

## **Explanatory Memorandum to the Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) (No. 2) 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) (No. 2) Regulations 2020. I am satisfied that the benefits justify the likely costs.

**Lee Waters MS**  
**Deputy Minister for Economy & Transport**  
**9 September 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 and the right to a fair trial under Article 1 Protocol 1 and Article 6 the European Convention on Human Rights respectively, the Welsh Government considers that the Regulations pursue a legitimate aim and are proportionate, necessary and 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. Whilst it is possible that restrictions by law of the rights of access to a Court under Article 6, is permissible where it does not affect the substance of the right, pursues a legitimate aim and is proportionate to the aim being sought.

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, provided 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 (26<sup>th</sup> March 2020), and ending with 30<sup>th</sup> 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 are therefore able to make regulations, to extend the “relevant period” for protections beyond 30<sup>th</sup> June 2020, thereby maintaining the protection provided by section 82 of the Act to such later date specified in regulations.

Regulations currently in force, the Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) Regulations 2020 (SI 2020/606 (W.140)) extend the “relevant period” from 30 June 2020 to 30 September 2020.

#### **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 31<sup>st</sup> December 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 31<sup>st</sup> December 2020.

## **PART 2 – REGULATORY IMPACT ASSESSMENT**

### **5. Options**

Four 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 September 2020.

Option 2: Lay Regulations to extend the protection for a further 3 months to 31<sup>st</sup> December 2020. This is the preferred option.

Option 3: Lay Regulations to extend the protection for a further 4 months to 31<sup>st</sup> January 2021.

Option 4: Lay Regulations to extend the protection for a further 6 months to 31<sup>st</sup> March 2021.

### **Costs and benefits**

There are potential financial implications associated with all options. With options 2, 3 and 4 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 support the economic recovery by trying to ensure businesses are able to continue trading. 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.

However, the assessment is supplemented by data from a voluntary fortnightly [Business Impact of Coronavirus \(COVID-19\) Survey \(BICS\)](#). It is carried out by the Office for National Statistics (ONS), which captures the views of businesses on the impact of the coronavirus (COVID-19) on turnover, workforce prices, trade and business resilience.

The annex contains some further information on the survey and the findings should be viewed in the context of this information. It should be noted that whilst the data is relatively timely, the situation with COVID-19 is very fast moving so the key messages from the survey may become outdated very quickly. Furthermore, the survey is not forward looking so future business conditions and impacts are not covered. The survey is voluntary and may only reflect the characteristics of those that responded; the results are experimental.

**Option 1: Do nothing - Allow the provision protecting commercial tenants from forfeiture proceedings due to non-payment of rent to lapse on 30<sup>th</sup> September 2020.**

Without making amending and extending the 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 to 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.

In opting to allow the provisions to lapse, businesses would experience the winding down of multiple Coronavirus support mechanisms in quick succession; namely through the ending of the Eat Out to Help Out scheme and the conclusion of the Coronavirus Job Retention Scheme (CJRS). It is determined that allowing such gaps in support to emerge would contribute to a sense of greater uncertainty for the Welsh economy.

The results from Wave 11 of the ONS BICS survey cover the period of **27 July to 9 August**. It shows that, of businesses who have not permanently stopped trading, 84% of businesses in Wales had applied for the Coronavirus Job Retention Scheme, compared to 83% of businesses in Scotland, 81% in Northern Ireland and 78% in England.

Given the high relative dependence on the CJRS scheme in Wales, the 'do nothing' option may place businesses in Wales at financial risk. Furthermore, given that other UK nations are extending protection, businesses in Wales may be placed at a comparative disadvantage if an extension is not put in place. However, this would need to be viewed in the context of financial risks to landlords who may experience cash flow issues if further extensions are granted.

Welsh businesses have also made use of a wide range of government schemes during the crisis. These include:

- Business grants funded by UK and devolved governments;
- Government backed accredited loans or finance agreements; and
- the CJRS.

Of businesses who have not permanently stopped trading, 13% of those operating in Wales had not applied for any of these schemes, this compares to 19% in England, 16% in Northern Ireland and 15% in Scotland.

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 31<sup>st</sup> December 2020**

Coronavirus has reduced economic activity, leading to a drop in income for many businesses. The ONS BICS survey shows:

- 52% of businesses in Wales reported a decrease in turnover outside of normal range. This compares to 54% in Scotland, 51% in England and 50% in Northern Ireland.
- Across all businesses currently trading in Wales, 12% reported that operating costs exceeded turnover.
- Of the UK countries, Wales had the second highest proportion of businesses with more than six months of cash reserves at 37%. This compares to 38% in Scotland, 36% in England and 32% in Northern Ireland.
- 40% of businesses in Wales had less than 6 months cash reserves, in line with the overall UK figure. Around 3% of Welsh businesses reported they had no cash reserves.

### *Insolvency:*

In Wales, of businesses not permanently stopped trading:

- 1% had a severe risk of insolvency
- 7% had a moderate risk of insolvency
- 48% had a low risk of insolvency
- 32% had no risk of insolvency

### *Footfall*

In Wales, of businesses currently trading:

- 30% reported footfall had decreased
- 12% reported footfall had stayed the same
- 4% reported footfall had increased

### *Customer interest*

In Wales, of businesses currently trading:

- 27% reported customer interest had decreased
- 36% reported customer interest had stayed the same
- 14% reported customer interest had increased

### *Capital expenditure*

Welsh businesses appear to have also had their capital expenditure affected by the coronavirus (COVID-19) pandemic.

Of all businesses continuing to trade in Wales, 12% reported that capital expenditure had stopped, while 30% reported that capital expenditure had been lower than normal.

This option will allow the Welsh Government to continue to protect commercial tenants during a continuing time of uncertainty, but at the same time 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 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.

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 continues 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.

### **Option 3: Lay Regulations to extend the protection for a further 4 months to 31st January 2021.**

Option 3 would allow more time (than option 2) for officials to develop alternative mechanisms of support for businesses and enable the UK Government greater capacity to review structures and the possibility for further fiscal or non-fiscal provisions. In doing so, such an extension would alleviate concerns that the regulations would lapse on the same date as the end of the EU Transition period.

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.

However, an extension to 31<sup>st</sup> January 2021 would represent a 10 month moratorium. As these regulations are viewed as an emergency response to the

Coronavirus pandemic, this length may put landlords and investors under increasing pressure.

**Option 4: Lay Regulations to extend the protection for a further 6 months to 31<sup>st</sup> March 2021.**

The implications of this option are similar to those under Option 3.

However, an extension to 31<sup>st</sup> March 2021 would represent a 12 month moratorium. In addition to increasing pressures on landlords and investors, this is likely to signal a lack of confidence in economic recovery efforts.

## **6. Consultation**

An engagement exercise with key stakeholders to better understand the impact that Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) Regulations 2020 has had on both commercial tenants and landlords in Wales was undertaken at the end of August 2020.

We received a number of representations from stakeholders and in summary the key points made were:

- Opportunistic companies may take advantage of the moratorium despite an ability to pay
- Low collection rates of rent and service charges have had a significant impact on property owners and their ability to invest which will, in turn, impact on the restart of the economy
- Attention should be given to aggressive debt enforcement
- Constructive dialogue between landlords and businesses are crucial to maintaining a strong relationship

The concerns raised by stakeholders will be central to the development of policy positions and will inform further discussions with the UK Government on this issue.

## **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 31<sup>st</sup> December 2020.

## **9. Annex**

### **Measuring the data**



The Business Impact of Coronavirus (COVID-19) Survey (BICS) is voluntary and may only reflect the characteristics of those that responded; the results are experimental.

**Table 1. Sample and response rates for Waves 9, 10 and 11 of BICS**

Wave	30 July 2020 Publication Wave 9	13 August 2020 Publication Wave 10	27 August 2020 Publication Wave 11
<b>Sample</b>	24,493	24,464	23,905
<b>Response</b>	5,851	5,733	5,927
<b>Rate</b>	23.9%	23.4%	24.8%

Source: Office for National Statistics – Business Impact of Coronavirus (COVID-19) Survey

Wave 11 data relate to the period 27 July to 9 August 2020. The survey questions are available in [Business Impact of Coronavirus \(COVID-19\) Survey questions: 27 July to 9 August 2020](#)

### **The different experiences of businesses during COVID-19**

In the final results of Wave 11, of 23,905 businesses surveyed, 5,927 businesses (24.8%) responded.

The Wave 11 survey was live for the period 10 August to 23 August 2020 and businesses were asked about their experience for the two-week survey reference period 27 July to 9 August 2020. Dependent on responses to certain questions, businesses are asked different questions.

For questions or response options referring to the “last two weeks” or expectations of the “next two weeks”, businesses could respond from the point of completion of the questionnaire based on their current experiences. This means that business responses may cover any two-week time period across the following reference periods respectively: 27 July to 9 August 2020 and 10 August to 23 August 2020. More detail on the type of questions asked are available in the [detailed dataset](#) in Section 9.

### **Weighting**

Estimates from the Business Impact of Coronavirus (COVID-19) Survey (BICS) are currently unweighted and should be treated with caution when used to evaluate the impact of the coronavirus across the UK economy. Each business was assigned the same weight regardless of turnover, size or industry, and the data in the latest period are preliminary.

### **Coverage**

The industries covered are:

- Non-financial services (includes professional, scientific, communication, administrative, transport, accommodation and food, private health and education, and entertainment services)
- Distribution (includes retail, wholesale and motor trades)
- Production (includes manufacturing, oil and gas extraction, energy generation and supply, and water and waste management)

- Construction (includes civil engineering, housebuilding, property development and specialised construction trades such as plumbers, electricians and plasterers)

The following sectors are excluded from the survey:

- Agriculture
- Public administration and defence
- Public provision of education and health
- Finance and insurance

## **Reporting Unit**

The business unit to which questionnaires are sent is called the reporting unit. The response from the reporting unit can cover the enterprise as a whole, or parts of the enterprise identified by lists of local units. Other than for a minority of larger business or businesses that have a more complex structure, the reporting unit is the same as the enterprise.

## **Sample**

Only the businesses that have responded to Wave 11 of BICS are represented in these data, and as such it is not fully representative of the UK as a whole. Currently, ONS do not apply weighting methods to these data.

## **Regional Estimates**

Regional BICS estimates are produced by taking the survey return from each reporting unit then applying this to the reporting unit's local sites. If a business has a site or several sites (also known as local units) within a country, using information from the Inter-Departmental Business Register (IDBR), then this business is defined to have presence there.

The business is then allocated once within each region (regardless of the number of sites) and the information provided by the reporting unit as a whole copied and used within each country.