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Commercial Rent (Coronavirus) Bill: What Landlords & Tenants Need to Know About the New Arbitration Regime for Covid-related Rent Arrears

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At a glance

The UK Government published a revised [Code of practice for commercial property relationships following the Covid-19 pandemic](#) alongside a draft [Commercial Rent \(Coronavirus\) Bill](#) on 9 November 2021, which will create a binding arbitration regime in respect of Covid-related rent arrears.

Moratorium measures will continue until the Bill has become law.

Government Policy

- ▶ Tenants who are able to pay rent debt in full (while maintaining the viability of their business) should do so, regardless of whether their business was forced to close.
- ▶ Tenants who are unable to pay in full should, in the first instance, seek to negotiate with their landlord, in the expectation that the landlord will 'share the burden' by waiving some or all rent arrears where they are able to do so. The revised Code of Practice provides a framework for negotiation.
- ▶ If landlord and tenant remain unable to reach agreement, either party may seek to access the new arbitration regime (in respect of 'protected rent debts' within its scope).

Arbitration Regime

- ▶ **Scope:** The new regime will apply to rent arrears under business tenancies in respect of periods where (a) the business or premises were required to cease or restrict trading, (b) the tenant can prove it is otherwise viable but cannot afford to pay such rent arrears, and (c) the landlord and tenant have not already reached agreement in respect of the arrears. Debts accrued at other times will not be in scope. See [page 3](#).
- ▶ **Constraints:** Landlords will be restricted from pursuing remedies in respect of protected rent debt. See [page 4](#).
- ▶ **Principles:** Contractual commitments should be recognised as far as possible, while achieving a proportionate balance between the interests of landlords and tenants, based on core principles of viability and affordability; see [page 5](#). The arbitrator's decision will be evidence-based and take various factors into account; see [page 6](#).
- ▶ **Process:** The presumption is this will be a document-only process, but the parties may request a formal hearing. See [page 7](#).

Limitations on subsequent restructuring

- ▶ Tenants that have entered the arbitration system may not include the ring-fenced rent debt in any CVA, restructuring plan or scheme of arrangement after an arbitrator is appointed and for a period of 12 months, beginning when the arbitration settlement is awarded.

Impact

Agreement has been reached on the treatment of Covid-19-related UK rent arrears in the vast majority of cases – more than 80% – since the start of the pandemic.¹ However, significant rent debt remains unresolved.

The scope of the arbitration regime is fairly narrow:

- ▶ The regime is clearly intended as a 'last resort'.
- ▶ Tenants will be expected to pay full rent in respect of periods where they were not *required* to close or restrict trading.
- ▶ Even in respect of ring-fenced periods, tenants will be expected to pay full rent if they can afford to do so without affecting their viability.
- ▶ Tenants will be ineligible for the arbitration regime if they would not be viable even with a possible full write-off of rent arrears.
- ▶ See further [page 9](#).

Timing

The draft legislation will now pass through Parliament over the next few months, with effectiveness anticipated from 25 March 2022, triggering a six-month 'application window'.

As ever, the draft Bill remains subject to change throughout the Parliamentary process.

1. According to survey data from the British Property Federation.

Scope of arbitration regime

*Rent arrears under business tenancies for periods in which premises were **required** to restrict trading*

“Protected rent debt”: defined scope

Any **rent** debt under a **business tenancy** where (1) the tenant was **adversely affected** by coronavirus and (2) the rent is attributable to a period within the **protected period**

Rent

- ▶ Includes payments such as service charges
- ▶ Excludes payments to third parties e.g. business rates
- ▶ Excludes where parties have already come to agreement on arrears
- ▶ Tenancy deposits drawn down by the landlord will be treated as unpaid rent (and ‘paid’ where the tenant makes good any shortfall in the deposit)

Business Tenancy

- ▶ Excludes tenancies where parties have already come to agreement on arrears
- ▶ Includes tenancies which have ended
- ▶ Only captures tenancies to which Part 2 of the Landlord and Tenant Act 1954 applies
- ▶ Includes England and Wales; Northern Ireland will have a power in the Bill to introduce similar legislation; it does not apply substantively to Scotland¹

Adversely Affected

- ▶ **Only** where the whole or part of the business or premises were required to close or restrict trading under UK public health regulations (including curfews and ‘takeaway only’ orders)
- ▶ Excludes periods in which premises were not required to restrict trading, e.g. premises which chose to close as it was uneconomic to open

Protected Period²

- ▶ Period from 21 March 2020 to 18 July 2021³ or (if earlier) the last day on which the premises were subject to a closure requirement (in whole or in part) or other specific coronavirus restriction which regulated how the business was to be carried on or the premises were to be used
- ▶ See [Annex](#) for periods of closure/restrictions

Exclusion of tenants subject to other restructuring proceedings

Tenants subject to a CVA, scheme of arrangement or restructuring plan which relates to any protected rent debt will be excluded from the new arbitration regime. Where protected rent debt has been referred to arbitration, no proposal/application for a CVA, scheme of arrangement or restructuring plan which relates to the protected rent debt may be made within 12 months after the arbitration award is made.

1. Scotland has adopted an alternative approach to commercial evictions during the pandemic. Limited provisions of the Bill extend to Scotland and Northern Ireland, to ensure that certain insolvency proceedings could not be brought or measures applied in Scotland or Northern Ireland, in respect of protected debt in England and Wales.
2. Rent paid outside of the ring-fenced period will be treated as covering such period of debt as the tenant has specified (or alternatively, landlord and tenant have agreed, and they are encouraged to reach agreement in that respect); absent specification (or agreement), the sum will be treated as being payment for rent due outside the period within scope of the arbitration process.
3. Or, for premises in Wales, 7 August 2021.

Constraints on landlords

Expanded constraints on landlord enforcement action in respect of protected rent debts

Existing restrictions on forfeiture and Commercial Rent Arrears Recovery (CRAR) will remain in place until 25 March 2022 (or, if earlier, the enactment of the legislation).

Effective 10 November 2021, landlords will also be prevented from pursuing debt enforcement by making a debt claim in civil proceedings (i.e. seeking a County Court or High Court Judgment) in respect of protected rent debts. This closes what certain tenants have viewed as a loophole.

For protected rent debts (within the scope described on the previous page):

- ▶ **Constraints on remedies:** Landlords will remain unable to pursue remedies such as forfeiture, CRAR or pursuing debt enforcement by making a debt claim in civil proceedings (i.e. seeking a County Court or High Court Judgment).
- ▶ **Timeframe:** Use of these remedies will be restricted until (a) a settlement has been reached (either through negotiation or through the arbitration system, when the time to appeal an arbitration decision has passed), or (b) the six-month window for application to the arbitration system has passed without an application being made.
- ▶ **Rent deposits:** Landlords will also be prevented from drawing down on tenancy deposits to cover outstanding ring-fenced rent arrears. If a landlord has already drawn down on the deposit and used it to cover ring-fenced debt, the requirement for the tenant to top up the deposit will be suspended.

Landlords will however be able to take action in respect of the following under the new regime:

- ▶ non-payment of rental arrears incurred prior to March 2020 and from the end of the ring-fenced period onwards;
- ▶ protected rent debt that is not referred to arbitration within the six-month application window;
- ▶ tenants that fall outside the scope of arbitration legislation over the non-payment of rental arrears accrued at any time; and
- ▶ charging interest on rent liabilities incurred from the end of the ring-fenced period onwards, if such interest payments are included in the terms of the lease.

Principles

Defining principles for the arbitrator to apply in determining what amount tenant should pay

Viability

- ▶ For tenant to be eligible for the new arbitration regime, the business must otherwise be “viable” – this is the key “gateway”.
- ▶ What constitutes “viability” is deliberately undefined, but:
 - when referring to viability, parties should consider whether ring-fenced debt aside the business has, or will in the foreseeable future have, the means and ability to meet its obligations and to continue trading;
 - if the tenant would not be viable even if it were given full relief from the protected rent debt, the arbitrator must dismiss the case;
 - the preservation of the viability of the business of the tenant should not be at the expense of the solvency of the landlord; and
 - both parties should consider their viability and any resources that may be available to them, though the Government does not consider a fair outcome to require substantial borrowing or restructuring by either party.
- ▶ Any settlement of rent debt should aim to preserve – so far as possible – the tenant business and the jobs that it supports (without undermining the solvency of the landlord).

Affordability

- ▶ Where a viable tenant is seeking to deviate from the terms of the lease in respect of rent owed, they will need to demonstrate why the payment is unaffordable and what payment or payment period might otherwise be affordable in the near future.
- ▶ Any relief should be no greater than necessary for the tenant to afford the payment.
- ▶ What is “affordable” is not defined and is again left to the arbitrator to determine, but:
 - the Government expects landlords and tenants to consider affordability in the context of debts owed being paid as soon as practicable but over a period of no more than two years, to allow a return to normality as fast as possible;
 - it is up to the landlord whether or not to submit evidence as to the financial impact of rent concessions from the landlord’s perspective; and
 - where the arbitrator is satisfied that a tenant has taken unjustifiable steps to alter its financial position so that its ability to afford to pay protected rent debt is reduced, for example through the payment of excessive dividends, the arbitrator will have the option to disregard the amounts involved in assessing any award. The arbitrator can also disregard anything that has been done by a landlord to manipulate their financial affairs so as to improve their position in relation to an award.

See further next page as to evidence that the arbitrator could consider when assessing viability and affordability.

Arbitrator's assessment – considerations

Wide range of evidence and factors, to be applied flexibly

The arbitrator must have regard to: the tenant's assets and liabilities; previous rent payments made to the landlord; the impact of coronavirus on the tenant's business; and any other information as to the tenant's financial position as the arbitrator considers appropriate. This may include the following factors.

The arbitrator must disregard the possibility of the tenant (or landlord) borrowing money or restructuring its business.

Factors¹

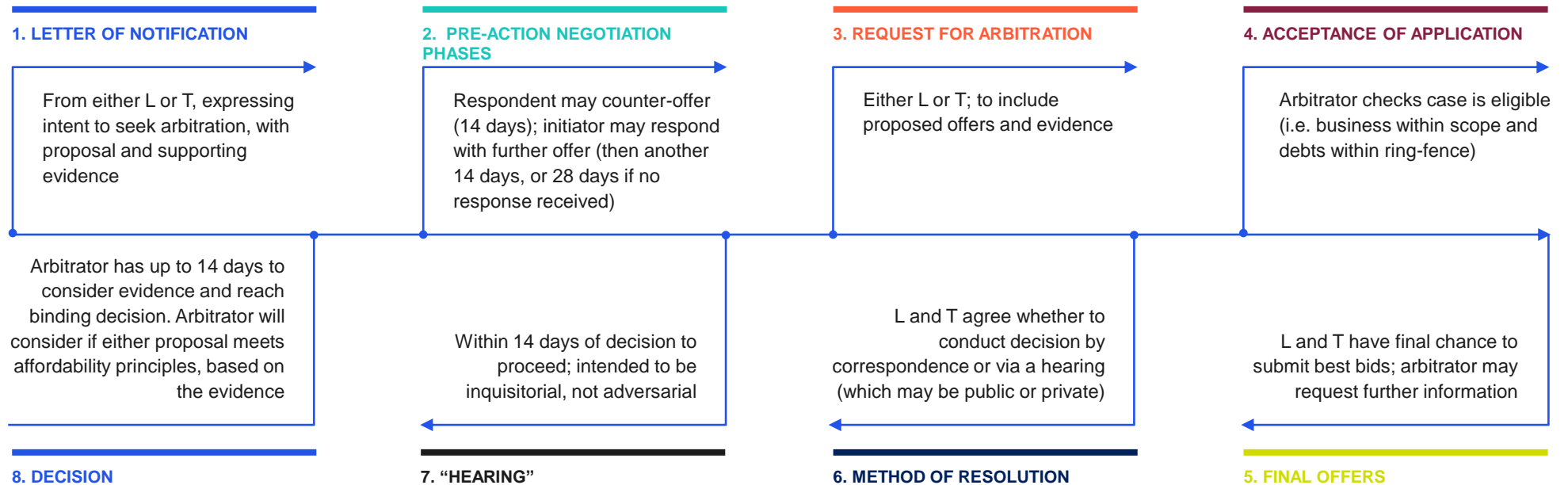
- ▶ existing and anticipated credit/debit balance
- ▶ business performance since March 2020
- ▶ tenant's assets (noting that some may be liquid assets such as cash and other may be plant and machinery which cannot be sold without ending the business)
- ▶ position of the tenant with other tenancies i.e., ability to absorb the costs within those other tenancies
- ▶ government assistance received by the tenant including loans and grants (which may not have covered rent but provided some financial support to the business)
- ▶ dividend and bonus payments to shareholders
- ▶ excessive or unreasonable dividend payments to directors (having regard for the fact that director dividends may be the director's only income during the ring-fenced period)
- ▶ overdue invoices or tax demands
- ▶ unpaid or returned cheques or electronic payments
- ▶ exceeding overdraft limits
- ▶ creditor demands
- ▶ money judgments
- ▶ expert evidence received as to the tenant's current trading position, e.g., from the tenant's accountant
- ▶ shortfalls in share issues
- ▶ evidence of prior refusal of further credit, funding, or lending, (although the possibility that the tenant could obtain finance if it has not already applied for it is not to be considered a factor)
- ▶ failure to meet budget projections
- ▶ loss of important contracts
- ▶ insolvency of a major customer
- ▶ unexpected retentions
- ▶ knowledge of a lack of working capital
- ▶ loss of key personnel or staff redundancy

These factors may also be used to assess the impact on the landlord's solvency, should the landlord wish to provide such evidence.

¹ This list is non-exhaustive and intended to be applied flexibly on a case-by-case basis.

Process

Multi-stage process may take 2-3 months



Does either proposal meet the key principles?

- ▶ **If both do:** Arbitrator will choose proposal most consistent with the principles
- ▶ **If only one does:** Arbitrator will choose that proposal
- ▶ **If neither does:** Arbitrator will make whatever award they consider appropriate

Decision: the arbitrator's award must be published (with any confidential information taken out, unless the relevant party consents to its publication).



Further details

Application Window

Parties may apply for arbitration within a six-month 'application window' following the enactment of legislation (expected around 25 March 2022, in which case applications would need to be made by 25 September 2022).

Multiple Premises

Where a tenant has multiple premises with the same landlord, these may be considered jointly providing the parties agree or if the arbitrator decides to consolidate the proceedings.

Where multiple debts are owed by one tenant to the same landlord, the tenant (and landlord, should they wish) should provide evidence on affordability relating to all debts. Where the tenant or landlord is part of a bigger group, evidence of affordability may include that wider context.

Costs

The cost of an arbitration application remains to be confirmed.

Appeals

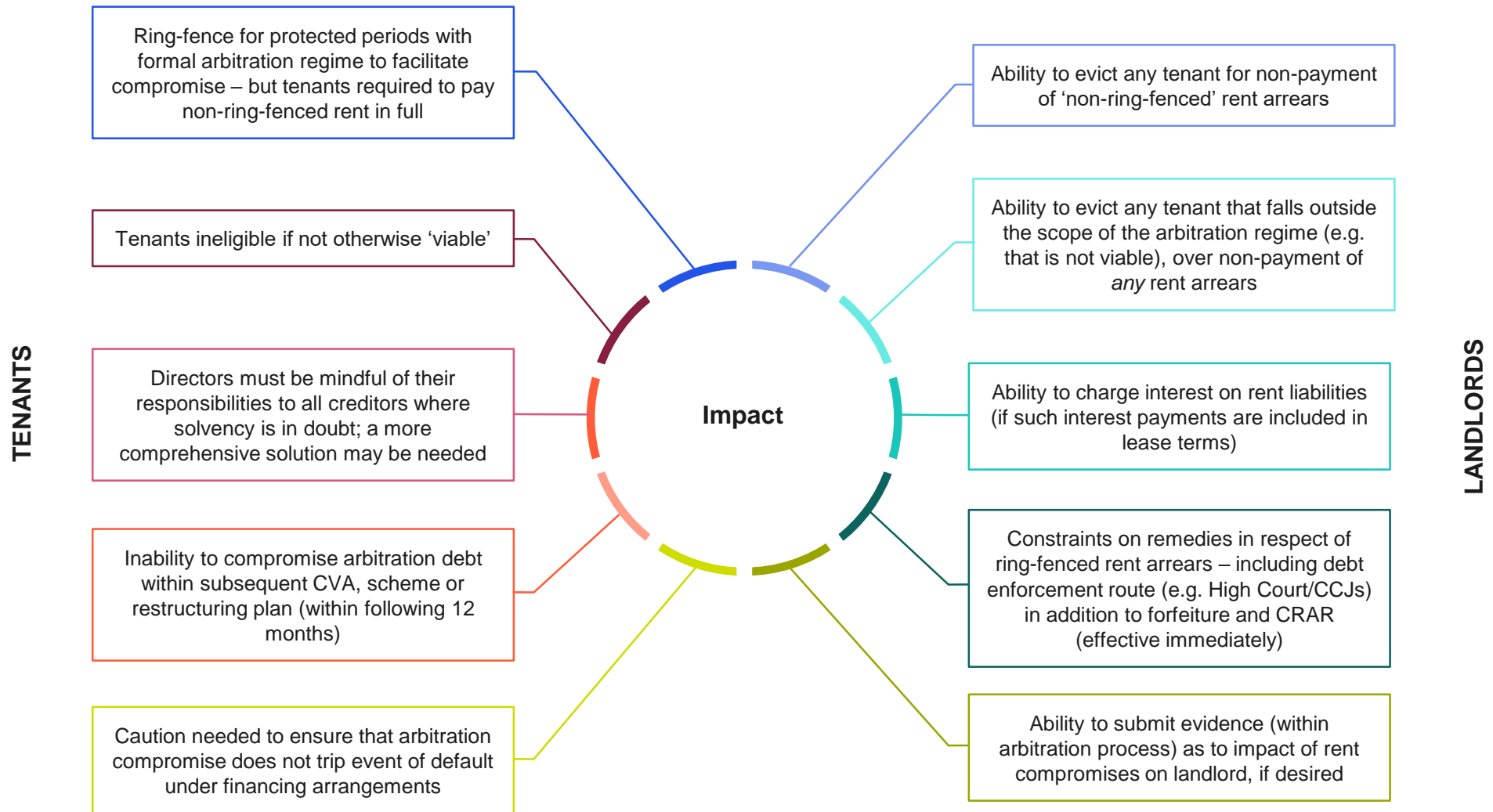
Appeal of an arbitration decision will be possible only in limited cases e.g., that the tenancy was not in scope.

Arbitration Bodies

Arbitration bodies will have to demonstrate that they are competent to supply arbitration dispute resolution services. This competency will be assessed by BEIS against an 'Acceptance Model' that will set out the requisite criteria, including standards such as evidencing impartiality, monitoring and training for their arbitrators, a robust appeals system; arbitrators will be required to be well versed in business finances and commercial negotiations. Arbitration bodies will publish a list of arbitrators that are approved according to these standards in due course.

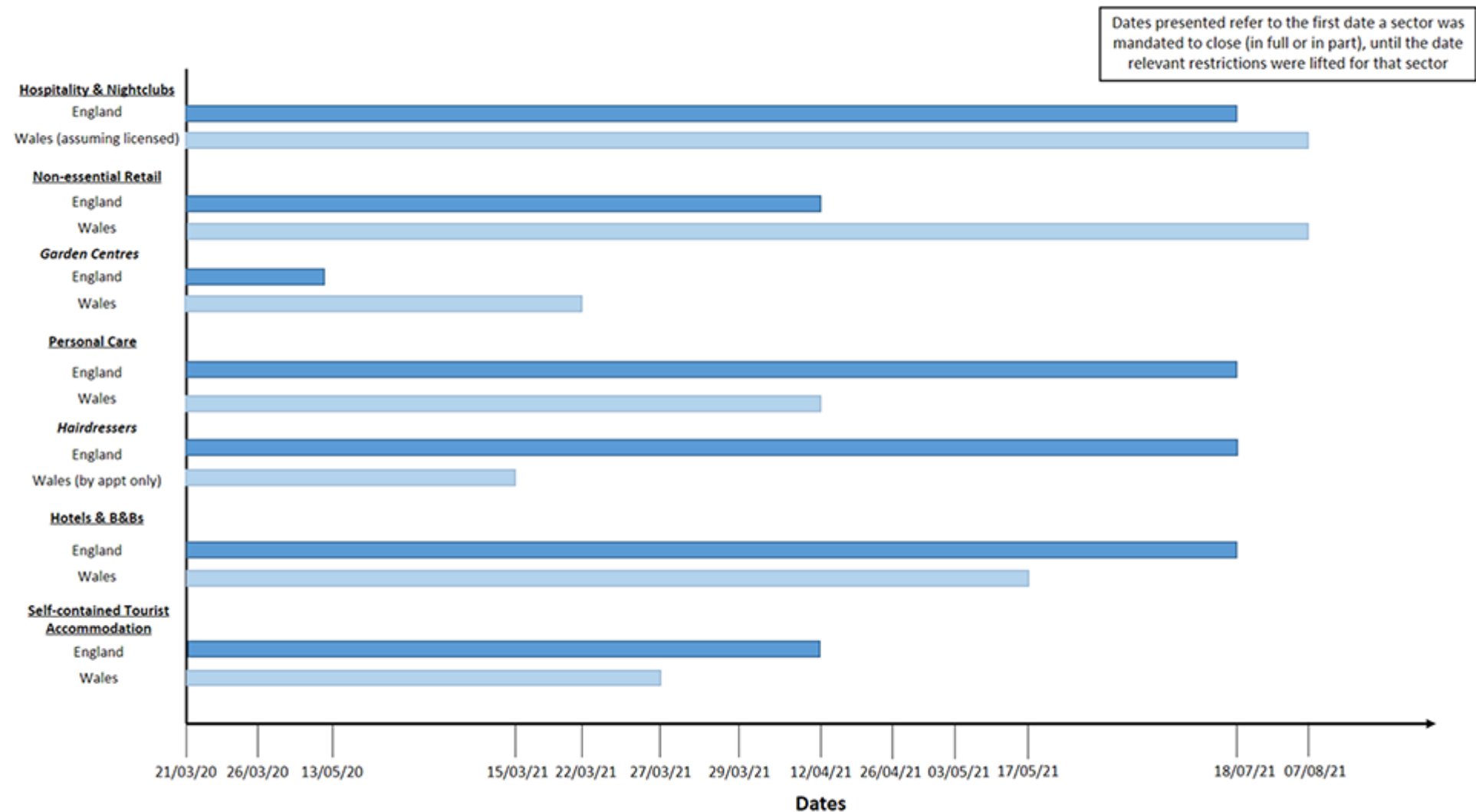
Impact

Impact on tenants and landlords following introduction of new regime (likely end March 2022)



Annex: periods of restrictions¹

For non-essential retail tenants seeking to settle rent arrears with landlords, c.12 months is ‘protected rent debt’ within the scope of the arbitration regime (in England; subject to relevant local restrictions)



1. Representative, indicative overview of ring-fenced period for differing sectors. Ring-fenced period must be considered on a business-by-business basis. See further Government timelines [here](#), which include further information on other tenant sectors such as gyms, cinemas, etc. and local restrictions.

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