

Explanatory Memorandum to the Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) (No. 2) Regulations 2021

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 2021. I am satisfied that the benefits justify the likely costs.

Vaughan Gething MS
Minister for Economy
28 June 2021

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

The Welsh Ministers has the executive competence to make these Regulations pursuant to section 82 of the Coronavirus Act 2020 (“the Act”). Section 82(12) of the Act defines the “relevant period” as “ending with 30 June 2020 or such later date as may be specified by the relevant national authority in regulations made by statutory instrument (and that power may be exercised on more than one occasion so as to further extend the period)”. Section 82(12) of the Act further confirms that “relevant national authority” means in relation to Wales, the Welsh Ministers.

According to the UK Government, the most recent data for the UK indicates that hospitality rent payment continues to lag significantly behind the average, with just 44.1% of rent 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.

The British Property Federation (BPF) estimate that by the 30 June 2021, £7.5bn of commercial rent across the UK will be in arrears. Remit Consulting estimate that of 30 March, £5.3bn of commercial rents arising since March 2020 were unpaid, of which half (£2.8bn) were in the retail sector.

According to the UK Government, the most recent data for the UK shows that hospitality rent payment continues to lag significantly behind the average, with just 23.6% of rent paid in the pubs, bars and restaurants sector 35 days after the March payment date.

Whilst the statistics relate to the whole of the UK, a proportion of this data relates to Wales.

There is an urgent need to ensure that the relevant period is extended beyond the 30 June. The number of businesses under immediate threat of eviction from their premises must be kept low, in order to continue to contribute to the range of measures in place that respond to the continuing effects of the pandemic. Consequently, these Regulations come into force on 30 June 2021 in order to ensure that there is no gap in the protection given to tenants, which means that they do not follow the convention that not less than 21 days should elapse between the laying of the Regulations and their coming into force. The decision to extend the relevant period has been taken in response to a situation that is still rapidly evolving, and in the light of continuing uncertainties surrounding the

impact of new variants of the virus. Taking this decision has been essential to ensuring appropriate alignment of the measures taken to combat the effects of the pandemic. Complying with the 21 day convention has thus not been practicable in this instance.

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, 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 “relevant 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 30th 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 2021 extend the “relevant period” until 30 June 2021.

These Regulations follow the Senedd’s negative resolution procedure.

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, in relation to Wales, with 30 September 2021.

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 30 September 2021.

PART 2 – REGULATORY IMPACT ASSESSMENT

5. Options

Five 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 30 June 2021.

Option 2: Make Regulations to extend the protection for a further 1 month to 31 July 2021.

Option 3: Make Regulations to extend the protection for a further 3 months to 30 September 2021. This is the preferred option.

Option 4: Make Regulations to extend the protection for a further 6 months to 31 December 2021.

Option 5: Make Regulations to extend the protection for nearly a further 9 months to 25 March 2022.

Costs and benefits

There are potential financial implications associated with all options. With options 2, 3, 4 and 5 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.

However, the assessment is supplemented by data from a voluntary fortnightly [Business Insights and Conditions 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 the survey is voluntary and may only reflect the characteristics of those that responded; the results are experimental. Furthermore, the survey is not forward looking so future business conditions and impacts are not covered.

Option 1: Do nothing - Allow the provision protecting commercial tenants from forfeiture proceedings due to non-payment of rent to lapse on 30 June 2021.

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.

The results from Wave 30 of the ONS BICS survey covers the period of **19 April to 2 May 2021**. It shows that, of businesses who have not permanently stopped trading, 61% of businesses in Wales are using or intend to use the Coronavirus Job Retention Scheme, compared to 62% of businesses in Scotland, 54% in Northern Ireland and 56% in England.

Welsh businesses have 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 Kickstart Job Scheme for young people as well as the CJRS.

Of businesses who have not permanently stopped trading, 61% of those operating in Wales had not received any government-backed loans or finance agreements, this compares to 63% in England and Northern Ireland and 66% in Scotland. Also, of business who have not permanently stopped trading and have applied for a government grant in Wales, 4% did not receive it. This compares to 8% in Northern Ireland and 6% in Scotland and England.

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 – Make Regulations to extend the protection for a further 1 month to 31 July 2021.

While extending the provisions for a short period of time – namely a month – would limit the burden on landlords, this option is not likely to be sufficient to signal to the Welsh economy that there is a significant framework of support in place to allow businesses to adapt.

Furthermore, an extension of this period of time will drastically reduce the scope for the Welsh Government to develop a more sustainable set of proposals.

Option 3: Make Regulations to extend the protection for a further 3 months to 30 September 2021.

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

- 28% of responding businesses in Wales reported a decrease in turnover of up to 50%, the **highest** of any other UK country or English Region. A further 8% reporting a decrease of over 50%. Across all businesses currently trading in Wales, 10% declared that profits have decreased by more than 50%, 9% said profits had decreased between 20-50% and 15% said profits had decreased by up to 20%.
- Of businesses not permanently stopped trading, 40% think that their cash reserves will last more than 6 months in Wales. This is the **lowest** of any other UK country or English region.
- 43% of businesses in Wales had less than 6 months cash reserves, similar to the overall UK figure of 44%. Around 3% of Welsh businesses reported they had no cash reserves.

Insolvency:

In Wales, of businesses not permanently stopped trading:

- 11% had a moderate risk of insolvency
- 55% had a low risk of insolvency
- 24% had no risk of insolvency

Business confidence:

In Wales, of businesses currently trading:

- 65% reported high confidence that they would survive the next three months;
- 28% reported medium confidence that they would survive the next three months;
- 2% reported low confidence that they would survive the next three months.

Site closures:

In Wales, of businesses currently trading:

- 2% intended to permanently close some business sites in the next three months;
- 86% did not intend to permanently close any business sites in the next three months;
- A further 13% were 'not sure'

Capital expenditure¹

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

In wave 27 of the BICS (8 March to 21 March 2021), of all businesses continuing to trade in Wales, 10% reported that capital expenditure had stopped, while 22% 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 3, the Welsh Government recognises the position of landlords, as investors in and providers of critical business infrastructure. The provisions of Option 3 will continue to put landlords at a disadvantage in negotiating rent deferment arrangements to ease tenants' current predicaments whilst seeking to protect their assets. It was previously considered that an extension to 30 September 2021 would signal a lack of confidence in economic recovery efforts. At that stage the continued significant effects on businesses and their cashflow was not known. In light of the continuation of the pandemic and anticipated further waves as a result of new variants, a further three month extension is now considered the best option to allow time for businesses to recover and for Welsh Government to further assess the public health situation.

Option 4: Make Regulations to extend the protection for a further 6 months to 31 December 2021.

Option 4 would allow more time for Welsh businesses to recover and bolster their ability to meet rent payments. The Welsh Government has recently outlined a cautious and considered approach to easing restrictions on the economy. While this represents cause for optimism, it is recognised that such an ability to pay

¹ The figures relating to footfall are from BICS Wave 23 (covering the period between 25 January to 7 February) as Wave 24 does not contain these figures.

rent would be limited until businesses are fully operational and many may continue to experience cash flow challenges. In this respect, Option 4 would allow for a period of breathing space to 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.

However, this option may put landlords and investors under increasing pressure at this stage.

Option 5: Make Regulations to extend the protection for a further 9 months to 31 March 2022.

Option 5 would allow more time for Welsh businesses to recover and bolster their ability to meet rent payments. The Welsh Government has recently outlined a cautious and considered approach to easing restrictions on the economy. While this represents cause for optimism, it is recognised that such an ability to pay rent would be limited until businesses are fully operational and many may continue to experience cash flow challenges. In this respect, Option 5 would allow for a period of breathing space to 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.

However, this option is highly likely to put landlords and investors under increasing pressure at this stage.

For the reasons outlined above, the Welsh Government consider Option 3 is the most appropriate option to pursue at this time.

6. Consultation

An engagement exercise with key stakeholders to better understand the impact that the Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) Regulations 2021 has had on both commercial tenants and landlords in Wales was undertaken, concluding in May 2021.

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

- The provisions were intended to be a short-term emergency measure.
- The moratorium is beginning to have an adverse impact on commercial landlords.
- The extension of the moratorium is likely to have led to unintended consequences with rent accruals causing a substantial debt for businesses and could be called in in short order.
- It is important that whether the protections are permitted to lapse or renewed, it is done so as a package underpinned by close engagement across Welsh and UK Governments.
- Landlords can be expected to take a tough approach to rent arrears should the moratorium be lifted on 30 June 2021. For businesses dealing with mandated closure and with no ability to generate income, rent is increasingly difficult to meet.
- It is reasonable to continue to provide support to impacted businesses until they are able to resume trading normally.
- The issue of commercial rent arrears is probably the last significant outstanding business concern arising from the pandemic.
- The worst outcome would be a 'cliff edge' on 1 July 2021 when all tenant protections are suddenly withdrawn with nothing to replace them.

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 30 September 2021.

9. Annex

Measuring the data

The Business Insights and Conditions Survey (BICS) is voluntary and the results are experimental.

Wave	22 April 2021 Publication Wave 28	6 May 2021 Publication Wave 29	20 May 2021 Publication Wave 30
Sample	39,002	38,919	38,834
Response	9,857	9,744	9,547
Rate	25.3%	25.0%	24.6%

Source: Office for National Statistics - Business Insights and Conditions Survey

Notes

1. Final weighted results, Wave 30 of the Office for National Statistics' (ONS') Business Insights and Conditions Survey (BICS).

The results are based on responses from the voluntary fortnightly BICS, which captures businesses' views on financial performance, workforce, prices, trade, and business resilience. The Wave 30 survey was live for the period 4 to 16 May 2021. For questions regarding the last two weeks, businesses were asked for their experience for the reference period 19 April to 2 May 2021. The [survey questions](#) are available.

ONS currently provide unweighted estimates with a country and regional split for selected variables. These should be treated with caution as only those that have responded to the survey are represented, and as such these are not fully representative of the UK as a whole. When unweighted, each business is assigned the same weight regardless of turnover, size or industry, and businesses that have not responded to the survey or that are not sampled are not taken into account.