

Explanatory Memorandum to the Business Tenancies (Extension of Protection from Forfeiture etc.) (Wales) (Coronavirus) (No. 3) Regulations 2020

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 2020. I am satisfied that the benefits justify the likely costs.

Ken Skates MS
Minister for Economy, Transport & North Wales
9 December 2020

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 (26th March 2020), 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 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.2) Regulations 2020 extend the “relevant period” until 31 December 2020.

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 31st March 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 31st March 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 December 2020.

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

Option 3: Make Regulations to extend the protection for a further 3 months to 31st March 2021. This is the preferred option.

Option 4: Make Regulations to extend the protection for a further 6 months to 30th June 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 December 2020.

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 16 of the ONS BICS survey covers the period of 5 **October to 18 October**. It shows that, of businesses who have not permanently stopped trading, 82% of businesses in Wales had applied for the Coronavirus Job Retention Scheme, compared to 80% of businesses in Scotland, 68% in Northern Ireland and 74% in England¹.

Given the high relative dependence on the CJRS scheme in Wales, this option may place businesses in Wales at financial risk. Furthermore, given that other UK nations are extending protection, businesses in Wales may be placed at a comparative disadvantage if an extension is not put in place. However, this would need to be viewed in the context of financial risks to landlords who may experience cash flow issues if further extensions are granted.

Welsh businesses have also 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 CJRS.

Of businesses who have not permanently stopped trading, 16% of those operating in Wales had not applied for any of these schemes, this compares to 23% in England, 27% in Northern Ireland and 18% in Scotland¹.

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 31st January 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

¹ Latest BICS release is for Wave 17 covering the period between 19 October and 1 November. However, that release does not contain these figures.

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 31st March 2021.

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

- 50% of businesses in Wales reported a decrease in turnover outside of normal range. This compares to 51% in Scotland, 47% in England and 50% in Northern Ireland.²
- Across all businesses currently trading in Wales, 13% declared that profits have decreased by more than 50%, 13% said profits had decreased between 20-50% and 23% 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 37%. This compares to 39% in Scotland, 36% in England and 43% in Northern Ireland.
- 44% of businesses in Wales had less than 6 months cash reserves, below the overall UK figure of 46%. Around 3% of Welsh businesses reported they had no cash reserves.

Insolvency³ .:

In Wales, of businesses not permanently stopped trading:

- 1% had a severe risk of insolvency
- 10% had a moderate risk of insolvency
- 51% had a low risk of insolvency
- 26% had no risk of insolvency

Footfall⁴

In Wales, of businesses currently trading:

- 25% reported footfall had decreased
- 15% reported footfall had stayed the same
- 3% reported footfall had increased

Customer interest³

² These figures were calculated using weighted numbers

³ The figures relating to insolvency and customer interest are from BICS Wave 15 (covering the period between 21 September to 4 October) as Waves 16 and 17 do not contain these figures.

⁴ The figures relating to footfall are from BICS Wave 16 (covering the period between 5 October to 18 October) as Wave 17 does not contain these figures.

In Wales, of businesses currently trading:

- 30% reported customer interest had decreased
- 36% reported customer interest had stayed the same
- 10% reported customer interest had increased

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, 13% reported that capital expenditure had stopped, while 31% 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. Officials will continue engaging with the UK Government to explore interventions to alleviate these pressures.

Option 4: Make Regulations to extend the protection for a further 6 months to 30th June 2021.

Option 4 would allow more time (than Option 3) for officials to develop alternative mechanisms of support for businesses and enable the UK Government greater capacity to review structures and the possibility for further fiscal or non-fiscal provisions.

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, an extension to 30th June 2021 would represent a 15 month moratorium. As these Regulations are viewed as an emergency response to the Coronavirus pandemic, this length 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.2) Regulations 2020 has had on both commercial tenants and landlords in Wales was undertaken, concluding in November 2020.

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

- Emphasis was placed on the development of a more nuanced approach to these provisions; refining the reach of relevant businesses to only severely affected sectors
- The moratorium has offered vital support to extremely vulnerable commercial tenants
- Opportunistic companies may take advantage of the moratorium despite an ability to pay
- Low collection rates of rent and service charges have had a significant impact on property owners and their ability to invest which will, in turn, impact on the restart of the economy
- Attention should be given to aggressive debt enforcement
- Constructive dialogue between landlords and businesses are crucial to maintaining a strong relationship and this aspiration should be encouraged
- Sufficient time should be permitted for businesses and landlords to prepare and adjust in line with interventions in this area

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 31st March 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 15, 16 and 17 of BICS

Wave	22 October 2020 Publication Wave 15	5 November 2020 Publication Wave 16	19 November 2020 Publication Wave 17
Sample	24,353	24,315	38,760
Response	5,970	5,755	10,377
Rate	24.5%	23.7%	26.8%

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

Wave 15

The indicators and analysis presented in this bulletin are based on responses from the voluntary fortnightly business survey, which captures businesses responses on how their turnover, workforce prices, trade and business resilience have been affected in the two week reference period. These data relate to the period 21 September to 4 October 2020.

The sample design for BICS was reviewed and refreshed in Wave 7 and will be the basis for future waves. This sample redesign improves our coverage for the smaller sized businesses.

The survey was sent to around 24,000 UK businesses, and results presented in this release are based on a limited number of responses, around 24.5% (5,970) of all businesses surveyed who responded.

Estimates from the Business Impact of Coronavirus (COVID-19) Survey (BICS) are unweighted with several tables now weighted (including imputation). A detailed description of the weighting methodology and its differences to unweighted results can be found in the recently published Business Impact of Coronavirus (COVID-19) Survey: preliminary weighted results. Currently, weighted data is only available for these three variables. However, weighted data for other variables is currently being developed.

Unweighted tables* should be treated with caution when used to evaluate the impact of COVID-19 across the UK economy. Each business was assigned the

same weight regardless of turnover, size or industry, and the data in the latest period are final.

**For certain workforce tables the proportions are based on employment within responding businesses.*

Wave 16

The indicators and analysis presented in this bulletin are based on responses from the voluntary fortnightly business survey, which captures businesses responses on how their turnover, workforce prices, trade and business resilience have been affected in the two week reference period. These data relate to the period 5 October to 18 October 2020.

The sample design for BICS was reviewed and refreshed in Wave 7 and will be the basis for future waves. This sample redesign improves our coverage for the smaller sized businesses.

The survey was sent to around 24,000 UK businesses, and results presented in this release are based on a limited number of responses, around 23.7% (5,755) of all businesses surveyed who responded.

Estimates from the Business Impact of Coronavirus (COVID-19) Survey (BICS) are now weighted with only regional tables currently unweighted. A detailed description of the weighting methodology and its differences to unweighted results can be found in the recently published Business Impact of Coronavirus (COVID-19) Survey: preliminary weighted results.

Unweighted tables* should be treated with caution when used to evaluate the impact of COVID-19 across the UK economy. Each business was assigned the same weight regardless of turnover, size or industry, and the data in the latest period are final.

**For certain workforce tables the proportions are based on employment within responding businesses.*

Wave 17

The indicators and analysis presented in this bulletin are based on responses from the voluntary fortnightly business survey, which captures businesses responses on how their turnover, workforce prices, trade and business resilience have been affected in the two week reference period. These data relate to the period 19 October to 1 November 2020.

The sample design for BICS was reviewed and refreshed in Wave 17 and will be the basis for future waves. This sample redesign improves our coverage for the smaller sized businesses and the survey will go to approximately 39,000 businesses.

The survey was sent to around 39,000 UK businesses, and results presented in this release are based on a limited number of responses, around 26.8% (10,377) of all businesses surveyed who responded.

Estimates from the Business Impact of Coronavirus (COVID-19) Survey (BICS) are now weighted with only regional tables currently unweighted. A detailed description of the weighting methodology and its differences to unweighted results can be found in the recently published Business Impact of Coronavirus (COVID-19) Survey: preliminary weighted results.

Unweighted tables* should be treated with caution when used to evaluate the impact of COVID-19 across the UK economy. Each business was assigned the same weight regardless of turnover, size or industry, and the data in the latest period are final.

**For certain workforce tables the proportions are based on employment within responding businesses.*