

Explanatory Memorandum to the Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) 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) Regulations 2021. I am satisfied that the benefits justify the likely costs.

Ken Skates MS

Minister for Economy, Transport & North Wales

9 March 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.

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) (No.3) Regulations 2020 extend the “relevant period” until 31 March 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 30th June 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 30th June 2021.

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 31st March 2021.

Option 2: Make Regulations to extend the protection for a further 1 month to 30th April 2021.

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

Option 4: Make Regulations to extend the protection for a further 6 months to 30th September 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.

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 31st March 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 24 of the ONS BICS survey covers the period of **25 January to 7 February 2021**. It shows that, of businesses who have not permanently stopped trading, 67% of businesses in Wales are using or intend to use the Coronavirus Job Retention Scheme, compared to 67% of businesses in Scotland and 62% in Northern Ireland as well as 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, 63% of those operating in Wales had not received any government-backed loans or finance agreements, this compares to 65% in England, 61% in Northern Ireland and 66% in Scotland. Also, of business who have not permanently stopped trading and have applied for a government grant in Wales, 11% did not receive it. This compares to 7% in Northern Ireland, 16% in Scotland and 11% in 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 30th April 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 30th June 2021.

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

- 47% of businesses in Wales reported a decrease in turnover outside of normal range. This compares to 45% in Scotland, 45% in England and 39% in Northern Ireland.
- Across all businesses currently trading in Wales, 10% declared that profits have decreased by more than 50%, 12% said profits had decreased between 20-50% and 20% said profits had decreased by up to 20%
- Of the UK countries, Wales had the third highest proportion of businesses with more than six months of cash reserves at 36%. This compares to 40% in Scotland, 36% in England and 34% in Northern Ireland.
- 44% of businesses in Wales had less than 6 months cash reserves, above the overall UK figure of 43%. Around 4% 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
- 14% had a moderate risk of insolvency
- 52% had a low risk of insolvency
- 24% had no risk of insolvency

Business confidence:

In Wales, of businesses currently trading:

- 59% reported high confidence that they would survive the next three months;
- 31% reported medium confidence that they would survive the next three months;
- 4% reported low confidence that they would survive the next three months.

Site closures:

In Wales, of businesses currently trading:

- 4% intended to permanently close some business sites;
- 81% did not intend to permanently close any business sites

Capital expenditure¹

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

In wave 23 of the BICS (11 January to 24 January 2021), of all businesses continuing to trade in Wales, 11% reported that capital expenditure had stopped, while 29% 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 something of a disadvantage in negotiating rent deferment arrangements to ease tenants' current predicaments whilst seeking to protect their assets.

Option 4: Make Regulations to extend the protection for a further 6 months to 30th September 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 rent would be limited until businesses are permitted to operate 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

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.

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, as these Regulations are viewed as an emergency response to the Coronavirus pandemic, this option may put landlords and investors under substantial pressure. In addition to increasing challenges 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) (No.3) Regulations 2020 has had on both commercial tenants and landlords in Wales was undertaken, concluding in February 2021.

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

- Since the previous extension, there has been significant restrictions imposed on businesses through alert level 4. Permitting the provisions to lapse at this stage would place commercial tenants at a profound risk.
- Many businesses are concerned about their viability and outlook.
- There are some opportunistic companies which may be taking advantage of the moratorium, despite an ability to pay.
- The UK Government's Debt Respite Scheme will give someone with problem debt the right to legal protections from their creditors; offering supplementary breathing space once the provisions are permitted to lapse.
- There are positive examples of constructive dialogue between tenants and landlords.
- The provisions were intended to be an emergency measure.
- There are differential impacts on different sectors.
- The actions of the UK Government and other Devolved Administrations in respect of these provisions should constitute an important factor in considerations.

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 30th June 2021.

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 22, 23 and 24 of BICS

Wave	28 January 2021 Publication Wave 22	11 February 2021 Publication Wave 23	25 February 2021 Publication Wave 24
Sample	38,831	39,418	39,278
Response	10,325	10,008	10,351
Rate	26.6%	25.4%	26.4%

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

Wave 23

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 23 survey was live for the period 25 January to 7 February 2021. For questions regarding the last two weeks, businesses were asked for their experience for the reference period 11 to 24 January 2021.

Weighted estimates for the BICS have now been developed for all variables that are collected at a UK level. A detailed description of the weighting methodology and its differences to unweighted estimates is available in Business Impact of Coronavirus (COVID-19) Survey (BICS): preliminary weighted results.

ONS currently provide unweighted estimates with a country and regional split for selected variables in the accompanying dataset. 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.

On 1 February 2021, experimental weighted regional estimates up to Wave 21 (28 December 2020 to 10 January 2021) were published in [Understanding the business impacts of local and national restrictions: February 2021](#), as part of the Economic Review.

Wave 24

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 24 survey was live for the period 8 to 21 February 2021. For questions regarding the last two weeks, businesses were asked for their experience for the reference period 25 January to 7 February 2021.

Based on user feedback, this survey has changed its name to the “Business Insights and Conditions Survey” (BICS) from Wave 24 (this wave) onwards. The purpose remains the same, to collect real-time information on important issues such as the coronavirus (COVID-19) pandemic and the end of the EU transition period.

Weighted estimates for the BICS have now been developed for all variables that are collected at a UK level. A detailed description of the weighting methodology and its differences to unweighted estimates is available in Business Impact of Coronavirus (COVID-19) Survey (BICS): preliminary weighted results.

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.