

**EXPLANATORY MEMORANDUM TO**

**THE TAKING CONTROL OF GOODS AND CERTIFICATION OF ENFORCEMENT AGENTS (AMENDMENT) (CORONAVIRUS) REGULATIONS 2020**

**2020 No. 451**

**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 and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (“the instrument”) is: (i) to prevent enforcement agents taking control of goods at residential premises and on highways while, due to the coronavirus pandemic, restrictions that prevent a person from leaving the place in which they live without a reasonable excuse (“the restrictions”) are in place; (ii) to extend automatically by 12 months the period for taking control of goods in cases where, at the time the restrictions were imposed there was less than one month remaining of the applicable time limit for taking control of goods, or such a point is reached while the restrictions remain in force; (iii) to increase the minimum amount of net unpaid rent that must be outstanding before commercial rent arrears recovery (CRAR) may take place to an amount equivalent to 90 days’ rent, while protections from forfeiture for business tenancies are in place under the Coronavirus Act 2020; and (iv) to extend automatically by 6 months certificates of enforcement agents where, at the time the restrictions were imposed, there were less than three months remaining before the certificate was due to expire, or such a point is reached while the restrictions remain in force.

**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 negative resolution procedure and is due to come into force the day after laying, in contravention of the convention that instruments will be laid before Parliament for 21 days before coming into force. This is emergency legislation in response to the coronavirus crisis where policy has had to be developed at fast pace to respond to the public health risk of enforcement activity at residential premises and on public highways and the impact of the crisis on the normal business of enforcement agents and the courts. The changes required in the instrument could not have been predicted to lay in time to meet the 21-day rule. The instrument needs to come into force the day after laying in order to address: the immediate public health risk of potential enforcement activity at residential premises and on highways; the immediate need to protect tenants of commercial premises from action to recover rent using CRAR; and the impact on enforcement agents and on the courts of expiring time limits for taking control of goods and enforcement agent certificates, which is

already occurring. The immediate need which the instrument is required to address has already arisen, so a delay of three weeks to meet the 21-day rule may contribute to the Department being unable to ensure enforcement agents are complying adequately with public health requirements and will cause further uncertainty and operational difficulties for enforcement agents and the courts.

- 3.2 While the Ministry acknowledges the general desirability of observing the 21-day convention, in the current fast-moving circumstances of the coronavirus pandemic and the urgent need to address the impact of the restrictions on enforcement activity, the Ministry's view is that these measures need to enter into force the day after the SI is made and cannot be delayed for 21 days.
- 3.3 Although the instrument does not affect any enforcement activity that took place prior to it coming into force, the consent of the Law Officers was obtained in relation to the amendment to the minimum amount of net unpaid rent that must be outstanding before commercial rent arrears recovery (CRAR) may take place because of the effect this may have on existing property rights of commercial landlords.

*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 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) (Schedule 12, paragraph 13 and s.90) empowers the Lord Chancellor to specify by regulations circumstances in which an enforcement agent may not take control of goods.
- 6.2 The TCEA 2007 (Schedule 12, paragraph 8 and s.90) empowers the Lord Chancellor to make regulations to provide for the prescribed time period for taking control of goods to be extended by the court.
- 6.3 The 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.
- 6.4 The TCEA 2007 (s.64 and s.90) empowers the Lord Chancellor to make regulations about the enforcement agent certification process, this includes specifying the duration of a certificate.
- 6.5 The current laws governing the seizure and sale of goods by enforcement agents (the Taking Control of Goods Regulations 2013) and the certification requirements for

enforcement agents (the Certification of Enforcement Agent Regulations 2014) came into force on 6 April 2014.

- 6.6 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.
- 6.7 On 26 March 2020, the Public Health (Coronavirus, Restrictions) England Regulations 2020 (the “English Regulations”) and the Health Protection (Coronavirus, Restrictions) Wales Regulations 2020 (the “Welsh Regulations”) came into force. Under regulation 6(1) of the English Regulations persons in England are prevented from leaving the place in which they usually live without a reasonable excuse, until such time as this restriction is terminated by direction of the Secretary of State. Under regulation 8(1) of the Welsh Regulations persons in Wales are prevented from leaving the place in which they usually live without a reasonable excuse, until such time as this restriction is terminated by direction of the Welsh Ministers.

## **7. Policy background**

### *What is being done and why?*

- 7.1 The Taking Control of Goods Regulations 2013 and the Certification of Enforcement Agent Regulations 2014 were part of a package of reforms, which were intended to respect both 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.

### *Amendments to the Taking Control of Goods Regulations 2013*

- 7.2 *Preventing enforcement agents taking control of goods at residential premises and on highways.* The Taking Control of Goods procedure permits enforcement agents to take control of goods at residential properties and on the highway following completion of a mandatory compliance stage (during which contact can be made by means such as letters and telephone calls). This procedure is used by: privately employed enforcement agents, certificated enforcement agents and High Court Enforcement Officers; county court bailiffs (employed by Her Majesty’s Courts and Tribunals Service (HMCTS)); bailiffs enforcing criminal fines (who may be employed privately or by HMCTS); and bailiffs acting for Her Majesty’s Revenue and Customs.
- 7.3 In response to the restrictions, which were put in place to prevent the spread of coronavirus, the Government believes it is necessary to amend the Taking Control of Goods Regulations 2013 to prevent enforcement agents from taking control of goods from domestic premises or on the highway while the restrictions are in place. The Government takes the view that it would be very difficult for enforcement agents to apply the social distancing requirements correctly in either scenario.
- 7.4 We understand that almost all in-person enforcement visits have ceased in response to the restrictions. However, there have been some reports from debt advice organisations that visits are still taking place. We are concerned that without clarity from the Government, in the form of this instrument, enforcement agents may come under pressure from their employing firms and from creditors, who may be facing financial pressures themselves, to undertake enforcement visits which could endanger the health of both enforcement agents and debtors.

- 7.5 The amendments to Regulations 10 and 23 will restrict enforcement visits to take control of goods from domestic premises and from the highway while the restrictions are in place. Enforcement will still be permitted to continue by other means (for example by telephone) and at business premises. The Government considers this to be a proportionate response, which takes public health guidance into account whilst allowing the justice system to continue to operate as much as possible. Where the address contained in the notice of enforcement is in England, the relevant restrictions are those imposed under regulation 6(1) of the English regulations and where the address contained in the notice of enforcement is in Wales, the relevant restrictions are those imposed under regulation 8(1) of the Welsh regulations.
- 7.6 *Extending the period for taking control of goods.* The power to take control of goods expires 12 months after a notice of enforcement is issued. As the taking control of goods process will be impacted by the suspension of in-person visits, the amendment to Regulation 9 will automatically extend this period, by a further 12 months, in cases where, at the time when the restrictions were imposed there is less than one month before expiry of the time limit for taking control of goods (or the time limited as already extended by the court, where applicable), or such a point is reached while the restrictions remain in place. Where the address contained in the notice of enforcement is in England, the relevant restrictions are those imposed under regulation 6(1) of the English regulations and where the address contained in the notice of enforcement is in Wales, the relevant restrictions are those imposed under regulation 8(1) of the Welsh regulations.
- 7.7 The 2013 Regulations already permit parties to apply to the court to seek an extension of the time period by a further 12 months. This instrument will remove the need for enforcement agents or creditors to do so and will save the courts from the administrative burden of dealing with individual applications.
- 7.8 *Increasing the minimum amount of net unpaid rent that must be outstanding before CRAR may take place.* 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). At present, the minimum amount of net unpaid rent that must be due before CRAR may be used is an amount equal to 7 days' rent. The amendment to Regulation 52 will increase this minimum to an amount equivalent to 90 days' rent, where the notice of enforcement is served after this instrument comes into force and during a period in which protections for forfeiture for business tenancies are in place in England and Wales under section 82 of the Coronavirus Act 2020.
- 7.9 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 crisis, use of CRAR at this time risks causing a significant and unnecessary risk of disruption to otherwise viable companies. Increasing the minimum amount of rent that must be due before CRAR may be used will provide businesses with additional protection and flexibility in managing their finances, and 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.

Amendments to the Certification of Enforcement Agents Regulations 2014

- 7.10 Enforcement agents are required to re-apply to the County Court for certification every two years. There are approximately 2,500 enforcement agents. They must submit the prescribed documents to the court and appear in front of a judge. As a result of the coronavirus restrictions, HMCTS is not able to offer this service, as they are prioritising urgent issues.
- 7.11 The amendment to Regulation 7 will automatically extend, for a period of six months, all certificates that were due to expire within three months of the restrictions being imposed, or which reach that point while the restrictions remain in place in either England or Wales. We have provided for the extension of certificates that are due to expire shortly after the restrictions are lifted to allow HMCTS to deal with the backlog of applications that will have built up.
- 7.12 We have considered whether as an alternative certification could take place via video or audio hearings. However, such hearings would not be a core priority for HMCTS and would be subject to considerable delay.

Commencement of the instruments

- 7.13 The instruments will come into force the day after laying.

**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. Guidance on the extension of time limits will be circulated to all relevant HMCTS staff.

**12. Impact**

- 12.1 The impact on business arising from this the restriction of in-person enforcement is expected to be minimal, as most enforcement agents, firms and creditors have already responded to the existing coronavirus restrictions by suspending in-person enforcement. Extending time limits for taking control of goods and enforcement agent certificates will be beneficial to enforcement agents and businesses by reducing or deferring costs. There may be some reduction in debt advice charities' workloads, as fewer individuals approach them with issues relating to enforcement.
- 12.2 The impact on public sector creditors will be minimal as most have already responded to the coronavirus restrictions by suspending in-person enforcement. There will be a positive impact on Her Majesty's Court and Tribunal Service from the measures to

extend time limits for taking control of goods and enforcement agent certificates automatically, as they will reduce the burden on administrative and judicial resource.

- 12.3 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. This measure will benefit tenants of commercial premises by protecting them from action to recover rent using CRAR for an extended period of time, providing additional flexibility in managing their finances.
- 12.4 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.
- 12.5 It has not been possible to conduct a detailed economic assessment in view of time constraints and administrative requirements have been relaxed by Government for COVID-19 related Statutory Instruments (SIs) and Impact Assessments (IAs). In the unlikely event of any significant costs arising the department will undertake an impact assessment to inform future scrutiny.

### **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses. Because most enforcement businesses and creditors have already suspended in-person enforcement, the measure restricting visits is not expected to have a significant negative impact on those businesses or small businesses who use their services. Extending the time limits for taking control of goods and enforcement agent certificates will reduce the regulatory burden on small businesses of making individual applications to the court.
- 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 their use.
- 14.2 This instrument 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 shortly after the coronavirus restrictions are lifted”.
- 14.3 However, we will ensure that, once it is clear that the measures are no longer needed, steps are taken to remove the obsolete provisions at the next available opportunity.

### **15. Contact**

- 15.1 Rachel Tocknell at the Ministry of Justice Telephone: 07971489933 or 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.