

EXPLANATORY MEMORANDUM TO
THE CORPORATE INSOLVENCY AND GOVERNANCE ACT 2020
(CORONAVIRUS) (EXTENSION OF THE RELEVANT PERIOD) (NO. 2)
REGULATIONS 2021

2021 No. 718

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 extend the duration of the temporary measures restricting the use of statutory demands and winding up petitions introduced by the Corporate Insolvency and Governance Act 2020 (c. 12) (CIG Act) beyond their current expiration date of 30 June 2021. This instrument extends these measures to 30 September 2021.

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 power to extend certain temporary provisions in the CIG Act, given by section 41 of that Act.
- 3.2 The power to extend the insolvency measures under section 41(1)(b) CIG Act includes a condition which must be met for the relevant measures to be extended. The condition requires the Secretary of State to consider it reasonable to prolong the relevant period of the temporary measures to mitigate an effect of coronavirus.

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 The territorial application of this instrument includes Scotland.
- 3.4 The power under which this instrument is made cover England, Wales and Scotland (see section 48 CIG Act) and the territorial application of this instrument is not limited by the Act or the instrument.

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 Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) (No. 2) Regulations 2021 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The CIG Act makes both permanent and temporary changes to the corporate insolvency landscape, 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, most recently amended by the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2021 (S.I. 2021/375), provides that some of the temporary insolvency measures, including those restricting the use of statutory demands and issuing of winding up petitions, will automatically expire on 30 June 2021 unless regulations are made to prolong the period within which those provisions have effect.
- 6.2 The power to prolong the duration of the temporary provisions is given by section 41(1)(b) of the CIG Act. The power in section 41 is exercisable in respect of four provisions specified in section 41(2). Section 41(1) provides that the maximum period of any single extension must not exceed 6 months, and the power can only be exercised if the Secretary of State considers it reasonable to mitigate an effect of coronavirus. Section 41(10) provides that regulations made under that section may make different provision for the purposes of different temporary provisions.
- 6.3 This instrument is the fourth exercise of the power given by section 41(1)(b) of the CIG Act. The instrument prolongs the duration of one of the four temporary provisions specified in section 41(2), specifically: Schedule 10 (winding-up petitions: Great Britain). The instrument provides that the measures contained in this Schedule are now to expire on 30 September 2021.

Measures not within the scope of this SI

Small supplier exemption from the termination clause provisions

- 6.4 Section 14 of the CIG Act prohibits the use of termination clauses in contracts for the supply of goods and services where a company enters a relevant insolvency procedure.
- 6.5 Section 15 of the CIG Act provides temporary relief for small companies from the requirement to continue supplying whilst the economy recovers, and trading conditions improve following the conclusion of fiscal measures.
- 6.6 This measure is not being extended and will automatically expire on 30 June 2021.

Wrongful Trading

- 6.7 The suspension of liability for wrongful trading provisions, which are contained in the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020 (S.I. 2020/1349), modify the effect of sections 214 and 246ZB of the Insolvency Act 1986.

- 6.8 This measure will also automatically expire on 30 June 2021, and so help return the insolvency framework to its usual functioning.

7. Policy background

What is being done and why?

- 7.1 This instrument extends two temporary insolvency measures contained in Schedule 10 of the CIG Act, relating to restrictions on the use of statutory demands and winding-up petitions.
- 7.2 The reason for extending the duration of these temporary insolvency measures is to continue to provide protection to companies from aggressive creditor enforcement as the economy opens up and allow business to get back to a more normal way of working. This will enable companies that are viable but cash poor due to recent trading restrictions to make use of the range of tools available to them, to work out a rescue, and non-viable companies that cannot be saved to exit the marketplace with their productive assets recycled to viable businesses.
- 7.3 The extension of these measures means creditors continue not to be able to rely on statutory demands as evidence of a company's inability to pay its debts, and therefore its solvency, to bring winding-up petitions where the company's inability to pay is due to coronavirus. Similarly, where company winding-up petitions are made, a petitioner will have to satisfy the court that the company's inability to pay is not due to coronavirus. It is recognised that this temporary measure is a significant intervention into the normal working of insolvency law, in particular the rights of creditors, therefore the Government will keep these temporary measures under constant review whilst they remain in force.
- 7.4 The measures relating to the exemption of small suppliers from the prohibition of the use of termination clauses in insolvency and the suspension of personal liability for wrongful trading are being allowed to lapse on 30 June 2021 to gradually return the insolvency framework to its normal operation.

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, however Government has engaged informally with a range of stakeholders, including business representative organisations and investor groups on these matters.

11. Guidance

- 11.1 The Insolvency Service issues regular bulletins to interested parties; these will be used to raise awareness of the further extension at the time of laying this instrument.

12. Impact

- 12.1 There will be a positive impact on all businesses, charities or voluntary bodies that may be subject to a winding-up petition due to their inability to pay debts as a result of coronavirus, by giving essential breathing space in order to negotiate with their creditors or seek a rescue plan, or both. There will also be an adverse impact on those creditor businesses that have outstanding debts owed by other businesses as they will temporarily be unable to present a winding up petition unless they are able to demonstrate that those debts are not coronavirus related and this temporary interference with their rights to enforce their debts may increase their risks when doing business. However, the Government assesses this temporary rebalancing of risk as an appropriate intervention, alongside the Government's wider fiscal support and other regulatory interventions.
- 12.2 The impact on the public sector falls on public sector creditors such as HMRC and local authorities that use winding up petitions to enforce national and local taxation and other related debts. However, the Government has assessed that any impact is an appropriate temporary intervention alongside with the Government's wider interventions.
- 12.3 An impact assessment has not been prepared for this instrument as it falls under the Civil Contingencies Exclusion and the administrative requirement to account for the impact of the measures on the Business Impact Target required by the better regulation framework will be done at the appropriate time. 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 the regulatory burdens on small businesses though it is expected that smaller sized businesses are more likely to benefit from the restrictions this instrument temporarily imposes.
- 13.3 The basis for the final decision on what action to take to assist small businesses is that the instrument is itself a temporary relaxation, or removal, of requirements that would otherwise apply under legislation.

14. Monitoring & review

- 14.1 The instrument does not include a statutory review clause; however, the Government will continue to monitor the need for these measures. The legal effect of the provisions in this instrument will automatically expire on the date that is specified in the instrument itself. At the time that the provisions are due to expire it will be necessary to review whether the provision made by this instrument continues to be necessary and whether to re-exercise the power so as to further prolong the duration of the temporary provision.

15. Contact

- 15.1 Louise Chester at the Insolvency Service (Telephone: 0300 304 8357 or email: louise.chester@insolvency.gov.uk) can answer questions about these regulations.
- 15.2 Angela Crossley, Director of Strategy, Policy and Analysis 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.