

## Constitutional and Legislative Affairs Committee Report

### CLA485 – The Non-Domestic Rating (Multiplier) (Wales) (No. 2) Order 2014

This Order is made under paragraph 5(3) of Schedule 7 to the Local Government Finance Act 1988 (“the Act”). The non-domestic rating multiplier is calculated in each financial year when new lists are not being compiled in accordance with paragraph 3B of Schedule 7 to the Act. 2015 is a year when new lists are not being compiled.

The formula in paragraph 3B of Schedule 7 to the Act includes an item B which is the retail prices index for September of the financial year preceding the year concerned, unless the Welsh Ministers exercise their power under paragraph 5(3) of Schedule 7 to the Act to specify by Order a different amount for item B. If the Welsh Ministers exercise that power in relation to a financial year, the different amount so specified must be lower than the retail prices index for September of the preceding financial year. The retail prices index for September of the preceding financial year is 257.6. This Order specifies that for the financial year beginning on 1 April 2015 the amount for item B is 256.9.

**Procedure:** Affirmative

#### 1. Technical Scrutiny

The following points are identified for reporting under Standing Order 21.2 (ii) and (v) in respect of this instrument.

1. The enabling power is correctly cited as paragraph 5(3) of Schedule 7 to the Local Government Finance Act 1988. The procedure applicable to an order made in reliance on that power is specified in sub-paragraph (15) of paragraph 5 as follows –

“An order made by the Welsh Ministers under sub-paragraph (3), in its application to a particular financial year (including an order amending or revoking another), shall not be effective unless it is approved by resolution of the Assembly before the approval by

the Assembly of the local government finance report for the year, or before 1 March in the preceding financial year (whichever is earlier).”

2. The Order made by the Welsh Ministers for the current financial year (The Non-Domestic Rating (Multiplier) (Wales) Order 2014) followed the normal affirmative procedure, subject only to complying with the additional requirement in sub-paragraph (15). The draft Order was approved by the National Assembly before the report was approved, and finally the Order was signed. This is explained in the third paragraph of Part 2 of the Explanatory Memorandum.

3. The fourth paragraph of the Explanatory Memorandum explains that the Welsh Government has revised its interpretation of the requirements of sub-paragraph (3). It now considers that the appropriate procedure is for the Order to be signed before it is approved, which in turn must happen before the Local Government Finance report.

4. The absence of reference to a draft order in sub-paragraph (15) does cast doubt on whether it should be signed before or after it is approved. The essential elements remain signature by one of the Welsh Ministers and approval by the National Assembly and those requirements will have been met regardless of the order in which they occur.

5. Nevertheless, the use of a different procedure from that adopted earlier this year to comply with the same statutory requirements does constitute an **“unusual or unexpected use of the power” to be reported under Standing Order 21.2 (ii).**

6. The different approach gives rise to a further difficulty – whether it will be clear to a reader of the legislation if it is in force or not. Article 1(2) of the Order includes the condition contained in sub-paragraph (15) that approval of the Order must precede approval of the report. Unfortunately, it will not clear from the Order whether that condition has been satisfied.

7. If the Order were made (by being signed by a Minister) after approval had occurred, it would have been possible to include a recital that approval of the Order had preceded approval of the report. The approach taken on this occasion makes that impossible as both approvals lay in the future when the Order was signed. That tends to support the use of the standard affirmative procedure.

8. As drafted, article 1(2) refers the reader to the precondition for approval, leaving unanswered the question of whether that condition has been satisfied. In order to discover the answer, it would be necessary to consult the Assembly's website to check the order in which votes took place. It is not satisfactory that such research should be necessary to ascertain whether the Order is in force. **The Assembly should therefore pay special attention to the Order as "its form or meaning needs further explanation" under Standing Order 21.2(v).**

## 2. Merits Scrutiny

No points are identified for reporting under Standing Order 21.3 in respect of this instrument.

## 3. Government Response

1. The Welsh Government disagrees that this is an unusual or unexpected use of the power. CLA committee agrees that the correct enabling power is cited, that is paragraph 5(3) of Schedule 7 to the Local Government Finance Act 1988 (the 1988 Act). Paragraph 5(3) enables Welsh Ministers to, by order, specify a figure for 'B' which is less than the retail prices index for September of the financial year preceding the year concerned. That is exactly what the Order does, at article 2.

2. It is accepted that the Order this year is following a different form of affirmative procedure to that followed last year. However, in both cases, the Order will not be effective unless the Assembly

approves it, and does so before its approval of the Local Government Finance Report. The only difference is that this year the Welsh Ministers have made the Order before it has been laid. Paragraph 5(15) of Schedule 7 to the 1988 Act provides that “*an order made by the Welsh Ministers ...shall not be effective unless it is approved...*” .Given that paragraph 5(15) refers to an **order made** by the Welsh Ministers, rather than a **draft order**, the Welsh Government has concluded that the 1988 Act prescribes for a rarely used variant of the affirmative procedure, under which the Order is laid after being made by the Welsh Ministers, but cannot come into force unless approved by the Assembly. Statutory Instrument Practice 2006 categorises this procedure as a Class (ii) affirmative procedure (see page 9). The equivalent Order made by the Secretary of State (the Local Government Finance Act 1988 (Non Domestic Rating Multipliers) (England) Order 2014) followed this rarely used variant of the affirmative procedure.

3. The Welsh Government disagrees that the form or meaning of the Order needs further explanation. Article 1(2) provides that the order comes into force the day after the Assembly approves it, provided that the Assembly’s approval of the order takes place before the Assembly’s approval of the Local Government Finance Report. The reader should therefore assume that the Assembly has complied with the statute which requires the approval of the order to be given before the approval of the local government finance report. It is not ideal that in order to be certain, the reader would need to check the Assembly’s order of business on its website, but that is not a fault of the order. Any lack of clarity stems from the primary legislation, as opposed to the secondary legislation made under it. Again, the equivalent Order made by the Secretary of State referred to above results in such a requirement. We are not aware of any report by the Joint Committee on Statutory Instruments on this Order.

4. Last year was the first time that this power in the 1988 Act had ever been used in England or Wales. The Order was prepared in exceptional haste, following the Autumn statement in December, given the need for it to be approved before the Local Government Finance

Report in mid January. This year, the Welsh Government has had more time to prepare for the possibility that such an Order might be needed and has had the opportunity to consider the relevant statutory framework in greater depth, resulting in the slightly different form of affirmative procedure being followed this year.

#### **4. Committee Consideration**

The Committee considered the instrument and Government response at its meeting 12 January 2015 and reports to the Assembly in line with the technical reporting points in section 1 above.