

## **Explanatory Memorandum to the Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) (No. 3) 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. 3) Regulations 2021. I am satisfied that the benefits justify the likely costs.

Vaughan Gething MS  
Minister for Economy  
26 August 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**

According to the UK Government<sup>1</sup>, 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.

Further, 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.

The UK Government have announced that Section 82 of the Coronavirus Act 2020, which prevents landlords of relevant business tenancies from being able to evict tenants for the non-payment of rent, will continue until 25 March 2022 in England, unless legislation is passed ahead of this. It is expected that this will provide sufficient time for the UK Government to legislate in respect of commercial rent arrears that have accrued during the pandemic. It is anticipated that this will include requiring landlords and tenants to come to an agreement on the treatment of commercial rent debt that has accrued during the pandemic and the introduction of a system of binding arbitration where agreement between tenants and landlords cannot be reached. Further information on the UK Government’s proposals and other measures the UK Government have put in place can be found in their policy statement which is available [here](#).

By extending the “relevant period”, as defined by section 82(12) of the Coronavirus Act 202 so that it ends, in relation to Wales, with 25 March 2022, the Welsh Government will be able to continue to work in considering and then where necessary, implementing, measures for Wales in relation to rent arrears accrued during the pandemic. It will also help to ensure that Welsh businesses are not put at a disadvantage to those businesses in England and will help with the recovery of Welsh businesses as the economy improves.

Now that Wales has entered alert level zero of the coronavirus control plan, the number of businesses under immediate threat of eviction from their premises must be kept low while the economy starts to recover. Consequently, these

---

<sup>1</sup> [Supporting businesses with commercial rent debts: policy statement - GOV.UK \(www.gov.uk\)](#)

Regulations come into force on 30 September 2021 in order to ensure that there is no gap in the protection given to tenants. Taking this decision has been essential to ensuring appropriate alignment of the measures taken to combat the effects of the pandemic with the view of a longer-term solution on rent arrears being able to be considered and where necessary, implemented.

### **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 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.

Regulations currently in force, The Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) (No.2) Regulations 2021 extend the “relevant period” until 30 September 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 25 March 2022.

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 in order that the relevant period ends, in relation to Wales, with 25 March 2022.

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

### **5. Options**

Three 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 September 2021.

Option 2: Make Regulations to extend the protection for a further three months to 31 December 2021.

Option 3: Make Regulations to extend the protection for a further almost 6 months to 25 March 2022.

### **Costs and benefits**

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

Annex A 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 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.

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

By doing nothing, 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, at higher 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 35 of the ONS BICS survey covers the period of **12 July to 25 July 2021**. It shows that, of businesses who have not permanently stopped trading, 51.9% of businesses in Wales are using or intend to use the Coronavirus

Job Retention Scheme (CJRS), compared to 52.8% of businesses in Scotland, 51.5% in Northern Ireland and 47.7% 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, 35.5% of those operating in Wales are not using, or intending to use, any of the government back schemes or incentives, this compares to 40.4% in England, 35.9% in Northern Ireland and 36.1% in Scotland. Also, of business who have not permanently stopped trading and have applied for a government grant in Wales, 3.7% did not receive it. This compares to 2.7% in Northern Ireland, 4.4% in Scotland and 4.8% in England.

The conclusion is that Option 1 would put Welsh businesses at a disadvantage to businesses in England where protection under s.82 of the Coronavirus Act 2020 currently runs until 25 March 2022. This would also leave Welsh businesses to deal with the end of the CJRS at the same time that protection from forfeiture ends and 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 3 months to 31 December 2021.**

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

- 11.6% of businesses in Wales reported a decrease in turnover outside of normal range. This compares to 13.8% in Scotland, 14.6% in England and 9.6% in Northern Ireland.
- Across all businesses currently trading in Wales, 5.6% declared that profits have decreased by more than 50% and 7.3% said profits had decreased between 20-50%.
- Business in Wales with more than six months of cash reserves was at 42.1%. This compares to 46.9% in Scotland, 42.4% in England and 43.3% in Northern Ireland.
- 37.3% of businesses in Wales had less than 6 months cash reserves (2.5% with no cash reserves), which compares to 34.7% (2.4% with no cash reserves) in Scotland, 40.1% in England (4% with no cash reserves) and 32.2% (2.9% with no cash reserves) in Northern Ireland

#### *Insolvency:*

In Wales, of businesses not permanently stopped trading:

- 9.4% had a moderate risk of insolvency

- 53.6% had a low risk of insolvency
- 28.5% had no risk of insolvency

*Business confidence:*

In Wales, of businesses currently trading:

- 65.5% reported high confidence that they would survive the next three months;
- 28.5% reported medium confidence that they would survive the next three months.

*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, 5.9% reported that capital expenditure had stopped, while 15.5% 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. However, it does not give the same protection as for those businesses in England and it would not provide sufficient time for us to further consider and where necessary work with the UK Government on measures for Wales in relation to commercial rent arrears that have accrued during the pandemic. Therefore, this option is not recommended.

**Option 3: Make Regulations to extend the protection for a just under a further 6 months to 25 March 2022.**

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 7<sup>th</sup> August 2021 and so the ability to pay rent will take time for many businesses until they get back onto their feet.

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. The protection provided by section 82 of the Coronavirus Act 2020 during the relevant period does not remove the requirement to pay rent, but suspends a landlord's right to take forfeiture action for non-payment of rent during the relevant period.

The UK Government has announced that it is proposing to legislate to ringfence commercial rent debt accrued during the pandemic and introduce a system whereby landlords and tenants will be required to come to an agreement on the

treatment of the arrears. Where agreement cannot be reached between landlords and tenants that they undertake binding arbitration to ensure that a legally binding agreement is made between the parties to which they must adhere. It's understood that this will be introduced in this UK Parliamentary session.

Since the UK Government's announcement, the Welsh Government has been analysing the proposals to understand the implications for Wales and Welsh businesses. The Welsh Government will continue to assess the situation during this period and will work in considering and then where necessary, implementing, a solution for Wales in relation to rent arrears accrued during the pandemic.

To support negotiations between tenants and landlords further, the UK Government also announced that it has:

- Extended the current protections for commercial tenants against eviction to 25 March 2022 in England, unless legislation is passed ahead of this.
- 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.

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.

Extending the "relevant period" for the purposes of section 82 of the Coronavirus Act 2020 in relation to Wales with 25 March 2022, 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.

## **6. Consultation**

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.

## **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 25 March 2022.



## Measuring the data

**Table 1: Sample and response rates for Waves 33, 34 and 35 of the Business Insights and Conditions Survey**

Wave	1 July 2021 Publication Wave 33	15 July 2021 Publication Wave 34	29 July 2021 Publication Wave 35
Sample	38,621	38,573	38,763
Response	9,645	9,058	9,036
Rate	25.0%	23.5%	23.3%

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

### Notes

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 35 survey was live for the period 12 to 25 July 2021. For questions regarding the last two weeks, businesses were asked for their experience for the reference period 28 June to 11 July 2021.

The [survey questions](#) are available.

### Coverage

The Monthly Business Survey (MBS) covers the UK for production and only Great Britain for services. The RSI and Construction are Great Britain-focused. Therefore, the BICS will be UK for production-based industries but Great Britain for the other elements of the economy covered.

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 industries are excluded from the survey:

- agriculture
- public administration and defence
- public provision of education and health
- finance and insurance.