

EXPLANATORY MEMORANDUM TO
THE TAKING CONTROL OF GOODS (AMENDMENT) (CORONAVIRUS)
REGULATIONS 2020

2020 No. 1002

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice 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 The purpose of the Taking Control of Goods (Amendment) (Coronavirus) Regulations 2020 (“the instrument”) is to increase the minimum amount of net unpaid rent that must be outstanding before commercial rent arrears recovery (CRAR) may take place, in order to continue to protect tenants of commercial leases with arrears accumulated during the coronavirus period while protections from forfeiture for business tenancies are in place under the Coronavirus Act 2020.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument is subject to the negative resolution procedure and is due to come into force on 29 September, in contravention of the convention that instruments will be laid before Parliament for 21 days before coming into force.
- 3.2 While the Ministry acknowledges the importance of observing the 21-day convention, and sincerely regrets that it was not possible to comply, the breach was necessary in order to ensure that the latest data and evidence from the sector was factored into the decision regarding the extension given the current fast-moving circumstances of the coronavirus pandemic. The Ministry’s view is that these measures need to enter into force on 29 September and cannot be delayed for 21 days in order to ensure continuous protection for commercial tenants with existing rent arrears accrued due to the coronavirus pandemic.

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)

- 3.3 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales only.
- 4.2 The territorial application of this instrument is England and Wales only.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 The Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) (s.77 and s.90) empowers the Lord Chancellor to make regulations to provide for the calculation of the minimum amount of net unpaid rent that must be due in order for CRAR to become exercisable.
- 6.2 Under s.77(3) of TCEA 2007, CRAR is only exercisable if the net unpaid rent is at least the minimum amount immediately before a) the time when the notice of enforcement is given and b) the first time that goods are taken into control after that notice.
- 6.3 The current laws governing the seizure and sale of goods by enforcement agents, the Taking Control of Goods Regulations 2013 (the TCG Regulations 2013), came into force on 6 April 2014.
- 6.4 On 25 March 2020, section 82 of the Coronavirus Act came into force, giving business tenants protection from forfeiture from that day until 30 June 2020 or such other date as may be specified in regulations.
- 6.5 On 25 April 2020, the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (the TCG Amendment Regulations) came into force. Amongst other things, they amended regulation 52 of the TCG Regulations 2013 to increase the minimum amount of net unpaid rent that must be due before CRAR can be used from an amount equivalent to 7 days' to an amount equivalent to 90 days' rent, while protections from forfeiture are in place under section 82 of the Coronavirus Act 2020.
- 6.6 On 24 June 2020, the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (No.2) (Coronavirus) Regulations 2020 (the TCG Amendment No.2 Regulations) came into force. Amongst other things, they amended regulation 52 of the TCG Regulations 2013 to increase the minimum amount of net unpaid rent that must be due before CRAR can be used to 189 days' rent, while protections from forfeiture are in place under section 82 of the Coronavirus Act.
- 6.7 On 29 June 2020, the Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) Regulations 2020 came into force. They amended the end date of the protection from forfeiture under section 82 of the Coronavirus Act to 30 September 2020. On 16 September, the Government will lay secondary legislation to extend the expiry date of section 82 of the Coronavirus Act until 31 December 2020.

7. Policy background

What is being done and why?

- 7.1 The TCG Regulations 2013 were part of a package of reforms, which were intended to respect the rights of debtors by protecting them from the oppressive pursuit of their debts, as well as the rights of creditors by ensuring an effective enforcement system.

- 7.2 Under the TCG Regulations 2013, landlords have the right to seek to recover unpaid rent due under a lease of commercial premises by instructing an enforcement agent and using the Taking Control of Goods procedure. This process is known as commercial rent arrears recovery (CRAR).
- 7.3 Section 82 of the Coronavirus Act 2020, which came into force on 26 March, introduced a moratorium on the ability of landlords of commercial properties to evict tenants by forfeiting the lease due to non-payment of rent in England and Wales, in response to the coronavirus pandemic. This moratorium was due to end on 30 June 2020; however, it was extended by statutory instrument until 30 September 2020. The Government is now extending the duration of these protections until 31 December 2020. This will provide continued support for businesses affected by the coronavirus pandemic and will give businesses and landlords a clear deadline to work to when negotiating rent repayments.
- 7.4 On 25 April 2020, the TCG Amendment Regulations came into force, providing protection from the use of CRAR to recover unpaid rent for commercial tenants with arrears accrued during the coronavirus period. The regulations amended Regulation 52 of the TCG Regulations 2013 to increase the amount of outstanding rent required in order for CRAR to be used from an amount equivalent to 7 days' rent to an amount equivalent to 90 days' rent. This amount was further increased to an amount equivalent to 189 days' rent from 24 June 2020 by the TCG Amendment No. 2 Regulations. The amendment regulations provide for the restriction on the use of CRAR to remain in force while the protection from forfeiture under s.82 of the Coronavirus Act 2020 is in force.
- 7.5 Commercial property rent is paid in advance on set quarter days, with the next rent payments falling due on 29 September and 25 December. In order to ensure the practical effect of the restriction on CRAR is not lost once further rent falls due in September and December and continue to protect tenants with arrears accrued from the March 2020 quarter, this instrument amends Regulation 52 of the TCG Regulations 2013 to increase the minimum amount of rent that must be due before CRAR is used as follows: from when this instrument comes into force on 29 September until 24 December (inclusive), the minimum amount is 276 days' rent. From 25 December, the minimum amount is 366 days' rent. Under section 77(3) of the TCEA 2007, this minimum applies to the amount of unpaid rent that must be due at the points immediately before notice of enforcement is given and immediately before the first time that goods are taken into control following that notice.
- 7.6 This provision will remain in force while the protection from forfeiture under s.82 of the Coronavirus Act 2020 is in force (in other words, until 31 December 2020 as set out under 7.1).
- 7.7 This instrument will come into force on 29 September so that tenants who already have outstanding arrears are protected from that date and also benefit from the increase to the minimum amount of rent that must be due before CRAR can be used.
- 7.8 The Government recognises that the ability to use CRAR is an important part of landlords' right to recover rent which is due to them. However, in view of the substantial challenges facing businesses due to the coronavirus pandemic, use of CRAR at present risks causing a significant and unnecessary risk of disruption to otherwise viable enterprises. Increasing the minimum amount of rent that must be due before CRAR may be used will not only facilitate the faster recovery of businesses,

but also provide additional protection and flexibility in managing their finances. This is in line with measures already taken by the Government to protect business tenancies from forfeiture and to encourage creditors to show forbearance to businesses affected by coronavirus.

- 7.9 The restriction on the use of CRAR and associated measures are not a rent holiday and tenants remain liable for payment of any rent arrears. These measures protect tenants of commercial leases when many have reduced or no income due to restrictions imposed by the Government to prevent the spread of coronavirus. They also provide businesses with breathing space in the current uncertain economic climate and a measure of certainty ahead of quarterly rent periods.

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.

9. Consolidation

- 9.1 None.

10. Consultation outcome

- 10.1 No consultation was conducted.

11. Guidance

- 11.1 The reforms will be drawn to the attention of enforcement agents by correspondence addressed to their trade associations: the High Court Enforcement Officers Association, CIVEA and the Civil Enforcement Agents Association; and to other interested parties including debt advice organisations.

12. Impact

- 12.1 Increasing the amount of rent due before CRAR can be used will impact landlords of commercial premises by delaying their ability to recover rent; however, it does not remove the right to collect this rent in future. The Government recognises that the impact of reduced rental income is causing some financial distress among commercial landlords, however this is a temporary measure and the Government is working to mitigate the impact. Further information is provided in the Explanatory Memorandum published by the Ministry of Housing, Communities and Local Government alongside the instrument extending the forfeiture moratorium. It has not been possible to conduct a detailed economic assessment in view of time constraints.
- 12.2 This measure will benefit tenants of commercial premises, including businesses, charities and voluntary bodies, by protecting them from action to recover rent using CRAR for an extended period of time, providing additional flexibility in managing their finances. This will also ensure otherwise viable businesses are able to continue trading in the long-term, facilitating a faster post-pandemic recovery. Given the ongoing closures and economic challenges, there is a high risk that without extension of these protections beyond September, organisations that would otherwise be viable would fold.
- 12.3 This instrument is exempt from the Small Business, Enterprise and Employment Act 2015 [s22 (4) (d)] as it is to have an effect for a period of less than 12 months and the

costs to business are expected to be minimal. We are monitoring the impact of these measures as part of our assessment of the impact of coronavirus and of the measures taken by Government in response to the crisis as a whole, including other measures taken to protect commercial landlords and tenants.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses. The impact will be temporary, and it will potentially benefit small businesses by providing them breathing space in the current uncertain economic climate, and a measure of certainty ahead of the next quarterly rent period.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses as the expected impact is low and we expect them to be in force for less than 12 months.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is through ongoing monitoring of its use.
- 14.2 The regulation does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 Alex Chalk MP has made the following statement: “It would be disproportionate to include a statutory review clause in this legislation because of the temporary nature of the regulations, which will cease to have effect after 31 December 2020.”

15. Contact

- 15.1 Rachel Tocknell at the Ministry of Justice email: Rachel.Tocknell@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 David Parkin, Deputy Director for Civil Justice and Law, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Parliamentary Under-Secretary of State Alex Chalk MP at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.