

SL(6)039 – Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) (No. 3) Regulations 2021

Background and Purpose

The Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) (No. 3) Regulations 2021 (“the 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, 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 30 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 30 June 2020, thereby maintaining the protection provided by section 82 of the Act to such later date specified in regulations. The “relevant period” has previously been extended on a number of occasions.

The Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) (No.2) Regulations 2021 extended the “relevant period” until 30 September 2021. The purpose of the present Regulations is to specify that the “relevant period” is now to end, in relation to Wales, with 25 March 2022.

Procedure

Negative.

The Regulations were made by the Welsh Ministers before they were laid before the Senedd. The Senedd can annul the Regulations within 40 days (excluding any days when the Senedd is: (i) dissolved, or (ii) in recess for more than four days) of the date they were laid before the Senedd.

Technical Scrutiny

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.



Merits Scrutiny

The following two points are identified for reporting under Standing Order 21.3 in respect of this instrument.

1. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

We note there has been no formal consultation on these Regulations. In particular, we note the justification for this in the following paragraphs of the Explanatory Memorandum:

“Given how recently we have approached stakeholders, and given the nature of their responses, we have not undertaken a further stakeholder engagement in this instance. Engagement exercises to better understand the impact the protections has had on both commercial tenants and landlords in Wales were previously undertaken and the feedback was broadly similar at each round. Key points included:

- *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. 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’ 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 as we work to find a suitable solution for Wales.”



2. Standing Order 21.3(ii) – that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Senedd

These Regulations engage a commercial landlord’s rights under Article 1 Protocol 1 (“A1P1”) of the European Convention on Human Rights (the protection of property). A1P1 rights can only be interfered with by a public authority where, in broad terms, such action is lawful and necessary for the public interest.

The Committee notes that the Regulations will only extend the “relevant period” up to 25 March 2022.

The Committee further notes the Welsh Government’s justification for any potential interference with human rights; in particular the following paragraphs of the Explanatory Memorandum supporting the adoption of “Option 3” of the Regulatory Impact Assessment:

“Option 3 would allow more time for Welsh businesses to recover as the economy recovers, and to therefore bolster their ability to meet rent payments. The Welsh Government has outlined a cautious and considered approach to easing restrictions on the economy. Whilst Wales is currently at alert level zero and all businesses are permitted to operate, this only came into effect on the 7th August 2021 and so the ability to pay rent will take time for many businesses until they get back onto their feet.

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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 something of a disadvantage in negotiating rent deferment arrangements to ease tenants’ current predicaments whilst seeking to protect their assets. However, we anticipate there being other measures available to landlords. For example, through successive amendments to the Taking Control of Goods Regulations 2013, the required amount of arrears for Commercial Rent Arrears Recovery (CRAR) will remain at 554 days’ of net unpaid rent.”

The Committee notes also the statement of the Minister for Economy, Vaughan Gething MS, of 26 August 2021, which states:

“The moratorium was introduced for reasons including limiting the significant impact on businesses from the series of interventions and restrictions imposed on the Welsh economy throughout the pandemic.

The UK Government has announced its intention to introduce legislation to ring-fence commercial rent debt accrued during the pandemic¹. It is anticipated that this will include principles which landlords and tenants of business tenancies should use to

¹ <https://www.gov.uk/government/publications/resolving-commercial-rent-arrears-accumulated-due-to-covid-19>



negotiate on the same and the introduction of a system of binding arbitration where agreement between tenants and landlords cannot be reached.

The UK Government also announced that they have:

- *Extended the "relevant period" in England to 25 March 2022, which it is expected will also allow for UK Parliamentary time to pass the necessary primary legislation.*
- *Extended the restrictions on the use of commercial rent arrears recovery (CRAR) so that, from the 24 June 2021, the minimum net unpaid rent that must be outstanding before CRAR can be used is 554 days.*
- *Extended the restrictions against serving a winding-up petition on the basis of a statutory demand implemented through the Corporate Insolvency and Governance Act 2020 until 30 September 2021.*

I have decided to extend the "relevant period" for the purposes of section 82 of the Act in relation to Wales to 25 March 2022 by making The Business Tenancies (Extension of Protection from Forfeiture etc) (Wales) (Coronavirus) (No. 3) Regulations 2021. This will give the same levels of protection in this respect for Welsh businesses as those in England, and will assist with the recovery of Welsh businesses as the economy improves. It will also provide the Welsh Government with what is believed to be sufficient time to continue to work in considering and then where necessary, implementing measures in relation to commercial rent arrears accumulated during the pandemic in Wales. It is expected that this will include working with the UK Government in the further consideration and development of their proposals.

The protection provided by section 82 of the Act during the "relevant period" does not remove the requirement to pay rent, and I am clear that, wherever possible, tenants should of course pay rent."

Welsh Government response

A Welsh Government response is not required.

Legal Advisers

Legislation, Justice and Constitution Committee

3 September 2021



Senedd Cymru
Pwyllgor Deddfwriaeth, Cyfiawnder a'r Cyfansoddiad
—
Welsh Parliament
Legislation, Justice and Constitution Committee