

EXPLANATORY MEMORANDUM TO
THE CORPORATE INSOLVENCY AND GOVERNANCE ACT 2020
(CORONAVIRUS) (EARLY TERMINATION OF CERTAIN TEMPORARY
PROVISIONS) REGULATIONS 2020

2020 No. 1033

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy 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 This instrument makes provision to terminate certain temporary provisions introduced by the Corporate Insolvency and Governance Act 2020 (“CIG Act”) and extended by the Corporate Insolvency and Governance (Coronavirus) (Extension of the Relevant Period) Regulations 2020, before the current expiration date of 30 March 2021.
- 2.2 Specifically, Paragraphs 5, 6(1)(b), 7(a), and 8 to 11 of Part 2 of Schedule 4 to the Corporate Insolvency and Governance Act 2020 cease to have effect on 1 October 2020.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The instrument is made using the powers to terminate the temporary provisions contained in paragraph 2 of Schedule 4 to the CIG Act and is subject to the negative procedure. This instrument is the first exercise of these powers.
- 3.2 This instrument is one of two sets of regulations being laid in respect of the extension of the temporary insolvency measures within the CIG Act. The other regulations, the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020 (“the Extension of Time Regulations”) were laid before this instrument. Those regulations extend the duration of certain temporary provisions of the CIG Act, which modify aspects of corporate insolvency law and provide for alternative methods of companies and other bodies holding meetings.
- 3.3 This instrument, and the consequence thereof, may appear anomalous when read together with the Extension of Time Regulations in that they appear to reinstate a time limit that was already in effect but has been extended by the earlier regulations. The effect is, however, as intended. The consequence of the instrument is to re-establish for certain measures the time limit that was originally specified in the legislation; (in effect, carving-out certain provisions from the Extension of Time Regulations). It was always envisaged that bespoke provision may be required to terminate certain of the temporary provisions in Schedule 4. The power is equally exercisable both for the purposes of modifying the time limit that is already in effect as well as carving out certain provision in Schedule 4 from the scope of any extensions.

- 3.4 The instrument makes non-textual modifications to primary legislation. These changes relate to Paragraphs 5, 6(1)(b), 7(a), and 8 to 11 of Part 2 of Schedule 4 of the CIG Act. They confirm that these modifications will cease to have effect on the 1 October 2020.
- 3.5 The Department regrets that the instrument breaches the rule that statutory instruments subject to the negative procedure should normally be laid 21 days before the instrument comes into force. The Department has been aware from the time that the CIG Act received Royal Assent on 25 June 2020 that the temporary provision as originally enacted in that legislation would expire after 30 September 2020 and that, accordingly, regulations would have to be made before that date if any of that temporary provision were to be extended. The decision as to which of the temporary provision to extend and the duration of that extension is necessarily contingent upon a range of factors including the economic impact, and anticipated economic impact, of coronavirus, as well as the nature of the restrictions to which business is subject. Due to the uncertain nature of these various contingencies it was not possible for the Department to anticipate the nature of the legislative provision that would be required; the Department has, however, acted promptly to make this instrument once it considered it had sufficient information to identify the nature of the provision that would be 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)

- 3.6 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, Wales and Scotland.
- 4.2 The territorial application of this instrument is England, Wales and Scotland.

5. European Convention on Human Rights

- 5.1 The Minister for Climate Change and Corporate Responsibility, Lord Callanan, has made the following statement regarding Human Rights:
- “In my view the provisions of the Corporate Insolvency and Governance (Coronavirus) (Early Termination of Certain Temporary Provisions) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The CIG Act makes provision about corporate insolvency as well as changes to the law relating to the governance and regulation of companies and other entities. The provisions concerning corporate governance, and some of the provisions concerning corporate insolvency, are intended to be temporary. These temporary provisions are designed to help UK companies and other entities during the difficult time caused by coronavirus. The CIG Act, as originally enacted, provides that the temporary provision automatically expire after 30 September 2020 unless regulations are made to prolong the period within which some or all of the temporary provisions have effect.

6.2 The Extension of Time Regulations extend the period within which certain of these temporary measures are to have effect. This instrument provides that the extension of time does not apply in respect of certain temporary provision in Schedule 4 to the CIG Act (moratoriums in Great Britain: temporary provision) which would otherwise fall within scope of the Extension of Time Regulations. The temporary provision to which this instrument applies will, accordingly, cease to have effect from the 1 October 2020. This instrument is made under powers given in paragraph 2(1) and (2) of Schedule 4 to the CIG Act which enable the Secretary of State to, by regulations, provide for any provision in Part 2 of that Schedule to cease to have effect at an earlier time than it would otherwise and to make transitional or saving provisions for that purpose. This instrument is the first exercise of these powers.

7. Policy background

What is being done and why?

- 7.1 The CIG Act makes provision about corporate insolvency as well as changes to the law relating to the governance and regulation of companies and other entities. As well as changes to the insolvency law in England, Wales and Scotland that are intended to have ongoing effect the CIG Act also includes provision that is expressly stated to be temporary in nature. The temporary provision is specifically intended to mitigate certain effects of coronavirus and consists of a combination of stand-alone measures as well as targeted modifications to the operation of various insolvency measures introduced by the CIG Act.
- 7.2 As enacted the CIG Act provides that the temporary provision ceases to have effect after 30 September 2020. This period has been extended for certain of these temporary measures by the Extension of Time Regulations. Some of the temporary measures to which the Extension of Time Regulations applies consist of modifications to the operation of the company moratorium procedure introduced by section 1 of the CIG Act. The purpose of these temporary modifications is, in summary, to simplify the process of obtaining a moratorium by removing certain procedural hurdles that would otherwise apply and, in certain respects, reduce the threshold for obtaining a moratorium to reflect the economic uncertainty resulting from the impact of coronavirus.
- 7.3 The instrument carves-out certain of the temporary moratorium provisions that would otherwise fall within scope of the Extension of Time Regulations. Specifically, this instrument terminates modifications to the conditions for having a moratorium which allows the supervising insolvency practitioner to disregard aspects of the company's financial position that relate to coronavirus when considering whether the company is "rescuable" for the purposes of having a moratorium. It also terminates the relaxation of the conditions for extending, monitoring and terminating of the moratorium on the grounds that any worsening of the company's financial position, because of coronavirus, should be disregarded.
- 7.4 As a result of this instrument the lowered threshold will no longer apply, and, when considering whether the company is rescuable, the monitor will not be able to disregard the economic impact of coronavirus. Whilst the Government's plans are to wind down the package of financial support, this will ensure that the requirements for obtaining a moratorium will begin to revert to the original legislative intention. That being only a company deemed to be rescuable by the proposed monitor is able to access a moratorium and therefore minimise the risk of increasing the number of so-called

zombie companies (those that have no real prospect of servicing and repaying their debts). Allowing the rescue criteria to take into account any worsening of the financial position caused by coronavirus could impede restructuring in the wider economy, leading to further damage to creditors or suppliers.

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 Not applicable

10. Consultation outcome

10.1 There has been no public consultation in relation to this instrument, although the Government has engaged informally with a range of stakeholders, including business representative organisations and investor groups on these matters.

11. Guidance

11.1 No guidance is proposed.

12. Impact

12.1 There is no, or no significant impact on business, charities or voluntary bodies.

12.2 There is no impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument as it is out of scope of the better regulation framework, due to the temporary aspects of the measures. The legal effects produced by this instrument will automatically expire within a period of less than 12 months. A full impact assessment was carried out for the CIG Act which considered costs & benefits in a steady state economy:
<https://publications.parliament.uk/pa/bills/cbill/58-01/0128/IA200519.pdf>

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

13.3 The basis for the final decision on what action to take to assist small businesses is that no, or no significant, impact on small business is envisaged as a result of this instrument. Although the instrument does impact on small businesses, the effect of it is to remove temporary modifications to the permanent moratorium regime that exists in insolvency legislation. As it simply returns the moratorium regime back to the normal requirements, there is no significant impact on small businesses.

14. Monitoring & review

14.1 The instrument does not include a statutory review clause. The instrument terminates certain time-limited exceptions to the normal operation of the CIG Act. The power under which the instrument is made cannot subsequently be re-exercised to re-

establish those temporary exceptions and accordingly a statutory review clause would not be appropriate.

15. Contact

- 15.1 Ann Newson at the Insolvency Service (Telephone: 0300 3045798 or email: ann.newson@insolvency.gov.uk) can be contacted with any queries regarding the instrument
- 15.2 Angela Crossley, Director of Strategy and Change at the Insolvency Service can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Minister for Climate Change and Corporate Responsibility, Lord Callanan at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.