

Explanatory Memorandum to the Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) Regulations 2020

This Explanatory Memorandum has been prepared by the Economy, Skills & Natural Resources Group and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) Regulations 2020. I am satisfied that the benefits justify the likely costs.

Ken Skates MS

Minister for Economy, Transport and North Wales

19 June 2020

PART 1

1. Description

These Regulations make provision to extend the duration of the moratorium provided by section 82 of the Coronavirus Act (2020) (“the Act”), during which 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.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

European Convention on Human Rights

Whilst the Regulations engage the right to the peaceful enjoyment of property (Article 1, Protocol 1) under the European Convention on Human Rights, the Government considers that the Regulations are proportionate, necessary and are in the public interest due to the exceptional circumstances arising out of COVID-19.

Article 1, Protocol 1 is a qualified right, which permits the Welsh Ministers to interfere with the exercise of that right where it is necessary in the general public interest and proportionate.

The restrictions imposed by section 82 of the Act are temporary and balance the need to maintain an appropriate response to the threat posed by the COVID-19 against the rights of individuals and businesses. Extending the restrictions by a further 3 months through these Regulations is necessary to protect the broader public interest caused by liquidity issues due to the current situation caused by COVID-19. The restrictions are proportionate in that they allow that rent will remain payable during this period, and a landlord will still be able to take action in response to non-payment at the end of the relevant period, providing that the landlord and the tenant have not entered into a rent deferment agreement or such other similar agreement which prevents the landlord from taking such action.

3. Legislative background

Section 82 of the Act makes provision 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”. Section 82(12) of the Act defines the “relevant period” as beginning with the day after the day the Act was passed (26th March 2020), and ending with 30th June 2020, or such later date as may be specified by the relevant national authority in regulations. The power to specify a later date may be exercised on more than one occasion so as to further extend the period.

The Welsh Ministers are the “relevant national authority” in relation to Wales, and may therefore make regulations to extend the “relevant period” for protections

beyond 30th June 2020, thereby maintaining the protection provided by section 82 of the Act to such later date specified in regulations.

4. Purpose and intended effect of the legislation

The purpose of the Regulations is to specify that the “relevant period”, as defined by section 82(12) of the Act, is to end with 30th September 2020 in relation to Wales.

The effect of the Regulations is to extend the “relevant period” in which 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 for a further 3 months to 30th September 2020.

PART 2 – REGULATORY IMPACT ASSESSMENT

5. Options

Two options have been considered:

Option 1: Do nothing - Allow the provision protecting commercial tenants from eviction due to non-payment of rent to lapse on 30th June 2020.

Option 2: Lay Regulations to extend the protection for a further 3 months to 30th September 2020.

Costs and benefits

There are potential financial implications associated with both options. With option 2 there may be increasing pressure for Welsh Ministers to provide additional financial support to commercial landlords during this period to counteract the protection provided to tenants. Extending the protection is intended to facilitate the re-starting of the economy by trying to ensure businesses are still in a position to operate when the current restrictions are lifted. The following is a qualitative assessment of the likely impact of each option. It has not been possible to produce a quantified assessment at this time.

Option 1: Do nothing - Allow the provision protecting commercial tenants from forfeiture proceedings due to non-payment of rent to lapse on 30th June 2020.

Without making amending Regulations, the protection will lapse and as a result there is an increased risk that commercial tenants could be evicted from their premises for non-payment of rent. As the principle aim of the original legislation was to protect commercial tenants and jobs, removal of the current protection would put those commercial tenants, some of which may have been supported financially by both the Welsh and UK Governments, back at risk as the economy recovers.

A consequence of this option is that commercial landlords will be free to take action for non-payment of rent. This will lead either to payment of some or all of rent owed by commercial tenants, or forfeiture proceedings. However, due to the uncertainty of the current economic climate, landlords would need to carefully consider whether they would benefit financially as tenants may in any event not be able make the necessary payments. It might be difficult to find a replacement tenant, or to sell the property, as demand for commercial space in some sectors (e.g. leisure, retail and hospitality) is likely to have reduced, at least in the short term.

More businesses might be at risk over the next quarter as the full effects of Coronavirus restrictions mean that many businesses have not had the opportunity to generate revenue sufficient to pay the next quarter's rent.

The conclusion is that Option 1 would not achieve the policy objective of supporting business and protecting commercial tenants from forfeiture during the Coronavirus pandemic.

Option 2 – Lay Regulations to extend the protection for a further 3 months to 30th September 2020

Coronavirus has reduced economic activity, leading to a drop in income for many businesses. This option will allow the Welsh Government to continue to protect commercial tenants during this difficult time, but also does not excessively remove the rights and remedies which enable landlords to pursue non-payment of rent.

The commercial property sector and market plays an important role in the economy and in delivering and providing business critical infrastructure in the form of commercial premises from which businesses can operate and grow. It is therefore important to recognise the needs of both landlord and tenant businesses.

This option does impact on landlords, their suppliers, lenders and investors. Unofficial sources¹ estimate that commercial rent collection for the March quarter fell by over 25% in the UK, compared to the previous two years. The position is expected to worsen for the June quarter. Some landlords will potentially face another 3 months without rental income, with associated difficulty in servicing debt/ paying dividends to investors. Feedback from landlord representatives inform us that one of the unintended consequences of the moratorium on forfeiture for non-payment of rent is that some businesses considered capable of paying rent have taken advantage of the position and not paid landlords.

This protection does not remove the requirement to pay rent, but suspends a landlord's right to take forfeiture action for non-payment of rent. Tenants will still be liable for any arrears, and will have to pay any rent owed once the protection is lifted or face actions such as forfeiture. The landlord's actions will not prejudice them from exercising a right to forfeit in the future, once the moratorium is over, unless the landlord and tenant have agreed otherwise by way of a rent deferment agreement or such similar agreement in relation to the payment of rent.

It is understood that the UK Government and the other Devolved Administrations in Scotland and Northern Ireland are considering a similar extension. The temporary protection would be reviewed before 30th September 2020, and at that point a decision will be taken on whether a further extension is required or not.

In recommending Option 2, the Welsh Government recognises the position of landlords, as investors in and providers of critical business infrastructure. The provisions of Option 2 will continue to put landlords at something of a disadvantage in negotiating rent deferment arrangements to ease tenants' current predicaments whilst seeking to protect their assets. The UK Government has announced its intention to put in place a Code of Practice for Landlords and

¹ <https://global.re-leased.com/covid19-insightsuk>

Tenants to encourage parties to work together, protect businesses and speed up recovery. The detailed provisions are in development and officials from the Devolved Administrations including the Welsh Government are involved. It is envisaged that this Code would help improve negotiations between Landlords and Tenants in reaching sensible and commercially sustainable solutions.

The UK Government continue to work with lenders to ensure flexible support is provided to commercial landlords, including payment holidays and restructuring facilities, and the Welsh Government supports this approach.

6. Consultation

No public consultation has been undertaken. The policy proposals are in direct response to the Coronavirus pandemic and restrictions.

7. Competition Assessment

On completion of the Competition Filter test it was determined that there are no effects on competition.

8. Post implementation review

The effect of these Regulations is time limited and the position will be reviewed prior to the proposed extension end date of 30th September 2020.