

EXPLANATORY MEMORANDUM TO

THE BUSINESS TENANCIES (PROTECTION FROM FORFEITURE: RELEVANT PERIOD) (CORONAVIRUS) (ENGLAND) (NO. 2) REGULATIONS 2021

2021 No. 732

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.

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 25 March 2022. This is an extension of the moratorium, which currently will end with 30 June 2021, 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 With regret, it is not possible in the case of this instrument to comply with the 21-day rule which requires relevant instruments to be laid before Parliament for at least 21 days prior to coming into force. At present, the moratorium on forfeiture of commercial properties expires with 30 June 2021, and a statutory instrument is required to be in force by that date in order to extend it. As such, it has been necessary to breach the 21-day period for the laying of this instrument. This is due to the time taken to analyse the findings from the Call for Evidence, which closed on 4 May, and to develop and agree complex proposals to enable withdrawal of current protections across various Whitehall departments, including MHCLG, BEIS, HMT, the Cabinet Office, and No.10. The Call for Evidence announcement, including next steps, forms part of Building Back Better High Streets, which is a key priority for the Government.

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 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. “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).
- 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.
- 6.3 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). It was further extended to 31 December 2020 by the Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No. 2) Regulations 2020 (S.I. 2020/994). It was extended again to 31 March 2021 by the Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No. 3) Regulations 2020 (S.I. 2020/1472). It was then extended further to 30 June 2021 by the Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) Regulations 2021 (S.I. 2021/283).
- 6.4 These Regulations provide that the relevant period is extended to 25 March 2022. They also revoke S.I. 2021/283.
- 6.5 A full impact assessment has not been produced for this instrument due to the non-permanent nature of the provision.

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 with 30 June 2020; however, it was extended by statutory instrument until 30 September 2020, further extended until 31 December 2020, and again until 31 March 2021. A further statutory instrument then extended the moratorium until 30 June 2021. This new instrument, by further extending the “relevant period”, will extend the moratorium for nine months until 25 March 2022 to provide continued support for businesses, particularly given the high levels of unpaid rent accrued since March 2020, allowing primary legislation to be drafted and introduced into Parliament with a view, subject to Parliament’s approval, to the measure being in force before the expiration of the moratorium.
- 7.2 Commercial rent is generally 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 The extension of the “relevant period” also has an effect in relation to the Commercial Rent Arrears Recovery (CRAR) process. CRAR is a statutory procedure which allows

landlords of commercial premises to recover rent arrears, once a specified amount of rent is unpaid and in arrears, by instructing enforcement agents to take control of the tenant's goods and sell them.

- 7.4 In order to prevent landlords from undermining the policy intent of the moratorium through use of CRAR, successive amendments were made to the Taking Control of Goods Regulations 2013 (by the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (S.I. 2020/451), the Taking Control of Goods and Certification of Enforcement Agents (Amendment) No.2 (Coronavirus) Regulations 2020 (S.I. 2020/614), the Taking Control of Goods (Amendment) (Coronavirus) Regulations 2020 (S.I. 2020/1002) and the Taking Control of Goods (Amendment) (Coronavirus) Regulations 2021 (S.I. 2021/300) to increase the amount of outstanding rent required for landlords to be able to use CRAR during the “relevant period”. The required amount of arrears now stands at an amount equivalent to 457 days’ rent where the notice of enforcement is given during the period from 25 March 2021 to 23 June 2021, and 554 days where the notice of enforcement is given on or after 24 June 2021. The effect of extending the “relevant period” is that the requirement for arrears to be 554 days’ rent for CRAR to be used will continue until 25 March 2022.
- 7.5 As part of the Corporate Insolvency and Governance Act 2020, the 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 June 2021; the Government is therefore considering the future of these measures in light of the effect of extension of the “relevant period” on the use of CRAR.
- 7.6 The Government had previously announced that the extension until 30 June 2021 would be the final extension to the moratorium. On 6 April 2021 the Government launched a Call for Evidence to gather data on the state of negotiations between landlords and tenants regarding rent arrears and ongoing lease terms, which closed on 4 May 2021. The Call for Evidence also sought views from interested parties on six options; one to allow the current moratorium to lapse with 30 June 2021 and five options to manage the exit from the current moratorium. The Government does not consider that allowing the current moratorium to lapse with 30 June 2021 is appropriate as it is likely to lead to a significant level of evictions and business insolvencies which will threaten jobs. Therefore, the Government intends to bring forward new measures to encourage negotiation between landlords and tenants and, if necessary, mandate rent debt settlements. In order to protect tenant business and the millions of jobs that they support it is necessary to extend the current moratorium until new measures can be put in place. Given that this will require primary legislation, which will take time to draft and receive Royal Assent, an extension sufficient to pass new legislation is required.

- 7.7 We have seen that turnover is not yet fully recovered, particularly in vulnerable sectors such as hospitality. Rent collection increased in September, December and March, although remained lower than normal. The most recent data provided by Remit Consulting indicates that hospitality rent payment continues to lag significantly behind the average. 44.1% of rent was paid following the March payment date, compared to 71.8% across all sectors, which constitutes a 2% reduction from the same period following the December rent payment date. Just 23.6% of rent had been paid in the pubs, bars and restaurants sector 35 days after the March 2021 rent payment date; hotel rent payments were at 31.2% and big box leisure at 40% at the same point, compared to 90% rent collection from industrial and office rents.
- 7.8 The current measures cannot be targeted to only cover specific types of businesses or sectors without new primary legislation.
- 7.9 Analysis by Government officials suggested that without further intervention, increased business closures and job losses across a range of sectors would be expected. An extension is viewed as necessary given the high levels of unpaid rent (particularly in the hospitality and leisure sectors) and will provide landlords and tenants in England additional time to negotiate and settle outstanding rental arrears.
- 7.10 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. The Government will be publishing further guidance to support this Code and help facilitate negotiations between landlords and tenants shortly.
- 7.11 Through the Budget, the Government continues to provide unprecedented financial support to protect jobs through the Coronavirus crisis, including extending the Coronavirus Job Retention Scheme until September and new ‘Restart Grants’ of up to £18,000 for highly impacted businesses. To protect jobs further, the Government has decided that business owners affected by the pandemic will therefore now be protected from eviction until 25 March 2022, given the high levels of unpaid rent across the commercial sector.
- 7.12 The measures provided for commercial tenants differ to those for the residential sector. From 1 June 2021 to 30 September 2021, residential landlords are required to give tenants at least four months’ notice of eviction in most cases (with exceptions for anti-social behaviour 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; this ended on 31 May.

8. European Union Withdrawal and Future Relationship

- 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 25 March 2022. 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 not a permanent measure, and Government is clear that once the closure restrictions on a businesses' sector have been lifted, tenants should begin to pay rent according to the terms of their lease (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, due to the time taken to develop and agree complex proposals to enable withdrawal of current protections across various Whitehall departments. Additionally, these measures are intended to be an interim step before the introduction of new primary legislation, and are therefore not permanent. 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. In the Call for Evidence that was conducted in April, Government sought views from both tenants and landlords on the efficacy of the moratorium and Code of Practice, and on steps that Government could take after 30 June 2021. We asked respondents to provide expected outcomes for each option – such as the likelihood of negotiation on rent arrears, closure of premises, and the impact on employment and trade – and used these responses to inform our decision to extend the existing moratorium. 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 2021 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 periods.

14. Monitoring & review

- 14.1 The regulation does not include a statutory review clause.

15. Contact

- 15.1 Stephen Boyle at the Ministry of Housing, Communities and Local Government, Email: Stephen.Boyle@communities.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Rachel Campbell, Deputy 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 Eddie Hughes MP at the Ministry of Housing, Communities and Local Government can confirm that this Explanatory Memorandum meets the required standard.