

EXPLANATORY MEMORANDUM TO

THE TAKING CONTROL OF GOODS AND CERTIFICATION OF ENFORCEMENT AGENTS (AMENDMENT) (NO. 2) (CORONAVIRUS) REGULATIONS 2020

2020 No. 614

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 purposes of the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (No.2) (Coronavirus) Regulations 2020 (“the instrument”) are as set out in paragraphs 2.2 and 2.3 below.
- 2.2 Firstly, 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 189 days’ rent, while protections from forfeiture for business tenancies are in place under the Coronavirus Act 2020.
- 2.3 Secondly, to prescribe 23 August 2020 as (a) the date on which the provisions for automatic renewal of the period of validity of an enforcement notice under regulations 9(5) and 9(6) of the Taking Control of Goods Regulations 2013 (“TCG Regulations 2013”) expire; (b) the date on which restrictions on bailiffs taking control of goods on the highway or at residential premises under regulations 10(1)(d) and 23(2)(c) of the TCG Regulations 2013 expire; and (c) the date on which the provisions for automatic renewal of enforcement agents’ certificates under regulation 7 of the Certificate of Enforcement Agents Regulations 2014 (“CEA Regulations 2014”) expire.
- 2.4 The Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (“TCG Amendment Regulations”) created restrictions (“the TCG restrictions”). The date of expiry of the TCG restrictions was tied to the operation of restrictions under regulation 6(1) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the “English Health Protection Regulations”) where the address for enforcement is in England and, where the address for enforcement is in Wales, to regulation 8(1) the Health Protection (Coronavirus, Restrictions) (Wales) Regulations 2020 (the “Welsh Health Protection Regulations”), (“the health protection restrictions”). The intended effect was in part that the period during which the TCG restrictions apply corresponded to the health protection restrictions that prevented people leaving their homes. As the health protection restrictions in England have been amended in that they no longer apply to leaving the home, the instrument amends the TCG restrictions to expire on 23 August 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 24 June, in contravention of the convention that instruments will be laid before Parliament for 21 days before coming into force.
- 3.2 This is emergency legislation in response to the coronavirus crisis where policy has had to be developed at fast pace to respond to the changes to the public health risk of enforcement activity at residential and commercial premises and on public highways and the impact of the crisis on the normal business of enforcement agents, debtors and the courts. The instrument is to come into force on 24 June in order to address: the urgent need to extend protection of tenants of commercial premises from action to recover rent using CRAR; to respond to changes to the Health Protection Regulations in England; the necessity for greater certainty as to the duration of the TCG restrictions for enforcement agents and debtors; and the impact on enforcement agents and on the courts of expiring time limits for taking control of goods and enforcement agent certificates.
- 3.3 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 on 24 June and cannot be delayed for 21 days.
- 3.4 The restriction on the use of CRAR, the practical effect of which will be lost from 24 June if the instrument is not in force by that date, is part of a package of measures brought forward by the Ministry of Housing, Communities and Local Government (MHCLG) that seeks to protect otherwise viable businesses who need more time to pay their rent. It was necessary for MHCLG to gather evidence on the impact of the pandemic before agreeing a way forward. MHCLG have recently decided to extend the protections. We consider there is an urgent need to amend these provisions both to support the MHCLG measures and in response to the amendments to the Public Health Regulations in England.
- 3.5 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 impact this may have on any prior expectations of commercial landlords as to their property rights.

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 the 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 the 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 TCG Regulations 2013) and the certification requirements for enforcement agents (the CEA 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, English Health Protection Regulations and the Welsh Health Protection Regulations came into force. Under regulation 6(1) of the English Health Protection Regulations and regulation 8(1) of the Welsh Health Protection Regulations, in force at that time, persons in England and Wales were prevented from leaving the place in which they usually live without a reasonable excuse, until such time as the restriction was terminated by direction of the Secretary of State or Welsh Ministers, respectively.
- 6.8 On 7 April 2020 the Health Protection (Coronavirus, Restrictions) (Wales) (Amendment) Regulations 2020 came into force. Amongst other things, they amended regulation 8 of the Welsh Health Protection Regulations.
- 6.9 On 22 April 2020 the Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations 2020 came into force. Amongst other things, they amended regulation 6 of the English Health Protection Regulations.
- 6.10 On 25 April 2020 the Health Protection (Coronavirus, Restrictions) (Wales) (Amendment) (No. 2) Regulations 2020 came into force. Amongst other things, they amended regulation 8 of the Welsh Health Protection Regulations.
- 6.11 On 11 May 2020 the Health Protection (Coronavirus, Restrictions) (Wales) (Amendment) (No. 3) Regulations 2020 came into force. Amongst other things, they amended regulation 8 of the Welsh Health Protection Regulations.
- 6.12 On 13 May 2020 the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations 2020 came into force. Amongst other things, they amended regulation 6 of the English Health Protection Regulations.

- 6.13 On 1 June 2020 the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations 2020 came into force. Amongst other things, they amended regulation 6 of the English Health Protection Regulations.

7. Policy background

What is being done and why?

- 7.1 The TCG Regulations 2013 and the CEA 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.

Increasing the minimum amount of net unpaid rent that must be outstanding before CRAR may take place.

- 7.2 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 Under Regulation 2(6) of the TCG Amendment Regulations, made on 24 April, the minimum amount of net unpaid rent that must be due before CRAR can be used, under regulation 52 of the TCG Regulations 2013, was increased from 7 days' to 90 days' rent.
- 7.4 This amendment to regulation 52 of the TCG Regulations 2013 will increase this 90 day minimum to an amount equivalent to 189 days' rent. It will correspond to protections for forfeiture for business tenancies which are in place in England and Wales under section 82 of the Coronavirus Act 2020.
- 7.5 The restriction on the use of CRAR achieved by amendment to Regulation 52 of TCG 2013 is due to expire on 30 June. However, commercial property rent is paid in advance on set quarter days, with the next rent payment falling on 24 June. These measures come into force on 24 June so that tenants who already have outstanding arrears, who would have been unprotected from that date, will also benefit from the increase from 90 days' rent to 189 days'. 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.

Prescribing 23 August as the expiry date on the restrictions on taking control of goods by bailiffs and on extending time limits for taking control of goods and for enforcement agent certificates.

- 7.6 (a) *TCG Regulations 2013*: 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.

- 7.7 In response to the restrictions, which were put in place to prevent the spread of coronavirus, the Government amended the TCG Regulations 2013 to prevent enforcement agents from taking control of goods from domestic premises or on the highway while the restrictions remain in place, on the grounds that it would be very difficult for enforcement agents to apply the social distancing requirements correctly in either scenario. Enforcement is still permitted to continue by other means (for example by telephone) and at business premises.
- 7.8 *(b) 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 is impacted by the suspension of in-person visits, under the TCG Amendment Regulations this period was automatically extended by a further 12 months, in cases where, at the time when the restrictions were imposed there was 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.
- 7.9 *(c) Amendments to the CEA Regulations 2014:* 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.
- 7.10 Under the TCG Amendment Regulations, an enforcement agent is able to apply to the court for an extension, for a period of six months, if the certificate is 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 back-log of applications that will have built up.
- 7.11 Each of these measures (a) TCG Regulations 2013; (b) Extending the period for taking control of goods; and (c) Amendments to the CEA Regulations 2014) was taken for public health reasons and to provide certainty to all parties. Their duration is tied to regulation 6(1) of the English Health Protection Regulations and regulation 8(1) of the Welsh Health Protection Regulations. At the time, regulation 6(1) and regulation 8(1) prevented people leaving their home without a reasonable excuse, but this has subsequently been replaced in England with a measure preventing people staying overnight at a place other than their home without a reasonable excuse. The logical link between the measures is now therefore less clear, at least in England, and it was considered preferable to amend the measures relating to Wales at the same time, to avoid the possibility of a similar situation arising in the future.
- 7.12 Prescribing that these measures should expire on 23 August removes the risk of the measures falling away at an unintended point through an amendment to regulation 6(1) of the English Health Protection Regulations and regulation 8(1) of the Welsh Health Protection Regulations and would bring the provisions in line with Civil Procedure Rule Practice Direction 51Z (PD51Z) which ends the stay on possession

proceedings on the same date (23 August) across England and Wales. (PD51Z may be found at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51z-stay-of-possession-proceedings,-coronavirus>).

Commencement of the instrument

7.13 The instrument will come into force on 24 June 2020.

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 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. This will also ensure otherwise viable businesses are able to continue trading in the long-term, facilitating a faster post-pandemic recovery.

12.2 The restriction of in-person enforcement visits will have an impact on the ability of businesses, individuals, local government and government and on enforcement agent firms to enforce debt, however, it does not remove their ability to enforce this debt in the future. The extension of the time period for taking control of goods is designed to facilitate the recovery of debt once the restrictions on enforcement activity are lifted.

12.3 There will be a positive impact on HMCTS 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.

12.4 This instrument is exempt from the Small Business, Enterprise and Employment Act 2015 (section 22 (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).

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses. 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 its 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 Tessa Wearing at the Ministry of Justice email: Tessa.Wearing@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.