

EXPLANATORY MEMORANDUM TO

THE BUSINESS TENANCIES (PROTECTION FROM FORFEITURE: RELEVANT PERIOD) (CORONAVIRUS) (ENGLAND) (NO. 2) REGULATIONS 2020

2020 No. 994

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Housing, Communities and Local Government 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 prevents landlords of commercial properties from being able to evict tenants due to non-payment of rent until 31 December 2020. This is an extension of the moratorium, which currently will end on 30 September 2020, introduced in response to the COVID-19 pandemic.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The laying of this instrument unfortunately breached the made negative statutory instrument 21-day convention. The changing nature of COVID-19 and its impacts meant that the breach was necessary in order to secure cross-government agreement on the expiry date for the extension and to ensure that latest data and evidence from the sector was factored into the decision regarding the extension.

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)

- 3.2 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.
- 4.2 The territorial application of this instrument is England.

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 Section 82 of the Coronavirus Act 2020 (“the Act”) provides that a right of re-entry or forfeiture, under a relevant business tenancy, for non-payment of rent may not be enforced, by action or otherwise, during the relevant period. Right of re-entry is defined

as the right, retained by the grantor at the time land is conveyed, to re-enter and take possession of the land if a certain condition occurs or fails to occur. “Relevant period” is defined in subsection 12 as the period starting with the day after Royal Assent and ending with 30 June 2020 (or such later date as may be specified in regulations). The relevant period was extended to 30 September 2020 by the Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) Regulations 2020 (S.I. 2020/602). These Regulations specify a later date, so the relevant period is further extended to 31 December 2020.

- 6.2 Section 82(2) of the Act provides protection for landlords so that, during the relevant period, no conduct by or on behalf of a landlord, other than giving an express waiver in writing, is to be regarded as waiving a right of re-entry or forfeiture, under a relevant business tenancy, for non-payment of rent.

7. Policy background

What is being done and why?

- 7.1 On 26 March, the Coronavirus Act 2020 received Royal Assent and section 82 of that Act came into force, introducing a three-month moratorium on the ability of landlords of commercial properties to evict tenants by forfeiting the lease due to non-payment of rent. This moratorium was due to end on 30 June 2020; however, it was extended by statutory instrument until 30 September. This new instrument will extend the moratorium until 31 December 2020 to provide continued support for businesses, particularly as many are continuing to struggle with rent payments as they are reopening. It will also give businesses and their landlords a clear deadline to work in terms of negotiating rent repayments.
- 7.2 Commercial rent is paid quarterly in advance. The moratorium is not a rent holiday and tenants remain liable for payment of any rent arrears. It protects tenants of commercial leases when many have reduced or no income due to restrictions imposed by the Government to prevent the spread of coronavirus. The moratorium also protects businesses by providing them with breathing space in the current uncertain economic climate, and a measure of certainty ahead of quarterly rent periods.
- 7.3 As part of the Corporate Insolvency and Governance Act 2020, government introduced a temporary ban on the use of winding-up petitions and statutory demands for rent payments by landlords. A winding-up petition is a legal notice put forward to the court by a creditor. The creditor petitions to the court if they are owed more than £750 and it has not been paid for more than 21 days. The application, in effect, asks the court to liquidate the company as they believe the company is insolvent. Statutory demands for payment are a written formal demand for payment within 21 days. If this payment is not made, the creditor is able to issue a winding-up petition. The temporary ban was introduced as there was evidence of landlords effectively circumventing the policy intent of the moratorium and using aggressive rent recovery tactics (for example, issuing a statutory demand for payment) to pursue unpaid rent. These are currently in place until 30 September; a decision is to be made shortly regarding the extension of these measures.
- 7.4 Similarly, Commercial Rent Arrears Recovery (CRAR) measures were amended. CRAR is a statutory procedure which allows landlords of commercial premises to recover rent arrears by taking control of the tenant's goods and selling them. The amendment extended the amount of outstanding rent required for landlords to use

CRAR firstly from 14 to 90 days in April, then to 190 days in line with the original extension to the moratorium until 30 September 2020. These measures are also to be amended so that the amount of outstanding rent required for landlords to use CRAR is 276 days, providing protection until 31 December 2020, for the same reasons set out above.

- 7.5 While restrictions on trade have been lifted for most sectors, we have seen that turnover is not yet fully recovered, particularly in vulnerable sectors such as hospitality, where at the end of July revenue was only at 30-40% of pre-lockdown rates. Businesses continue to struggle to pay their rent: 35 days after the June rent collection date, the overall rent collection average was 63.3%, down from 73.5% 35 days after the March collection date. Rent collection is particularly low in the leisure and retail sectors, and we anticipate rent collection rates at the September quarter date to be lower than in other years. There is a risk that without extension of the moratorium beyond September, businesses that would otherwise be viable would be unable to pay their rent and so be evicted.
- 7.6 Analysis by government officials suggested that without further intervention, increased business closures and job losses across a range of sectors would be expected.
- 7.7 The government encourages all commercial landlords and tenants to communicate with one another at as early a stage as possible to discuss the repayment of rent during these unprecedented times. The sector-led Code of Practice for landlords and tenants, published in June 2020, was designed to increase negotiations and help to mitigate pressures on landlords.
- 7.8 A recent MHCLG survey found that 69% of landlords had been able to maintain 100% of payments to creditors, with a further 25% reporting they had maintained 50-99% of payments. Of those landlords who had asked lenders for flexibility, lenders had generally been supportive for 53% of landlords. Only 6% stated lenders had not been supportive.
- 7.9 The measures provided for commercial tenants differ to those for the residential sector. Protections for residential tenants go far beyond the possession stay until 20 September. From 29 August 2020 to 31 March 2021, residential landlords are required to give tenants six months' notice of eviction in most cases (with exceptions for anti-social behaviour, six months' plus worth of rent arrears and other serious grounds). Government also confirmed on 10 September that if an area is in a local lockdown that includes a restriction on gathering in homes, evictions will not be enforced by bailiffs.

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 Not applicable.

10. Consultation outcome

- 10.1 There is no statutory requirement for the Department to consult. However, the Department has engaged closely with representative bodies of landlords and commercial tenants through regular meetings with sector bodies to understand the impact of the moratorium and coronavirus in order to inform the government position

on commercial property. The Department has also engaged with officials in the Devolved Administrations to align approaches.

11. Guidance

11.1 Not applicable.

12. Impact

12.1 The impact on business, charities or voluntary bodies is that those who are commercial tenants will continue to be protected from eviction for non-payment of rent until 31 December 2020. Given the ongoing economic challenges and businesses adapting to the end of the job retention scheme, there is a high risk that – without extension of these protections beyond September – businesses that would otherwise be viable would fold. 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 (see 12.3).

12.2 There is no significant impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because of the temporary nature of the moratorium. The instrument is not a regulatory provision under the Better Regulation Framework. However, the Government recognises the current challenges facing commercial landlords and the significant impact recent changes are having on their business models. The Government has worked with the sector to create a Code of Practice that encourages businesses that can pay rent to do so. This will help ensure the impact of the moratorium is mitigated and landlords are treated fairly. We have also worked closely with lenders to ensure that flexibility is being shown to commercial landlords. For example, UK Finance issued a statement on 29 May that confirmed its members' continued support for commercial landlord customers, including amendments to facilities and capital payment holidays. Government has also provided an unprecedented package of support to UK businesses and the commercial real estate sector, through the Coronavirus Business Interruption Loan Scheme, the Coronavirus Large Business Interruption Loan Scheme and the Coronavirus Corporate Financing Facility. These programmes continue to support business lending through grants and government-backed loans and are available to landlords in distress.

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.

14. Monitoring & review

14.1 The regulation does not include a statutory review clause.

15. Contact

15.1 Ben Jones at the Ministry of Housing, Communities and Local Government, Email: ben.jones2@communities.gov.uk can be contacted with any queries regarding the instrument.

- 15.2 Kate O'Neill, Director, Cities and Local Growth Unit at the Ministry of Housing, Communities and Local Government can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kelly Tolhurst MP at the Ministry of Housing, Communities and Local Government can confirm that this Explanatory Memorandum meets the required standard.