrument is made cover England and Wales and Scotland (see paragraph 20 of Schedule ZA1 to the Insolvency Act 1986, which applies to England and Wales and Scotland, and sections 245 and 347(3) of the Charities Act 2011, which apply to England and Wales) and the territorial application of this instrument is not limited either by those Acts or by the instrument.
- 3.6 The provisions made under the power in paragraph 20 of Schedule ZA1 to the Insolvency Act 1986 apply beyond England to ensure that a company registered in Wales or Scotland, but that is registered as a private registered provider of social housing in England, will not have recourse to the Part A1 moratorium

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales and Scotland, with the exception of Regulation 3 (Amendment of the Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012), which extends to England and Wales.
- 4.2 The territorial application of this instrument is England, Wales and Scotland, with the exception of Regulation 3 (Amendment of the Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012), which applies to England and Wales.

5. European Convention on Human Rights

- 5.1 The Minister of State for Housing, the Rt Hon Christopher Pincher MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Insolvency Act 1986 Part A1 Moratorium (Eligibility of Private Registered Providers) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The Corporate Insolvency and Governance Act 2020 inserted a new Part A1, together with Schedules ZA1 and ZA2, into the Insolvency Act 1986. These insertions introduced provision enabling the new Part A1 moratorium in Great Britain, which will provide eligible companies in financial distress with at least twenty business days of breathing space in which to explore their rescue and restructuring options free from creditor action. During a Part A1 moratorium, insolvency and legal proceedings against the company are restricted in many circumstances, and property disposals and other transactions and payments are subject to special provision.
- 6.2 A Part A1 moratorium is available to “eligible companies”, as defined in paragraph 1 of Schedule ZA1 by reference to a list of specific exclusions within that schedule. The moratorium may also be applied to other legal entities, with or without modification, by secondary legislation. Under paragraph 20 of Schedule ZA1, the Secretary of State

has the power to amend Schedule ZA1 by regulations in order to alter the circumstances in which a company is eligible to obtain a Part A1 moratorium. By virtue of section 43 of the Corporate Insolvency and Governance Act 2020, such regulations can be made using the “made affirmative” procedure described in that provision within six months of the day on which section 43 itself comes into force. The provisions enabling the new Part A1 moratorium, the power to alter which companies are eligible for that moratorium, and section 43 all came into force on the day after the Corporate Insolvency and Governance Act was passed.

- 6.3 Separately, Part 2 Chapter 4 of the Housing and Regeneration Act 2008 and Part 4 Chapter 5 of the Housing and Planning Act 2016 make provision relevant to certain private registered providers of social housing in financial distress. “Private registered provider of social housing” is defined in section 80(3) of the Housing and Regeneration Act 2008. A private registered provider is registered as such in England by the Regulator of Social Housing, but can be registered as a company or as another legal entity in Scotland or Wales. The Part A1 moratorium applies to England, Wales and Scotland, and thus so do the relevant provisions of this statutory instrument which amend Schedule ZA1 Insolvency Act 1986 to exclude companies which are private registered providers from eligibility for the Part A1 moratorium.
- 6.4 Under Chapter 4 of Part 2 of the Housing and Regeneration Act 2008, a “housing moratorium” is triggered in relation to certain private registered providers, including a private registered provider that is a company, if notice is given to the Regulator of Social Housing of a winding up petition, an application for permission to pass a resolution for voluntary winding up, an application for ordinary administration, the appointment of an ordinary administrator or the intention to enforce security (as required under sections 104 – 108 of the Housing and Planning Act 2016). A housing moratorium lasts for 28 days unless extended, cancelled or superseded by a housing administration order under the Housing and Planning Act 2016.
- 6.5 During a housing moratorium, the consent of the Regulator of Social Housing is required for most disposals of the private registered provider’s land, and the procedures to which the notification requirement relates cannot be progressed for 28 days unless the Regulator consents. Under Chapter 4 of Part 2 of the Housing and Regeneration Act 2008, the Regulator of Social Housing may also agree proposals with the private registered provider’s secured creditors for the future ownership and management of its land to ensure that it will be properly managed by a private registered provider in future. The Regulator can provide financial or other assistance to the private registered provider in order to preserve its position pending the agreement of such proposals, and may appoint a manager of the private registered provider.
- 6.6 Chapter 5 of Part 4 of the Housing and Planning Act 2016 provides for a special “housing administration” regime for those private registered providers of social housing which are incorporated as companies, charitable incorporated organisations or registered societies. Under Chapter 5 of Part 4, a court may appoint a “housing administrator” to manage a private registered provider’s business, affairs and property following an application by the Regulator of Social Housing or the Secretary of State. The administrator’s objectives will include keeping the registered provider’s social housing in the regulated housing sector. The insolvency procedures which trigger a housing moratorium are restricted in certain circumstances where a housing administration order has been applied for, and the Secretary of State has further

powers to provide financial support to a private registered provider which is subject to such an order.

- 6.7 Regulation 3 and Schedule 1 of the Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012 (S.I. 2012/3013) apply provisions of the Insolvency Act 1986 to charitable incorporated organisations (“CIOs”) with modifications. Schedule 3 paragraph 49 of the Corporate Insolvency and Governance Act 2020 amended paragraph 1 of Schedule 1 to those Regulations in order to apply Part A1 of the Insolvency Act 1986 to CIOs in general. This general application was subject to an exception in paragraph 1(2A) of Schedule 1 to those Regulations, which stated that Part A1 of the Insolvency Act 1986 did not apply to a CIO which was either a private registered provider of social housing, or a registered social landlord under Part 1 of the Housing Act 1996.
- 6.8 These Regulations insert new provisions into Schedule ZA1 Insolvency Act 1986 to ensure that private registered providers of social housing are not eligible companies for the purposes of the Part A1 moratorium. They are made under the power set out in paragraph 20 of Schedule ZA1 Insolvency Act 2020, using the made affirmative procedure available by virtue of section 43 of that Act. This is the first exercise of these powers.
- 6.9 These Regulations also amend the Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012 by removing a redundant provision at paragraph 1(2A)(a) of Schedule 1 to those Regulations. That provision excludes private registered providers of social housing from the application of Part A1 of the Insolvency Act 1986 to CIOs. It will be redundant once regulation 2 of these Regulations comes into force, since paragraph 1 of Schedule 1 to the Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012 will apply Schedule ZA1 Insolvency Act 1986 as amended by regulation 2 to CIOs, excluding those CIOs which are private registered providers of social housing from eligibility for the Part A1 Insolvency Act 1986 moratorium.

7. Policy background

What is being done and why?

- 7.1 As detailed above, the Part A1 moratorium introduced by the Corporate Insolvency and Governance Act 2020 is intended to give struggling businesses a formal breathing space to pursue a rescue plan.
- 7.2 Financial difficulties in the social housing sector are rare and where they have arisen in the past have been resolved within the sector. Maintaining the sector’s no loss on default record is important because it ensures tenants remain in their homes and allows providers to continue to be able to access cheap borrowing to build more housing.
- 7.3 Housing legislation already provides arrangements for dealing with financial difficulties and insolvencies in private registered providers that are registered societies, companies or CIOs. This includes a housing moratorium that is automatically triggered if certain insolvency-related actions occur (for example, a creditor seeks to enforce security). This provides the Regulator of Social Housing, working with the provider, 28 calendar days to assess the problem, develop a plan for the organisation and agree the solution with creditors. These arrangements were bolstered by the implementation in 2018 of a special administration regime for social

housing put in place by the Housing and Planning Act 2016 to deal with a failure in a larger or more complex provider.

- 7.4 In this context, the Government does not believe that it is appropriate to apply the Part A1 moratorium provisions to private registered providers. The Government considers that the availability of the Part A1 moratorium to private registered providers would adversely impact the existing arrangements already in place by creating uncertainty about the interaction and primacy of the different regimes and is unlikely to offer greater protection for either private registered providers or their tenants. This instrument therefore disapplies the Part A1 moratorium provisions for private registered providers that are companies by excluding them from being an eligible company for the purposes of the Part A1 moratorium.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 There are currently no plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

- 10.1 The moratorium measure contained in the Corporate Insolvency and Governance Act 2020 was consulted on in 2016. The Government published its response in August 2018 announcing its intention to bring forward proposals when parliamentary time allowed. There are over four million companies in the UK and only 322 are private registered providers of social housing in England. The consultation therefore did not consider application to this comparatively small group.
- 10.2 However, the existing arrangements for dealing with insolvency in a private registered provider were last updated when the special administration regime for social housing was introduced through the Housing and Planning Act 2016. Prior to that, the Government carried out extensive informal consultation with representatives from insolvency practitioners, valuers, UK Finance, private registered providers and their main lenders. The same stakeholders were informally consulted on the subsequent associated Regulations.
- 10.3 Given the effect of this instrument is to maintain the existing regulatory framework no formal consultation has taken place. The Regulator of Social Housing is, however, supportive of the approach to be taken and UK Finance's position during the passage of the Corporate Insolvency and Governance Bill was that the moratorium provision should not apply to private registered providers.
- 10.4 The UK Government has engaged with the Scottish and Welsh Governments in relation to its disapplication of the moratorium to private registered providers of social housing in England. Those Governments are considering the application of the moratorium to registered social landlords in their own territories.

11. Guidance

- 11.1 There is no need to produce guidance on this instrument.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A formal Regulatory Impact Assessment (RIA) has not been prepared for this instrument because impacts as a result of this measure are expected to be small based on estimates in the RIA for the Corporate Insolvency and Governance Bill 2020 (rated fit for purpose on 29 May 2020). The RIA estimated a direct net benefit for the Part A1 moratorium measure in the Bill of £0.7million per annum based on 1,000-1,500 companies out of the 4.2 million registered in the UK. Information supplied by the Regulator of Social Housing indicates that there are only 322 private registered providers that are companies so any benefit for this will be far lower than £0.7million per annum, which is well within the de minimis threshold of ±£5m per annum.

13. Regulating small business

- 13.1 The legislation applies to small businesses which are companies and private registered providers of social housing.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to maintain the existing regulatory framework and thereby avoid confusion and complexity.
- 13.3 The basis for the final decision on what action to take to assist small businesses was the need to act quickly to disapply the Part A1 moratorium measure for private registered providers given that that the provisions enabling that moratorium come into effect the day after Royal Assent of the Corporate Insolvency and Governance Act 2020.

14. Monitoring & review

- 14.1 The regulation does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Minister of State for Housing, the Rt Hon Christopher Pincher MP, has made the following statement:

“In my view the inclusion of a review clause in this instrument would be inappropriate. The impacts of the measure will be very small and the effect is simply to maintain the existing regulatory framework for dealing with financial difficulties in a private registered provider of social housing.”

15. Contact

- 15.1 Shayne Coulson at the Ministry of Housing, Communities and Local Government, Telephone: 0303 444 1797 or email: shayne.coulson@communities.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Kerry MacHale, Deputy Director for Affordable Housing Regulation and Investment, at the Ministry of Housing, Communities and Local Government can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt Hon Christopher Pincher MP at the Ministry of Housing, Communities and Local Government can confirm that this Explanatory Memorandum meets the required standard.