EXPLANATORY MEMORANDUM TO

THE TAKING CONTROL OF GOODS (AMENDMENT) (CORONAVIRUS) REGULATIONS 2021

2021 No. 300

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 (Amendment) (Coronavirus) Regulations 2021 ("the instrument") is to increase the minimum amount of net unpaid rent that must be outstanding before commercial rent arrears recovery (CRAR) may take place, in order to continue to protect tenants of commercial leases with arrears accumulated during the coronavirus period while protections from forfeiture for business tenancies are in place under the Coronavirus Act 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 25 March 2021, in contravention of the convention that instruments will be laid before Parliament for 21 days before coming into force.

3.2 While the Ministry acknowledges the importance of observing the 21-day convention, and sincerely regrets that it was not possible to comply, the breach was necessary in order to ensure that the latest data and evidence from the sector and an analysis of the impact of the recently announced roadmap out of lockdown on the sector was factored into the decision regarding the extension. The Ministry's view is that this instrument needs to come into force on 25 March and cannot be delayed for 21 days in order to ensure continuous protection for commercial tenants with existing rent arrears.

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 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) (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.

6.2 Under s.77(3) of TCEA 2007, CRAR is only exercisable if the net unpaid rent is at least the minimum amount immediately before a) the time when the notice of enforcement is given and b) the first time that goods are taken into control after that notice.

6.3 The laws governing the seizure and sale of goods by enforcement agents, the Taking Control of Goods Regulations 2013 (the TCG Regulations 2013), came into force on 6 April 2014.

6.4 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.

6.5 On 25 April 2020, the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (the TCG Amendment Regulations) came into force. Amongst other things, they amended regulation 52 of the TCG Regulations 2013 to increase the minimum amount of net unpaid rent that must be due before CRAR can be used from an amount equivalent to 7 days' to an amount equivalent to 90 days' rent, while protections from forfeiture were in place under section 82 of the Coronavirus Act 2020.

6.6 On 24 June 2020, the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (No. 2) (Coronavirus) Regulations 2020 (the TCG Amendment No. 2 Regulations) came into force. Amongst other things, they amended regulation 52 of the TCG Regulations 2013 to increase the minimum amount of net unpaid rent that must be due before CRAR can be used to 189 days' rent, while protections from forfeiture were in place under section 82 of the Coronavirus Act.

6.7 On 29 September 2020 the Taking Control of Goods (Amendment) (Coronavirus) Regulations 2020 came into force. They amended regulation 52 of the TCG Regulations 2013 to increase the minimum amount of net unpaid rent that must be due before CRAR can be used to 276 and then 366 days' rent, while protections from forfeiture were in place under section 82 of the Coronavirus Act.

6.8 The relevant period during which section 82 of the Coronavirus Act remains in force was extended to 30th September 2020 by the Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) Regulations 2020 (S.I. 2020/602). It was further extended to 31st December 2020 by the Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No. 2) Regulations 2020 (S.I. 2020/994). It was further 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). The Government intends to lay a statutory instrument to further extend the relevant period until 30 June 2021.

7. Policy background

What is being done and why?

7.1 Under the TCG Regulations 2013, 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).

7.2 Section 82 of the Coronavirus Act 2020, which came into force on 26 March, introduced a moratorium on the ability of landlords of commercial properties to evict tenants by forfeiting the lease due to non-payment of rent in England and Wales, in response to the coronavirus pandemic. This moratorium was due to end on 30 June 2020; however, it has been extended three times by statutory instruments until 31 March 2021. The Government is now extending the duration of this protection until 30 June 2021. This will provide continued support for businesses affected by the coronavirus pandemic and will give businesses and landlords a clear deadline to work to when negotiating rent repayments.

7.3 Measures were introduced to prevent landlords from circumventing the policy intent of the moratorium through use of the CRAR process. Amendments to the Taking Control of Goods Regulations 2013 have extended the amount of outstanding rent required for landlords to be able to use CRAR. In April there was an increase from an amount equal to 7 days' rent to 90 days. This amount was subsequently been increased via statutory instrument up to a total current amount of 366 days. The amendment regulations provide for the restriction on the use of CRAR to remain in force while the protection from forfeiture under section 82 of the Coronavirus Act 2020 is in force.

7.4 The Government had previously announced that the previous extension of section 82 until 31 March 2021 would be the final extension to the measures. However, this was before the discovery of the new UK variant of Covid-19 and the national restrictions announced by the Prime Minister on 4 January 2021. These restrictions have prevented many tenant businesses from being able to trade normally and have undermined negotiations regarding rent arrears and ongoing lease terms because tenants have lacked certainty regarding when they may be able to resume trading. This has necessitated the introduction of a further extension to give time for the current restrictions to be relaxed and for tenants to be able to negotiate with their landlords with some certainty over their ability to trade and so pay rent and accumulated rent arrears.

7.5 We have seen that turnover is not yet fully recovered, particularly in vulnerable sectors such as hospitality. Rent collection increased in June, September, and December although remained lower than normal. While September rent collection showed a marked improvement from the June quarter, rent collection remains lower than pre-Covid levels, estimated by Remit Consulting to be 20% lower than 2019 levels, and there are concerns the ongoing national restrictions will further worsen this particularly for those sectors forced to close.

7.6 The current measures cannot be targeted on specific sectors, without new primary legislation.

7.7 Analysis by government officials suggests that without further intervention, increased business closures and job losses across a range of sectors would be expected,

particularly if the current provisions expire before the relaxation of current restrictions as per the Prime Minister's roadmap. An extension to the section 82 moratorium until 30 June is needed to give tenants time to be able to negotiate with their landlords with some certainty over their ability to trade and so pay rent and accumulated rent arrears.

7.8 Commercial property rent is paid in advance on set quarter days, with the next rent payments falling due on 25 March and 24 June. In order to ensure the practical effect of the restriction on CRAR is not lost once further rent falls due in March and June and to continue to protect tenants with arrears accrued from the March 2020 quarter onwards, this instrument amends Regulation 52 of the TCG Regulations 2013 to increase the minimum amount of rent that must be due before CRAR is used as follows: from when this instrument comes into force on 25 March until 23 June (inclusive), the minimum amount is 457 days' rent; from 24 June, the minimum amount is 544 days' rent. Under section 77(3) of the TCEA 2007, this minimum applies to the amount of unpaid rent that must be due at the points immediately before notice of enforcement is given and immediately before the first time that goods are taken into control following that notice.

7.9 This provision will remain in force while the protection from forfeiture under s.82 of the Coronavirus Act 2020 is in force (in other words, until 30 June 2021 as set out under 7.7).

7.10 This instrument will come into force on 25 March so that tenants who already have outstanding arrears are protected from that date and also benefit from the increase to the minimum amount of rent that must be due before CRAR can be used.

7.11 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.

7.12 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.

7.13 The restriction on the use of CRAR and associated measures are not a rent holiday and tenants remain liable for payment of any rent arrears. These measures protect tenants of commercial leases when many have reduced or no income due to restrictions imposed by the Government to prevent the spread of coronavirus. They also provide businesses with breathing space in the current uncertain economic climate and a measure of certainty ahead of quarterly rent periods.

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 There is no statutory requirement for the Department to consult. However, MHCLG officials have 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 in this area.

11. Guidance

11.1 This measure will be drawn to the attention of enforcement agents by correspondence from the Ministry of Justice addressed to their trade associations: the High Court Enforcement Officers Association, CIVEA and the Civil Enforcement Agents Association; and to other interested parties by MHCLG.

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 enforcement action to recover rent by use of the CRAR process until 30 June 2021. Given the ongoing covid-19 restrictions, there is a high risk that – without extension of these protections beyond 31 March – businesses that would otherwise be viable would fold.

12.2 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. The government recognises that 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 paragraph 12.5).

12.3 This measure will impact enforcement agents who enforce CRAR. The government recognises that this will have a detrimental financial impact on firms that undertake this type of enforcement work. The impact on these firms will be mitigated to a certain extent by the extension of the government's job retention scheme until the end of September 2021 and other support measures to businesses such as grants and loans.

12.4 There is no significant impact on the public sector.

12.5 An Impact Assessment has not been prepared for this instrument because of the temporary nature of the moratorium and is exempt from the Small Business, Enterprise and Employment Act 2015. 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, including commercial tenants, landlords and enforcement agents. The impact will be temporary, and it will potentially benefit some 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 These Regulations do not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 Lord Wolfson of Tredegar, QC 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 after 30 June 2021."

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 Lord Wolfson of Tredegar, QC at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.