

## **Explanatory Memorandum to the Non-Domestic Rating (Property in Common Occupation) (Wales) Regulations 2022**

This Explanatory Memorandum has been prepared by Local Government Finance Reform Division 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 Non-Domestic Rating (Property in Common Occupation) (Wales) Regulations 2022. I am satisfied that the benefits justify the likely costs.

**Rebecca Evans MS**  
**Minister for Finance and Local Government**  
**7 October 2022**

## **PART 1: EXPLANATORY MEMORANDUM**

### **1 Description**

- 1.1 The Non-Domestic Rating (Property in Common Occupation) (Wales) Regulations 2022 (“the 2022 Regulations”) specify the circumstances in which two or more hereditaments, whether occupied or unoccupied, must be treated as one hereditament for the purposes of determining an owner’s or occupier’s non-domestic rating (NDR) liability. The 2022 Regulations also set out the circumstances in which two or more hereditaments are to be considered as contiguous with each other.

### **2 Matters of special interest to the Legislation, Justice and Constitution Committee**

- 2.1 None.

### **3 Legislative background**

- 3.1 The powers of Welsh Ministers to make provision as to the definition of a hereditament for non-domestic rating purposes are contained in Section 64(3) of the Local Government Finance Act 1988. The 2022 Regulations are made under this power are subject to the negative resolution procedure.

### **4 Purpose and intended effect of the legislation**

- 4.1 For over 50 years, a Court of Appeal judgement (*Gilbert (VO) v S Hickinbottom & Sons Ltd* [1956] 2 Q.B. 40) was regarded as the leading case on the identification of the unit of assessment (hereditament) for NDR purposes. Ratepayers who occupied more than one unit of property in a building shared with other organisations were assessed based on the premise that: where their units of property were contiguous (touching), they received one rates bill; and where their units of property were separated by another business or an area in shared use, they received a separate rates bill for each unit of property.
- 4.2 It was the practice of the Valuation Office Agency (VOA) to treat contiguous units of property as a single hereditament, when occupied by the same person. The VOA approach to the meaning of contiguous was to treat two units of property as such, where they were separated only by a wall or floor/ceiling. For example, though a wall or floor/ceiling between two otherwise contiguous offices may contain services in a void, used by the landlord, such spaces were not considered to prevent the units of property being contiguous.
- 4.3 In 2015, the Supreme Court ruled, in the case of *Woolway (VO) v Mazars* [2015] UKSC 53 (“the Mazars decision”), that the test should concern the geographical nature of the property and, as a result, the VOA changed its practice. The general rule now being operated in Wales is that two contiguous properties in the same occupation are only assessed as one if

they can be considered a self-contained unit of property. Typically, this will apply if both parts are physically accessible from each other without having to go onto other property or through commons parts (such as a common corridor or stairwell).

- 4.4 The intended effect of the 2022 Regulations is to reinstate the practice of the VOA, prior to the Mazars decision, to coincide with the start of the 2023 rating list and continue to apply going forward.
- 4.5 The intention is that, where two or more **occupied** hereditaments meet the following conditions, they are to be treated as one hereditament for valuation purposes:
- they are occupied by the same person;
  - they meet the 'contiguity condition'; and
  - none of them is used for a purpose which is wholly different from the purpose for which any of the others is used.
- 4.6 In the case of two or more **unoccupied** hereditaments, they are to be treated as one hereditament for valuation purposes if:
- they are owned by the same person;
  - they meet the 'contiguity condition';
  - they ceased to be occupied on the same day and have remained unoccupied since that day; and
  - immediately before that day, they formed part of a single hereditament in accordance with the conditions set out above in relation to occupied hereditaments.
- 4.7 Two or more hereditaments are intended to meet the '**contiguity condition**' if at least two of them are contiguous and, where they are not all contiguous with each other, each hereditament is contiguous with at least one of the others.
- 4.8 Two or more hereditaments are intended to be considered **contiguous** if:
- some or all of a wall, fence, or other means of enclosure of one hereditament forms all or part of a wall, fence, or other means of enclosure of the other hereditament; or
  - the hereditaments are on consecutive storeys of a building and some or all of the floor of one hereditament lies directly above all or part of the ceiling of the other hereditament.
- 4.9 Hereditaments either occupied or owned by the same person are not prevented from being contiguous under these conditions merely because there is a space between them that is not occupied or owned by that person. This allows for the situation where a sufficiently strong functional connection could be shown to exist between the two parts. For example, two parts of a leisure park separated by a road.

## 5 Consultation

- 5.1 A policy [consultation](#) took place from 9 March to 1 June 2022. The consultation sought views on the Welsh Government's proposal to make secondary legislation, with the purpose and intended effect set out above, to come into force on 1 April 2023. A summary of responses was published on 24 June 2022.
- 5.2 The consultation received eight responses. Respondents included property agents, representative bodies, a local authority, ratepayer and private individual.
- 5.3 Seven of the eight respondents were in favour of the proposal to reinstate the practice of the VOA prior to the Mazars decision. Of those, five were of the view that retrospective changes should be made, to backdate the change to cover the 2010 and 2017 rating lists. The constraints in relation to making legislation with a retrospective effect were set out in the consultation.
- 5.4 A draft of the 2022 Regulations which was prepared to implement the proposal was the subject of a [technical consultation](#) between 4 August and 16 September 2022. The consultation received six responses. No changes to the 2022 Regulations were considered necessary following the technical consultation.

## PART 2: REGULATORY IMPACT ASSESSMENT

### 6 Options

- 6.1 This Regulatory Impact Assessment (RIA) presents two options in relation to the valuation of two or more contiguous hereditaments for the purposes of determining an owner's or occupier's NDR liability. All costs and benefits quantified in this RIA are based on information available to the Welsh Government leading up to publication.
- 6.2 The options considered are as follows.

**Option 1 – Do nothing.** Retain the existing valuation practice following the Mazars decision, so that all hereditaments receive a separate NDR bill, whether contiguous and used by the same ratepayer for the same primary purpose, or otherwise, or are unoccupied.

**Option 2 – Make the Regulations.** Legislate to reinstate the valuation practice of the VOA prior to the Mazars decision, so that contiguous hereditaments used by the same ratepayer for the same primary purpose are to receive a single NDR bill, from the 2023 rating list onwards. The same valuation practice would apply to contiguous unoccupied hereditaments owned by the same person, which ceased to be occupied on the same day, have remained unoccupied since that date and which were treated as a single hereditament before that occupation ceased.

### 7 Costs and benefits

#### Option 1 – Do nothing

- 7.1 Option 1 would not require any legislative change. The existing practice of the VOA in valuing relevant hereditaments in Wales would be retained. It would continue to differ from their practice for valuing hereditaments in England, where the valuation approach used prior to the Mazars decision has already been reinstated. Based on data provided by the VOA, there were 466 cases in which properties in Wales had their valuation reviewed as a result of the Mazars decision. Of these, 246 resulted in an increase in rateable value, 162 in a decrease and 58 in no change.

#### Costs

- 7.2 The VOA has also provided estimates of the financial impact of the Mazars decision in Wales. For the cases which saw an increase in rateable value, the average increase is around £4,700. For the cases which saw a decrease in rateable value, the average decrease is around £4,200. Changes are likely to vary considerably between affected ratepayers.
- 7.3 The overall impact on total rateable value for Wales is estimated to be an increase of £480,000, indicating an increase in the size of the tax-base following the application of the Mazars decision. This comes at a net cost to

affected ratepayers. The increase does not necessarily result in a proportional increase in rates revenue because other factors, such as eligibility for relief schemes, can also change and affect the overall financial impact.

- 7.4 Some ratepayers may have become eligible for Small Business Rates Relief (SBRR), due to their property being divided into smaller units for valuation purposes, as a result of the Mazars decision. Where this has occurred, it may have increased the cost to the Welsh Government in providing SBRR.
- 7.5 Some other ratepayers may have become entitled to less relief because of the changes to SBRR which mean that, since 1 April 2018, each ratepayer is only eligible for SBRR on up to two properties per local authority. The Welsh Government does not have information about how many ratepayers are affected by the loss of SBRR, either as a result of the Mazars decision or the changes to SBRR.

### ***Benefits***

- 7.6 Doing nothing would minimise administrative burdens on local authorities, the VOA and the Welsh Government, and no legislative changes would be required.
- 7.7 The existing approach provides some financial certainty for property owners.

### ***Disadvantages***

- 7.8 Doing nothing would not address the Welsh Government's policy aims and the decision announced following consultation. It would also fail to reinstate a consistent approach to the valuation of affected properties in Wales and England, which would adversely affect Welsh businesses operating from those properties and would continue to do so going forward. It would also adversely affect the owners of unoccupied affected properties in Wales.

### **Option 2 – Make the Regulations**

- 7.9 Option 2 would require the 2022 Regulations to reinstate the previous practice of the VOA, prior to the Mazars decision, in valuing relevant occupied and unoccupied hereditaments in Wales. It would realign their practice in Wales with their practice for valuing hereditaments in England, where the valuation approach used prior to the Mazars decision has already been reinstated. The changes would come into force from 1 April 2023, in line with the next rating list, and apply going forward.

### ***Costs***

- 7.10 Based on the changes which occurred following the Mazars decision, reverting to the previous valuation practice of the VOA would be expected to result in a net reduction in the overall rateable value of the tax base of around £480,000. This would result in an expected annual reduction in the NDR pool

of less than £200,000, but it is not possible to determine a precise figure due to the interaction of changes with reliefs.

- 7.11 A minority of affected ratepayers would be expected to incur an increase in their NDR liability. Some ratepayers may also become ineligible for SBRR as a result.

### ***Benefits***

- 7.12 A net benefit to ratepayers is expected overall, as a result of a modest contraction in the value of the tax-base.
- 7.13 In rating valuation, larger properties may attract a lower value for each square metre of space than similar smaller properties. This reflects the practice in the market under which landlords will agree a discount for tenants who take more space and is known as a 'quantum discount'. Some of the properties assessed as one hereditament, as a result of reversing the Mazars decision, are likely to benefit from this quantum discount and receive lower NDR bills.
- 7.14 Making the 2022 Regulations would address the Welsh Government's policy aims and the decision announced following consultation. It would also reinstate a consistent approach to the valuation of affected properties in Wales and England.

### ***Disadvantages***

- 7.15 There could be a short-term increase in administrative costs for local authorities and the VOA arising from changes to valuation and billing.
- 7.16 There may be reduced financial certainty for ratepayers, particularly the minority which will see an increase in their NDR liability.

### ***Option summary***

- 7.17 Doing nothing would result in no changes to the existing practice of the VOA in valuing relevant properties and would not, therefore, deliver on the Welsh Government's decision to reinstate the practice that was operated in Wales prior to the Mazars decision. Option 1 is, therefore, not the preferred approach.
- 7.18 The approach described by Option 2 was announced by the Welsh Government on 24 June 2022. The 2022 Regulations were published in draft for technical consultation on 4 August 2022.
- 7.19 Option 2 is, therefore, the preferred approach.

## 8 Duties

- 8.1 ***Well-being of Future Generations (Wales) Act 2015***. Ensuring that contiguous units of non-domestic property used by the same ratepayer for the same primary purpose, and contiguous unoccupied hereditaments owned by the same person (which ceased to be occupied on the same day, have remained unoccupied since that date and which were treated as a single hereditament before that occupation ceased), are valued as one by the VOA and receive a single NDR bill will make the approach to valuing affected properties simpler and fairer. This will support stability and clarity in the NDR tax base and contribute to the wellbeing objective of a prosperous Wales.
- 8.2 ***UNCRC***. No particular impact on the rights of children has been identified.
- 8.3 ***Welsh language***. No direct effect on the opportunities to use the Welsh language or the equal treatment of the language has been identified in connection with this legislation.
- 8.4 ***Equalities***. No specific impacts, positive or negative, on persons who share a protected characteristic (as determined by the Equality Act 2010) have been identified.
- 8.5 ***Voluntary sector***. No particular impact on the voluntary sector has been identified.

## 9 Competition assessment

- 9.1 A competition filter test has been applied to the 2022 Regulations and the risk of a significant detrimental impact on competition is considered to be low.

## 10 Post-implementation review

- 10.1 The Welsh Government will monitor the impact of the change on the NDR tax-base.