

EXPLANATORY MEMORANDUM TO
THE CHARITABLE INCORPORATED ORGANISATIONS (INSOLVENCY AND
DISSOLUTION) (AMENDMENT) (NO. 2) REGULATIONS 2020

2020 No. 856

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Digital, Culture, Media and Sport 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 These Regulations revoke and supersede the Charitable Incorporated Organisations (Insolvency and Dissolution) (Amendment) Regulations (S.I. 2020/710) (“the first Regulations”).
- 2.2 Due to an administrative error, the version of the first regulations made on 6 July was not the final draft of the instrument and contained drafting errors and omissions. That instrument is therefore revoked. These Regulations also amend the Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012 (“the 2012 Regulations”) to make the correct provision in order to ensure that the provision enabling a moratorium set out in Part A1 of the Insolvency Act 1986 applies effectively to Charitable Incorporated Organisations. Part A1 was inserted into the Insolvency Act 1986 by the Corporate Insolvency and Governance Act 2020 (“the 2020 Act”).
- 2.3 As this instrument is being made in consequence of defects in the first Regulations, it is being issued free of charge to all known recipients of those Regulations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory

- 3.1 This instrument has been brought into force on the day after it was made. It is subject to the made affirmative parliamentary procedure by virtue of section 43 of the 2020 Act. Ordinarily the affirmative resolution procedure would apply by virtue of sections 347 and 348 of the Charities Act 2011.
- 3.2 The coming into force of this instrument breaches the ‘21-day rule’, under which instruments usually lie in Parliament for at least 21 days before coming into force. It was important to bring the instrument into force as soon as possible in order to revoke the first Regulations and ensure that the correct provision was made. During passage of the 2020 Act, the Government set out its intention to make regulations ensuring the effective application of the Moratorium provisions of that Act to Charitable Incorporated Organisations as soon as possible after Royal Assent. The Department views it as essential for the instrument to come into force as soon as practicable after Royal Assent of that Act. This is to ensure the provisions apply effectively to any Charitable Incorporated Organisations seeking to make use of the moratorium provisions of new Part A1 of the Insolvency Act 1986, which came into force on 25 June 2020.

- 3.3 This instrument will ensure that the application of the Part A1 moratorium provisions to Charitable Incorporated Organisations is effective, makes sense and provides clarity for any Charitable Incorporated Organisations that may seek to use it imminently, rather than having to interpret some provisions that either are not relevant or simply do not work for Charitable Incorporated Organisations. Charitable Incorporated Organisations seeking to use the moratorium procedure will find the clarity afforded by the modifications made by this instrument invaluable at a time where COVID-19 is having profound impacts on the charitable sector. We do not believe that there will be any detriment suffered by those affected by the Regulations.

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 This entire instrument applies to England and Wales only.
- 3.5 In the view of the Department, for the purposes of House of Commons Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this instrument would not be within the devolved legislative competence of any of the Northern Ireland Assembly as a transferred matter, the Scottish Parliament or the National Assembly for Wales if equivalent provision in relation to the relevant territory were included in an Act of the relevant devolved legislature.
- 3.6 The Department has reached this view because the Charitable Incorporated Organisation is a legal structure that is only available in England and Wales. In Scotland, the Scottish Charitable Incorporated Organisation is a similar but different legal structure, regulated under Scots law (the Charities and Trustee Investment (Scotland) Act 2005), and not subject to the Insolvency Act 1986 framework as amended. It is not possible to set up a Charitable Incorporated Organisation in Northern Ireland at present as the relevant provisions of the Charities Act (Northern Ireland) 2008 are not yet in force.

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 set out in Section 3 under “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)”.

5. European Convention on Human Rights

- 5.1 The Parliamentary Under Secretary of State, The Baroness Barran MBE has made the following statement regarding Human Rights:

“In my view the provisions of the Charitable Incorporated Organisations (Insolvency and Dissolution) (Amendment) (No. 2) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 This instrument revokes the Charitable Incorporated Organisations (Insolvency and Dissolution) (Amendment) Regulations and amends the Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012 to ensure the effective application to Charitable Incorporated Organisations of Moratorium provisions in new

- Part A1 of the Insolvency Act 1986, as inserted by the Corporate Insolvency and Governance Act 2020.
- 6.2 The Charitable Incorporated Organisation is a corporate legal structure available only to charities in England and Wales, under Part 11 of the Charities Act 2011.
 - 6.3 Section 245 of the Charities Act 2011 provides a power to make regulations regarding the winding up, insolvency, dissolution and restoration to the register of Charitable Incorporated Organisations. The 2012 Regulations make provision for the dissolution of a Charitable Incorporated Organisation either through a bespoke dissolution procedure or through the insolvency and dissolution procedures set out in the Insolvency Act 1986. The Insolvency Act 1986 is applied, with appropriate technical modifications, to Charitable Incorporated Organisations. The 2012 Regulations also make provision for the restoration to the register of a dissolved Charitable Incorporated Organisation in certain circumstances.
 - 6.4 The 2020 Act provides for a new free-standing moratorium mechanism. Section 1 introduces a new Part A1 to the Insolvency Act 1986. It is situated before Part 1 but within the First Group of Parts of that Act. Schedule 3 paragraph 49 of the 2020 Act amended paragraph 1 of Schedule 1 to the 2012 Regulations in order to apply Part A1 of the Insolvency Act 1986 to Charitable Incorporated Organisations. This general application was subject to an exception in paragraph 1(2A) of Schedule 1 to those Regulations, which stated that Part A1 of the Insolvency Act 1986 did not apply to a Charitable Incorporated Organisation which was either a private registered provider of social housing, or a registered social landlord under Part 1 of the Housing Act 1996.
 - 6.5 Section 43 of the 2020 Act provides that for a period of six months of the section coming into force, relevant provisions that may be made by the Secretary of State by regulations, including under section 245 of the Charities Act 2011, that are normally subject to the affirmative resolution procedure may instead be made by regulations that are subject to the made affirmative procedure. It also temporarily disapplies the consultation duty in section 348(4) of the Charities Act 2011. This instrument makes necessary modifications to ensure the effective application of new Part A1 to the Insolvency Act 1986 to Charitable Incorporated Organisations.
 - 6.6 Most of the modifications made by this Instrument disapply provisions of new Part A1 of the Insolvency Act 1986 that are not applicable or not relevant to Charitable Incorporated Organisations.
 - 6.7 Regulation 2 provides that the first Regulations are revoked and each amendment made by those Regulations is reversed. This is in order to ensure that there can be no doubt that the amendments made by the first Regulations fall away.
 - 6.8 Regulation 4 amends regulation 9 of the 2012 Regulations to provide that an application to the Charity Commission for voluntary dissolution of a Charitable Incorporated Organisation cannot be made during a moratorium period. This reflects the policy that the moratorium procedure is to be used to identify options for rescue or restructure, and if it becomes apparent that rescue or restructure is not possible then the moratorium should be ended.
 - 6.9 The instrument also makes transitional provisions at regulation 7 to ensure that any moratoriums in place prior to the commencement of the relevant provisions of the 2020 Act continue to be dealt with under the 2012 Regulations without the amendments made by this instrument.

7. Policy background

What is being done and why?

- 7.1 The 2020 Act creates a new free-standing moratorium during which no legal action can be taken against a company, or certain other corporate entities (including Charitable Incorporated Organisations) without leave of the court. The moratorium provisions are being implemented immediately to ensure that companies, and other relevant corporate entities, which are struggling as a direct result of the Covid-19 pandemic are given the opportunity to survive by providing a formal breathing space to pursue a rescue plan free from creditor action. A moratorium will be overseen by an insolvency practitioner (IP) acting as a monitor although the directors (or in this case the trustees of the Charitable Incorporated Organisation) will remain in charge of running the business on a day-to-day basis.
- 7.2 This instrument makes minor and technical modifications to ensure the effective application of the moratorium provisions to Charitable Incorporated Organisations.

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 These Regulations have been drawn up in close consultation with the Charity Commission for England and Wales. Sector representative organisations, including the National Council for Voluntary Organisations, and the Charity Law Association, have also been engaged on the provisions. However, formal public consultation has not taken place due to the limited time to prepare this instrument and the minor and technical provisions it contains.

11. Guidance

- 11.1 The Charity Commission for England and Wales has already published guidance for trustees on running their charities during covid-19. This includes reference to the relevant provisions of the 2020 Act, and is available at: <https://www.gov.uk/guidance/coronavirus-covid-19-guidance-for-the-charity-sector>. There is no need to produce specific guidance on this instrument.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because this instrument makes only minor and technical modifications to the application of the moratorium provisions of the 2020 Act to Charitable Incorporated Organisations.
- 12.4 The Regulatory Impact Assessment for the Corporate Insolvency and Governance Bill 2020 estimated a direct net benefit for the Part A1 moratorium measure in the Bill of

£0.7million per annum based on 1,000-1,500 companies out of the 4.2 million registered in the UK. There are only approximately 22,500 Charitable Incorporated Organisations on the register of charities in England and Wales. Any benefit for Charitable Incorporated Organisations will be far lower than £0.7million per annum, which is well within the de minimis threshold of ±£5m per annum.

13. Regulating small business

13.1 The legislation applies to small businesses that are Charitable Incorporated Organisations.

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is that the moratorium provisions are permissive, providing them with the option of a moratorium and ensuring consistency with the provisions that are available for charities structured as companies.

13.3 The basis for the final decision on what action to take to assist small businesses was to ensure that Charitable Incorporated Organisations could benefit from the same moratorium provisions as charities structured as companies, and for the Regulations to make necessary modifications in order for the moratorium provisions to apply effectively.

14. Monitoring & review

14.1 The regulation does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Parliamentary Under Secretary of State The Baroness Barran MBE has made the following statement:

“In my view the inclusion of a review clause in this instrument would be inappropriate. The impacts of the measure will be very small and the effect is simply to make minor and technical modifications in the application of Part A1 of the Insolvency Act 1986 to Charitable Incorporated Organisations to ensure their effective application”.

15. Contact

15.1 Ben Harrison at the Department for Digital, Culture, Media and Sport email: ben.harrison@dcms.gov.uk can be contacted with any queries regarding the instrument.

15.2 Maria Nyberg, Deputy Director for Strategy and Partnerships in the Office for Civil Society, at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Baroness Barran MBE at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.