Non-Domestic Rates (Coronavirus) (Scotland) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Non-Domestic Rates (Coronavirus) (Scotland) Bill introduced in the Scottish Parliament on 14 December 2021.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 8-EN);
- a Financial Memorandum (SP Bill 8-FM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP 8–LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Policy Objectives of the Bill

4. Non-domestic rates, also known as business rates, are a property tax based on the rateable value (RV) of a property. RVs are derived from Net Annual Values (NAVs), themselves based on the annual rental value that a property would attract in an open market. Rating valuations are carried out by independent Scottish assessors and all RVs are periodically updated at revaluations, with the most recent being on 1 April 2017 based on rental values as at 1 April 2015 (the 'tone date'). NAVs and RVs are updated at periodic revaluation to reflect changes in the general level of rents including those caused by economic factors.

5. The independent Barclay Review of Non-Domestic Rates which reported in 2017[1] recommended the move to three yearly revaluations and a one-year tone date in order to ensure that rateable values at future revaluations more closely reflect market trends and also to reduce the volatility risk between tone and revaluation. The Scottish Government accepted both of these recommendations and legislated for three yearly revaluations in the Non-Domestic Rates (Scotland) Act 2020 and a one-year tone date

[1] Non-domestic tax rates review: Barclay report - gov.scot (www.gov.scot)

in The Valuation (Postponement of Revaluation) (Coronavirus) (Scotland) Order 2020 (S.S.I. 2020/418).

6. The next revaluation will take place on 1 April 2023 with a tone date of 1 April 2022. Prior to the start of the COVID-19 (coronavirus) pandemic the revaluation was scheduled for 1 April 2022 with a tone date of 1 April 2020. However, in order to allow time for the property market to adjust post-COVID-19, Scottish Ministers chose to delay the revaluation by one year and also move to a one-year tone date for the 2023 revaluation.

7. Outside of revaluation, NAVs and RVs can be amended for instance to reflect "material change of circumstances" (MCC), as defined in section 37 of the Local Government (Scotland) Act 1975 ("the 1975 Act"). This includes for instance physical alterations to the property (e.g. extension or demolition); major, localised and impactful alterations in the area such as the Edinburgh Tram Works; and relevant decisions by the Valuation Appeal Committee, Lands Tribunal for Scotland or Lands Valuation Appeal Court.

8. Valuation appeals are subject to an independent appeals process and are heard in the first instance either by a Valuation Appeal Committee, or if referred (e.g. complex cases) to the Lands Tribunal for Scotland. The appellate court for non-domestic rates appeal decisions in Scotland is the Lands Valuation Appeal Court. A new or amended entry in the valuation roll can be appealed within six months of revaluation, or six months of receiving the valuation notice specifying this change. Appeals can also be lodged not more than six months after the next revaluation on the grounds that there has been a MCC, or, prior to the next revaluation, on the grounds that there has been for instance an arithmetic or clerical error in the entry.

9. New owners, tenants or occupiers also have a six-month right of appeal upon acquiring an interest in a property. Appeals on revaluation values are known as 'revaluation appeals' while other appeals can be referred to as 'running roll' appeals.

10. Under the Non-Domestic Rates (Scotland) Act 2020, the definition of MCC was amended with effect from 2 April 2020 to exclude changes in general economic circumstances (specifically, changes in the rent of particular lands and heritages[2] or any other lands and heritages, or in the level of valuations generally or in the value of lands and heritages generally). This reflected that with a move to a three-yearly revaluation period, and a one-year tone date, valuations would be more closely aligned to current market values and there was no longer a need for appeals on the basis of changes to general economic circumstances. On this basis, the Scottish Government is of the view that it is not appropriate to use the MCC provisions in the non-domestic rates legislation in relation to COVID-19, or COVID-19 restrictions. Any impact on rental values arising

[2] "Lands and heritages" is defined by section 42 of the Lands Valuation (Scotland) Act 1854, and includes lands, houses, shootings, deer forests, fishings, and all the other categories of property listed in that section.

from COVID-19 or COVID-19 restrictions form part of general market conditions and therefore should be considered at revaluation.

11. According to data provided to the Scottish Government by the Scottish Assessors Association in respect of financial years 2019-20 and 2020-21, approximately 40,900 properties with a total RV of £3,492 million were appealed in 2019-20 after the outbreak of the pandemic. A further 37,000 properties with a total RV of £2,902 million were appealed in 2020-21. During 2018/19, 5,774 running roll appeals were lodged[3]. It is therefore likely given the timing of these appeals and the atypical spike of such appeals at this point in a revaluation cycle, that the majority of these appeals were lodged as a result of COVID-19. These are therefore referred to as 'COVID-19 appeals' in the below.

12. Most of the properties in the dataset provided - around 28,500 - with an RV of £2,465 million, were appealed in respect of both 2019-20 and 2020-21. Therefore, approximately 49,400 unique properties with a total RV of £3,929 million have been appealed since the outbreak of the pandemic.

13. In the absence of case law, it is not known to what extent the impact of COVID-19 could still be deemed to be a MCC. Therefore it is assumed that these COVID-19 appeals could potentially, should they be successful, impact the level of RVs across a wide range of properties and sectors ahead of the next revaluation and therefore non-domestic rates income as well.

14. Non-domestic rates income is pooled at a Scottish Government level and redistributed back to local authorities to help fund local services, including those benefiting non-domestic properties. The Scottish Government then distributes additional central government grants to each local authority according to a needs-based formula which has been agreed by the Convention of Scottish Local Authorities (COSLA) on behalf of Scotland's 32 local authorities. It also guarantees the sum of General Revenue Grant and non-domestic rates income for each local authority. This protects local authorities from volatility in non-domestic rates income and ensures that each local authority budget is not solely determined by its revenue-raising capacity (non-domestic rates, council tax and various fees and charges for services provided by the authority). The Financial Memorandum provides further detail.

15. On 25 March 2021[4] the UK Government committed to ruling out COVID-19 related MCC appeals on non-domestic properties in England, and laid the Valuation for Rating (COV) (England) Regulations 2021 (S.I. 2021/398)[5] on the same day. The purpose of these Regulations was to ensure that RVs in the 2017 rating list in England continue to be based upon the economic factors, market conditions and the general level of rents which prevailed at the valuation date for those lists of 1 April 2015 by

[3] SAA-Annual-Report-2018.pdf
[4] Business rates relief boosted with new £1.5 billion pot - GOV.UK (www.gov.uk)
[5] The Valuation for Rating (Coronavirus) (England) Regulations 2021 (legislation.gov.uk)

making provision assuming, for the purpose of assessing RVs, that interventions to control COVID-19 had not occurred. These Regulations came into force on 25 March 2021, the day after they were made.

16. On 12 May 2021, the UK Government introduced the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill to implement this commitment with retrospective effect. Following a request from the Welsh Government and amendments tabled in the House of Commons, this Bill now extends to Wales as well as England. In Northern Ireland, to similarly prevent matters attributable to COVID-19 being taken into account, the Non-domestic Rates Valuations (Coronavirus) Bill was introduced on 15 November 2021.

17. The Scottish Government announced on 23 June 2021[6] that it also intended to take measures such that economic changes to RVs resulting from COVID-19 could only be considered at revaluation. This would ensure fairness to all ratepayers by ensuring that any effects of COVID-19 are considered for all properties at revaluation rather than through the use of MCC provisions which the Scottish Government does not consider appropriate for such situations. Rather, MCC appeals should only be used to address issues of a discrete geographic, sectoral or temporal nature rather than market-wide economic changes.

18. The Valuation and Rating (Coronavirus) (Scotland) Order 2021 (S.S.I. 2021/445) was laid in the Scottish Parliament on 22 September 2021 and came into force on 1 December 2021. This Order specifies a rule to clarify that, in calculating the rateable value of properties in the 2017 valuation roll, no account can be taken of any matter arising on or after 1 April 2021 that is directly or indirectly attributable to COVID-19. The rule does not apply to changes to the physical state of a property. The decision as to whether a property should be entered in the valuation roll is not affected by this Bill. For instance, if someone had started working from home during the pandemic and created an ‘office’, whether or not the latter is rateable would not be affected by this legislation despite the fact it would not have occurred had the pandemic not occurred; equally a property extension carried out during the pandemic may still lead to a change in RV.

19. The policy aim of the Bill is to rule out potential reductions in NAVs and RVs due to the effects of COVID-19. Primary legislation is required to ensure that no account can be taken of any matter occurring before 1 April 2021 that is directly or indirectly attributable to COVID-19 for determinations made in future. The Programme for Government[7], published on 7 September 2021, announced that a Bill would be introduced during the parliamentary year 2021-22. Primary legislation is also necessary to extend this rule to NAVs (rather than just RVs), which is consistent with the fact that RVs are derived from NAVs.

[6] Written question and answer: S6W-00997 | Scottish Parliament Website
[7] A Fairer, Greener Scotland: Programme for Government 2021-22 - gov.scot (www.gov.scot)

20. The Bill has retrospective effect back to 2 April 2020. Subject to the exception in relation to changes to the physical state of a property, the Bill will ensure that when calculating the NAV and RV of properties in the current (2017) valuation roll, no account can be taken of any matter occurring on or after 2 April 2020 that is directly or indirectly attributable to COVID-19, consistent with the date the definition of MCC was amended (see paragraph 10).

21. The Bill also makes provision amending the 1975 Act to make clear that if an NAV or RV of a property were to be reduced as a result of a matter occurring before 2 April 2020 which is attributable to COVID-19, an assessor will be required to reverse that change as of 2 April 2020 and revise the valuation roll accordingly to reflect the non-effect of COVID-19 on the valuation from that date.

22. The Scottish Government agrees in principle with the UK and Welsh Governments, and Northern Ireland Executive, that market-wide economic changes to rateable values, such as from COVID-19, should be only considered at revaluation to ensure fairness to all ratepayers.

23. The Scottish Government is of the view that it is not appropriate to use the MCC provisions in the non-domestic rates legislation in relation to COVID-19, or COVID-19 restrictions as any impact on rental values arising from COVID-19 or COVID-19 restrictions form part of general market conditions and therefore should be reflected in RVs at revaluation. If this were not the case, assessors would be required to change RVs constantly to reflect any relevant changes in rent, including for any COVID-19 related intervention or restriction affecting the use or enjoyment of property or the locality. The Scottish Government is also of the view that MCC appeals should only be used to address issues of a discrete geographic, sectoral or temporal nature rather than market-wide economic changes impacting RVs. This principle is as reflected in section 13 of the Non-Domestic Rates (Scotland) Act 2020, which amended the definition of MCC in the 1975 Act (with effect from 2 April 2020), to exclude changes in general economic circumstances.

24. The Scottish Government responded quickly to the coronavirus pandemic to provide, within its devolved powers, a tailored package of financial support for business, including non-domestic rates reliefs, of more than £4.4 billion as at October 2021[8]. This has provided a quicker, more tailored, coherent and proportional allocation of support than is likely to have resulted from the appeals system given the complexity of the property market, the uncertain nature of the outcome of any COVID-19 appeals in the absence of legislation ruling them out and the potentially long timescales attached to any outcome, the absence of necessary correlation between the property market for a given property and the success or otherwise of the business occupier, and the likelihood that potential successes at appeal would be skewed towards well-resourced ratepayers with professional representation.

[8] https://www.gov.scot/publications/coronavirus-covid-19-summary-of-scottish-business-support-funding/

25. The Bill will provide certainty for stakeholders including business and other ratepayers, assessors and rating agents and will help ensure that limited public resources are protected and can be efficiently targeted. The package of business support provided to date facilitates a more targeted and timeous use of public funds to support non-domestic ratepayers than the appeals system may have delivered and delivers a fairer outcome overall.

26. The Bill will help maintain non-domestic rates as a credible and robust system of taxation, and provide consistency in approach to the definition of MCC which excludes changes in general economic circumstances since 2 April 2020. It will also help protect the public interest by avoiding exposing public finances to significant potential risk.

Alternative Approaches

27. Three alternative options were considered.

28. The first option was to do nothing. In the absence of case law, it is not known to what extent the impact of COVID-19 could still be deemed an MCC. Therefore it is assumed that COVID-19 appeals could potentially, should they be successful, impact the level of RVs across a wide range of properties and sectors ahead of the next revaluation and therefore non-domestic rates income as well. As noted above, the Scottish Government guarantees the sum of General Revenue Grant and non-domestic rates income for each local authority and this could put significant pressure on Scottish public revenues.

29. The second option was to lay secondary legislation, but not to legislate further. This option would mean, following the Valuation and Rating (Coronavirus) (Scotland) Order 2021 (S.S.I. 2021/445) coming into force on 1 December 2021, that in calculating the RV of properties in the 2017 valuation roll, account can still be taken of matters arising before 1 April 2021 directly or indirectly attributable to COVID-19, but not after that date. The secondary legislation was laid to offer clarity and certainty to ratepayers, but primary legislation is needed to affect a period further back in time. This creates an artificial cut-off date which, if it remained in place, would result in an inconsistency before and after 1 April 2021 within the non-domestic rates system, which would likely be confusing and complex for both ratepayers and assessors.

30. The third option was to apply a different period of time for which matters relating to COVID-19 are ruled out for MCC appeals, within primary legislation. The Bill has retrospective effect back to 2 April 2020 which corresponds to the date the definition of MCC in the 1975 Act was amended by the Non-Domestic Rates (Scotland) Act 2020, to exclude changes in general economic circumstances with effect from 2 April 2020. This reflects the view that market-wide economic changes to rateable values, such as from COVID-19, should be only considered at revaluation to ensure fairness to all ratepayers. While an earlier date (prior to 2 April 2020), or no specific date, could in principle be set, the Scottish Government considers that the provisions in the Bill set a clear framework, consistent with previous non-domestic rates policy on the definition of MCC, as well as

with the European Convention on Human Rights. Human rights considerations are explained further below.

Consultation

31. The Cabinet Secretary for Finance and the Economy, the Minister for Public Finance, Planning and Community Wealth, and the Minister for Business, Trade, Tourism and Enterprise have concluded an extensive consultation and engagement exercise with all the major business representative bodies as well as a large number of businesses from a diverse range of sectors and regions across Scotland. Although these meetings were not specifically intended to discuss COVID-19 appeals, they nevertheless presented a comprehensive and constructive opportunity to discuss the Scottish Government's approach to supporting businesses during the COVID-19 pandemic and the priorities in terms of the next stages of re-opening and recovery.

32. The Scottish Government has also frequently engaged with relevant public bodies including COSLA, local authorities and assessors throughout its response to the COVID-19 pandemic. This includes the government's position on MCC appeals not being appropriate for market-wide economic changes. Scottish Government officials will continue to engage with key stakeholders both in the private and public sector after the Bill is introduced.

33. The policy for the Bill is broadly similar to the Valuation and Rating (Coronavirus) (Scotland) Order 2021 (SSI 2021/445) for which the views of stakeholders were articulated to the Scottish Parliament Local Government Housing and Planning Committee at oral evidence sessions (26 October 2021 and 9 November 2021) [9], and in written evidence submissions[10].

34. While some stakeholders expressed concerns at removing a right of appeal, the exceptional circumstances, the importance of support for business, including rates relief, and the complexity of the appeals process were widely acknowledged.

Effects on Equal Opportunities, Human Rights, Island Communities, Local Government, Sustainable Development etc.

Equal opportunities

35. The Bill is intended to apply equally to those affected by its provisions, ensuring all properties are treated equally by providing adequate time for market wide changes to

[9] Scottish Parliament Local Government, Housing and Planning Committee Official Reports: LGHP Committee 26 October 2021 and LGHP Committee 9 November 2021
[10] Scottish Parliament Local Government, Housing and Planning Committee Papers LGHP/S6/21/8/1 and LGHP/S6/21/10/3

rateable values to be considered. An Equality Impact Assessment (EQIA) has been conducted in order to ascertain the impact of the Bill on equality groups. The EQIA has confirmed that the provisions of the Bill will not directly or indirectly discriminate in any way on the basis of age, disability, gender reassignment, sex (including pregnancy and maternity), race, religion or belief or sexual orientation. The EQIA will be published on the Scottish Government website shortly after the introduction of the Bill.

Human rights

36. The Scottish Government has assessed the potential impact of the Bill on human rights. The Bill is considered by the Scottish Government to be fully compatible with the European Convention on Human Rights (ECHR).

37. Article 6 of ECHR provides that, in the determination of their civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Scottish Government does not consider that the provisions in the Bill engage Article 6 rights, under its civil limb, because the obligation to pay tax forms a public-authority prerogative; tax disputes fall outside the scope of the civil property rights and obligations that Article 6 protects.

38. Article 1 of the first Protocol to the ECHR protects the peaceful enjoyment of possessions but recognises that a person may be deprived of possessions in the public interest, as long as that is subject to the conditions provided for by law. That Article confirms that a State retains the right to control the use of property in the public interest and to secure payment of taxes. Against the background of the considerable margin of appreciation given to the decisions of national authorities and particularly, the legislature, in areas of taxation, revenue and economic strategy, it is for the Scottish Parliament, as the democratically elected institution of the State, to determine where the public interest lies here, and the appropriate balance between the private and public interests.

39. The Scottish Government considers that the Bill engages Article 1 of the first Protocol to the ECHR and that it has the effect of interfering with the peaceful enjoyment of possessions. The Bill has retrospective effect back to 2 April 2020, which corresponds with the date that the amendment to the definition of MCC took effect, to exclude changes in general economic circumstances. There is a general public interest in the law not being changed retrospectively. However, in the context in which the Bill applies, the Scottish Government considers that this is outweighed by a competing public interest justifying the retrospective application of the provisions. Paragraphs 4 to 26 above set out the background to this and the factors that have been taken into account.

40. The Scottish Government does not consider that the retrospective application of the Bill imposes an unreasonable burden on the individual ratepayer or that it fails to strike a fair balance between ratepayers' interests and the general interest. The application of the Bill is considered by the Scottish Government to be proportionate to the policy objectives pursued, particularly in light of the exception to the general rule

that the Bill provides for and the fact that the Bill does not have retrospective effect in relation to matters occurring before 2 April 2020.

Island communities

41. The Bill will apply to all communities across Scotland, including island communities.

42. The Scottish Government has assessed the potential impact of the Bill on island communities and has determined it will have no significantly different or detrimental impact on island communities.

Local government

43. Responsibility for the day-to-day administration of the non-domestic rates system, including the billing and collection of non-domestic rates due, rests with each of Scotland’s 32 local authorities. This Bill may have a financial impact on local authorities as the billing authority for non-domestic rates insofar as any RV that is reduced would require the reissuance of a non-domestic rates bill for the ratepayer. Savings should therefore be incurred should the Bill preclude changes to property entries that may potentially otherwise have occurred following appeals. The Financial Memorandum provides more information on the costs associated with the measures introduced by the Bill.

44. Local authorities are also ratepayers in their own right when they occupy rateable non-domestic properties. Any financial gain from a successful appeal by a local authority in the form of a lower non-domestic rates bill following a RV reduction would currently accrue to the local authority.

Sustainable development

45. The Scottish Government has assessed the potential impact of the Bill on sustainable development and no detrimental effects are anticipated.

46. In terms of the three pillars of sustainability: environmental protection, social equity and economic viability:

- environmental effects: The Bill has minimal or no impact on the environment, and under section 4(3)(b) of the Environmental Assessment (Scotland) Act 2005, financial and budgetary plans and programmes are exempt from the Act requirements for Strategic Environmental Assessments.
- social effects: the Bill seeks to ensure fairness and a level playing field amongst ratepayers.
- economic effects: non-domestic rates have a key role to play in delivering sustainable economic growth and the provisions of the Bill will avoid potential reductions in RV due to COVID-19 until the next revaluation in April 2023.

47. The Scottish Government's National Performance Framework sets out a clear purpose for Scotland – to focus on creating a more successful country with opportunities for all of Scotland to flourish through increased wellbeing, and sustainable and inclusive economic growth. The National Performance Framework embeds the UN Sustainable Development Goals. This Bill contributes towards the Scottish Government achieving its purpose by providing a clear, consistent framework for non-domestic rates which contributes to the national outcome to have a globally competitive, entrepreneurial, inclusive and sustainable economy, and therefore supports United Nations Sustainable Development Goal 8: Decent work and economic growth.

This document relates to the Non-Domestic Rates (Coronavirus) (Scotland) Bill (SP Bill 8) as introduced in the Scottish Parliament on 14 December 2021

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