

SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (MEMORANDUM NO 2)

Commercial Rent (Coronavirus) Bill

1. This Supplementary Legislative Consent Memorandum is laid under Standing Order (“SO”) 29.2. SO29 prescribes that a Legislative Consent Memorandum must be laid, and a Legislative Consent Motion may be tabled, before Senedd Cymru if a UK Parliamentary Bill makes provision in relation to Wales for any purpose within, or which modifies the legislative competence of the Senedd.
2. The Commercial Rent (Coronavirus) Bill (the “Bill”) was introduced in the House of Commons on 9 November 2021 and consideration in the House of Lords commenced on 13 January 2022 with Lords Committee stage concluding on 10 February. On 28 February, the UK Government tabled 10 amendments for consideration at Lords Report stage due to take place on 14 March. Five of these amendments make provision falling within the legislative competence of the Senedd.
3. The latest version of the Bill, as amended at Lords Committee Stage can be found here:

[Commercial Rent \(Coronavirus\) Bill \(as amended in Grand Committee\)](#)

4. A copy of the amendments to the Bill tabled by UK Government for Lords Report Stage (the “Tabled Amendments”) can be found here:

[1492 \(parliament.uk\)](#)

Policy Objectives

5. The objectives of the Bill are to make provision enabling relief from payment of certain rent debts under business tenancies adversely affected by coronavirus to be available through arbitration; and for connected purposes.

Summary of the Bill

6. The Bill is sponsored by the Department for Business, Energy, and Industrial Strategy.
7. The Legislative Consent Memorandum laid on 3 December 2021 was based on the Bill as introduced into the UK Parliament on 9 November 2021. A full summary of the Bill as introduced is contained within that Legislative Consent Memorandum, where I also stated the following:
 - a) That legislative consent of the Senedd would be required for the following provisions of the Bill: Clause 9 (to the extent that Clause 9 relates to the extension of the “moratorium period”); Clause 23; Clause

27 (to the extent that Clause relates to matters within the legislative competence of the Senedd); and Schedule 2.

- b) That whilst the Welsh Government is broadly content with the principles of the Bill, there were concerns with the way in which Clauses 9 and 27 of the Bill (as introduced) were drafted to the extent that I could not at that stage recommend the Senedd gives its consent to the Bill.

Update on the position since the publication of the first Legislative Consent Memorandum of the Bill

- 8. Following extensive discussions between the UK Government and the Welsh Government at both an official and ministerial level, the UK Government has laid the Tabled Amendments, which include amendments to Clauses 9, 23 and 27 of the Bill and the creation of two new Clauses to the Bill (namely, Clauses 23A and 27A). This Supplementary Legislative Consent Memorandum sets out my position on these amendments.

Clauses 9, 23 and 23A of the Bill

- 9. We understand that in light of the Tabled Amendments, Clauses 9, 23 and 23A of the Bill are to be drafted as shown at Annex 1 (which we set out for illustrative purposes only).
- 10. As originally drafted, the ability for the Secretary of State to make regulations to extend the reference period to arbitration made no provision for recourse to Welsh Ministers before this power was exercised. While the regulation making power covered reserved matters, it also covered matters falling within the legislative competence of the Senedd, as the exercise of the power would also have had the effect of extending the “moratorium period” for the purposes of Clause 23 and Schedule 2 of the Bill.
- 11. However, the amendments to Clauses 9, 23 and 23A of the Bill provides that where the Secretary of State decides to extend the arbitration period in the case of Welsh business tenancies (defined as business tenancy comprising premises in Wales) then whilst the Secretary of State may make regulations to extend the period specified in section 23(2)(b)(i) (in the case of a protected rent debt under a Welsh business tenancy) for the same period of time, the consent of the Welsh Ministers will be required where such extension of the period specified in section 23(2)(b)(i) has effect for the purposes of Schedule 2 of the Bill (other than the purposes of paragraph 3(6) and (7) of Schedule 2).
- 12. In the circumstances I recommend the Senedd supports the amendments at Clauses 9, 23 and 23A of the Bill.

Clauses 27 and 27A of the Bill

13. We understand that in light of the Tabled Amendments, Clauses 27 and 27A of the Bill are to be drafted as shown at Annex 2 (which we set out for illustrative purposes only).
14. As originally drafted, the Secretary of State was able to exercise powers under Clause 27 of the Bill in relation to those provisions of the Bill which fall within the legislative competence of the Senedd and without any degree of control or influence being able to be exercised by the Welsh Ministers in relation to the same.
15. However, the updated drafting of Clause 27 ensures that the Secretary of State's powers under Clause 27 would only be exercisable with the consent of the Welsh Ministers so far as it relates to the re-application, in relation to Welsh business tenancies, of (a) Schedule 2 apart from paragraph 3(6) and (7); (b) section 23 so far as relating to Schedule 2 apart from paragraph 3(6) and (7); and (c) Part 1 and Part 4 so far as relating to the provision mentioned in paragraphs (a) and (b). We take the view that this covers the substantive elements of the Bill falling within the legislative competence of the Senedd.
16. The drafting at Clause 27A also provides the Welsh Ministers with the ability to exercise the power conferred by Clause 27, concurrently with the Secretary of State, so far as it relates to the reapplication, in relation to Welsh business tenancies of (a) Schedule 2 apart from paragraph 3(6) and (7); (b) section 23 so far as relating to Schedule 2 apart from paragraph 3(6) and (7); and (c) Part 1 and Part 4 so far as relating to the provision mentioned in paragraphs (a) and (b).
17. The updated drafting also makes provision to ensure that the powers conferred on the Secretary of State under Clause 27 in relation to these provisions do not fall within the scope of Paragraph 11(1)(a) of Schedule 7B of the Government of Wales Act 2006.
18. In the circumstances I recommend that the Senedd supports the amendments at Clauses 27 and 27A of the Bill.

Financial implications

19. There are currently no additional financial implications for the Welsh Government or the Senedd as a result of the powers in this bill.

Conclusion

20. Whilst the Tabled Amendments do not fully reflect the amendments to the Bill which I originally sought, it is my view that the amendments to Clauses 9 and 27 of the Bill, in conjunction with the amendments at Clauses 23, 23A and 27A of the Bill, represent a significant improvement on the UK Government's original position. This has followed extensive and urgent

discussions with the UK Government at both an official and ministerial level.

21. In my view it is appropriate to use the Bill as a vehicle to seek to resolve outstanding commercial rent arrears in Wales constituting a protected rent debt for the purposes of the Bill, whilst also taking forward protections for those businesses in Wales falling in scope of the Bill. I therefore recommend the Senedd supports the proposals and gives its consent.

Vaughan Gething MS
Minister for Economy
3 March 2022

ANNEX 1

Draft of Clauses 9, 23 and 23A of the Bill with the Tabled Amendments (shown for illustrative purposes only)

Clause 9 (Period for making a reference to arbitration)

- “(1) This section applies where the tenant and the landlord under a business tenancy are not in agreement as to the resolution of the matter of relief from payment of a protected rent debt.*
- (2) A reference to arbitration may be made by either the tenant or the landlord within the period of six months beginning with the day on which this Act is passed.*
- (3) The Secretary of State may by regulations made by statutory instrument extend the period allowed by subsection (2) for making references to arbitration in the case of—*
- (a) English business tenancies,*
 - (b) Welsh business tenancies, or*
 - (c) English business tenancies and Welsh business tenancies.*
- (4) A statutory instrument containing regulations under subsection (3) is subject to annulment in pursuance of a resolution of either House of Parliament.”*

Clause 23 (Temporary moratorium on enforcement of protected rent debts)

- “(1) Schedule 2 contains—*
- (a) provision preventing a landlord who is owed a protected rent debt from using the following remedies in relation to (or on the basis of) the debt during the moratorium period—*
 - (i) making a debt claim in civil proceedings;*
 - (ii) using the commercial rent arrears recovery power;*
 - (iii) enforcing a right of re-entry or forfeiture;*
 - (iv) using a tenant’s deposit;*
 - (b) retrospective provision in relation to certain debt claims made by such a landlord before the start of the moratorium period for the protected rent debt;*
 - (c) provision relating to the right of such a landlord during the moratorium period to appropriate any rent paid by the tenant;*
 - (d) retrospective provision in relation to the right of such a landlord to appropriate any rent paid by the tenant before the start of the moratorium period for the protected rent debt;*
 - (e) provision connected with certain things mentioned in paragraphs (a) to (d).*

- (2) *In this section “the moratorium period”, in relation to a protected rent debt, is the period—*
- (a) *beginning with the day on which this Act is passed, and*
 - (b) *ending—*
 - (i) *where the matter of relief from payment of the protected rent debt is not referred to arbitration within the period of six months beginning with that day, with the last day of that period, or*
 - (ii) *where that matter is referred to arbitration, with the day on which the arbitration concludes.*
- (2A) *Subsection (2) is subject to any extension of the period mentioned in paragraph (b)(i) that—*
- (a) *is made by or by virtue of section 23A, and*
 - (b) *has effect in relation to the protected rent debt.*
- (3) *For the purposes of subsection (2)(b) an arbitration concludes when—*
- (a) *the arbitration proceedings are abandoned or withdrawn by the parties,*
 - (b) *the time period for appealing expires without an appeal being brought, or*
 - (c) *any appeal brought within that period is finally determined, abandoned or withdrawn.*
- (4) *In this section “arbitration” means arbitration under Part 2.”*

Clause 23A (Alteration of moratorium period)

- “(1) *In this section “extension regulations” means regulations under section 9(3) extending the period allowed by section 9(2) for making references to arbitration.*
- (2) *Where extension regulations made by virtue of section 9(3)(a) or (c) extend that period in the case of English business tenancies, the period specified in section 23(2)(b)(i), so far as it applies in the case of a protected rent debt under an English business tenancy, is extended for the same period of time.*
- (3) *Subsection (4) below applies where extension regulations made by virtue of section 9(3)(b) or (c) extend that period in the case of Welsh business tenancies.*
- (4) *The Secretary of State may by regulations made by statutory instrument extend the period specified in section 23(2)(b)(i), so far as it applies in the case of a protected rent debt under a Welsh business tenancy, for the same period of time.*

- (5) *Regulations under subsection (4) must provide for the extension referred to in that subsection—*
- (a) *to have effect for the purposes of this Part including the purposes of Schedule 2, or*
 - (b) *to have effect for the purposes of this Part other than the purposes of Schedule 2.*
- (6) *The power to make the provision referred to in subsection (5)(a) is exercisable only with the consent of the Welsh Ministers to the extension having effect for the purposes of Schedule 2 other than the purposes of paragraph 3(6) and (7).*
- (7) *A statutory instrument containing regulations under subsection (4) is subject to annulment in pursuance of a resolution of either House of Parliament.”*

ANNEX 2

Draft of Clauses 27 and 27A of the Bill with the Tabled Amendments (shown for illustrative purposes only)

Clause 27 (Power to apply Act in relation to future periods of coronavirus control)

“(1) The Secretary of State may by regulations provide for this Act (apart from this section) to apply again in relation to rent debts under business tenancies adversely affected by closure requirements.

(1A) Regulations under this section may—

- (a) be made so as to apply in relation to—
 - (i) English business tenancies,*
 - (ii) Welsh business tenancies, or*
 - (iii) English business tenancies and Welsh business tenancies;**
- (b) exclude the provisions mentioned in subsection (7B)(a) to (c) from the provisions being re-applied in relation to Welsh business tenancies.*

(2) A business tenancy is adversely affected by a closure requirement for the purposes of subsection (1) if—

- (a) the whole or part of a business carried on at or from the premises comprised in the tenancy, or*
- (b) the whole or part of those premises, is of a description subject to a closure requirement imposed at any time after 7 August 2021.*

(3) In this section “closure requirement” means a requirement imposed by regulations as a public health response to coronavirus and expressed as an obligation—

- (a) to close businesses, or parts of businesses, of a specified description, or*
- (b) to close premises, or parts of premises, of a specified description.*

(4) In subsection (3) “coronavirus” means severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

(5) The power under this section is exercisable whether or not the closure requirement remains in force when the regulations are made.

(6) Subsections (3) to (5) of section 4 apply for purposes of this section as they apply for purposes of section 4.

(7) Regulations under this section may—

- (a) provide for provisions of this Act to apply with such necessary modifications as are specified in the regulations;*

- (b) *make different provision for England and for Wales;*
- (c) *make incidental, supplemental, consequential, saving or transitional provision (including provision amending or otherwise modifying an Act of Parliament).*

(7A) For the purposes of subsection (7)(b)—

- (a) *“modifications” means omissions, additions or variations, and*
- (b) *modifications are “necessary” if they appear to the Secretary of State to be necessary for the provisions being reapplied to operate correctly in relation to business tenancies adversely affected by the closure requirements in question.*

(7B) The power under this section is exercisable only with the consent of the Welsh Ministers so far as it relates to the re-application, in relation to Welsh business tenancies, of—

- (a) *Schedule 2 apart from paragraph 3(6) and (7),*
- (b) *section 23 so far as relating to Schedule 2 apart from paragraph 3(6) and (7), and*
- (c) *Part 1 and this Part, so far as relating to the provision mentioned in paragraphs (a) and (b).*

(8) Regulations under this section—

- (a) *are to be made by statutory instrument, and*
- (b) *may not be made unless a draft of the statutory instrument containing them has been laid before and approved by a resolution of each House of Parliament.”*

Clause 27A (Concurrent power for Welsh Ministers to apply moratorium provisions again)

(1) The Welsh Ministers may exercise the power conferred by section 27, concurrently with the Secretary of State, so far as it relates to the reapplication, in relation to Welsh business tenancies, of—

- (a) *Schedule 2 apart from paragraph 3(6) and (7),*
- (b) *section 23 so far as relating to Schedule 2 apart from paragraph 3(6) and (7), and*
- (c) *Part 1 and this Part, so far as relating to the provision mentioned in paragraphs (a) and (b).*

(2) Section 27 has effect in relation to regulations made by the Welsh Ministers by virtue of this section as if—

- (a) *references to the Secretary of State were to the Welsh Ministers,*
- (b) *subsection (1A)(a)(i) and (iii) and (b) were omitted,*
- (c) *in subsection (7)—*
 - (i) *the references in paragraph (a) to provisions of this Act were references to provisions mentioned in subsection (1)(a) to (c) above and,*

- (ii) *the reference in paragraph (c) to an Act of Parliament included a reference to an Act or Measure of Senedd Cymru,*
 - (d) *subsection (7B) were omitted, and*
 - (e) *in subsection (8)(b), for “each House of Parliament” there were substituted “Senedd Cymru”.*

- (3) *In Schedule 7B to the Government of Wales Act 2006 (general restrictions on legislative competence of Senedd Cymru), in paragraph 11(6)(b) (exceptions to restrictions relating to Ministers of the Crown)—*
 - (a) *omit the “or” at the end of paragraph (vi), and*
 - (b) *after paragraph (viii) insert “;*
 - (ix) *section 27 of the Commercial Rent (Coronavirus) Act 2022.”*