BREXIT
Challenges & Opportunities in Rating
Brexit is the withdrawal of the United Kingdom (UK) from the European Union (EU) and the European Atomic Energy Community on 31 January 2020.

The broad consensus among economists is that Brexit will probably harm the UK’s economy and reduce its real per capita income. The reactions to Brexit by governments across the European Union and the UK are likely to have fundamental effects on business both in the short and medium terms. The question addressed in this document is whether rateable values should be reduced as a result of Brexit itself.

**Chronology**

- **2016** - on 23 June 2016, in a UK-wide referendum 52% voted in favour of leaving the EU and 48% voted to remain.

- **2017** - on 29 March 2017 the UK Government led by Theresa May formally notified the EU of the country’s intention to withdraw, beginning the Brexit process.

- **2019** - whilst the withdrawal was originally scheduled for 29 March 2019 it was delayed by deadlock in the UK Parliament after the June 2017 general election. This deadlock led to three extensions of the withdrawal process.

- **2020** - deadlock was resolved after a subsequent general election was held in December 2019. The UK left the EU at 11pm on 31 January 2020. This began a transition period that ended on 31 December 2020. During the transition, the UK remained subject to EU law and remained part of the EU customs union and single market but was no longer part of the EU’s political bodies or institutions.

- **2020** - on 24 December 2020 a post Brexit EU-UK Trade and Cooperation Agreement¹ was reached.

The post Brexit agreement covers not just trade in goods and services, but also a broad range of other areas, such as investment, competition, state aid, tax transparency, air and road transport, energy and sustainability, fisheries, data protection, and social security coordination.

It provides for zero tariffs and zero quotas on all goods that comply with the appropriate rules of origin.

Both parties have committed to ensuring a robust level playing field by maintaining high levels of protection in areas such as environmental protection, climate change and carbon pricing, social and labour rights, tax transparency and state aid; with effective domestic enforcement, a binding dispute settlement mechanism and the ability of both parties taking remedial measures if necessary.

The EU and the UK agreed on a new framework for the joint management of fish stocks in EU and UK waters. The UK will be able to develop British fishing activities, while the activities and livelihoods of European fishing communities will be safeguarded, and natural resources preserved.

On transport, the agreement provides for continued and sustainable air, road, rail and maritime connectivity. It includes provisions to ensure that competition between EU and UK operators takes place on a level playing field, so that passenger rights, workers’ rights and transport safety are not undermined.

On energy, the agreement provides a new model for trading and interconnectivity, with guarantees for open and fair competition, including on safety standards for offshore, and production of renewable energy.

On social security coordination, the agreement aims at ensuring a number of rights for EU citizens and UK nationals. This concerns EU citizens working in, travelling or moving to the UK and to UK nationals working in, travelling or moving to the EU after 1st January 2021.

Finally, the agreement enables the UK’s continued participation in a number of flagship EU programmes for the period 2021-2027 (subject to a financial contribution by the UK to the EU budget), such as Horizon Europe.
There is a basic tension in the rating system because it is trying to achieve equality between different hereditaments. First, equality requires that all properties be valued to the same yardstick – the same statutory hypothesis and to a single valuation date\(^2\). Second, equality requires that all properties be valued as they are now, even if they were not like that at the valuation date. That second requirement means that some specified matters are not fixed by the valuation date but are allowed to be variable over time.

After a rating list comes into force\(^3\), a change in a matter that is fixed at the valuation date will not affect a rateable value (even though it may be significant). But a change in an allowable matter can affect a rateable value. Such a change in an allowable matter is known as a “material change in circumstances” (MCC).

In broad terms, the legislation is seeking to distinguish between, on the one hand, matters which affect the way in which an occupier can exploit the property, or which affect the area in which the property is located and, on the other, economic matters.

Whilst that is a clear distinction in theory, it is inexact in practice. That is because economic factors play a fundamental role in any valuation. There is no logical way to separate the two; or even to clearly explain where the line of separation lies\(^4\).

Therefore, the primary feature of any rating valuation must be its historic valuation date (AVD\(^5\)). Any rating valuation has to be by reference to the economic circumstances at that date. A tribunal will not accept an argument, however plausible, if the effect is that the valuation is not really anchored at the standard valuation date.

In seeking the rateable value, we are to assess the rent at which the hereditament ‘might reasonably be expected to let’ on the statutory terms and assumptions. In carrying out that exercise, it is important that consideration is given to every intrinsic quality and circumstance which tends to push the rental up or down. The rent to be ascertained is the figure at which the hypothetical landlord and tenant would, in the opinion of the valuer or the tribunal, come to terms as a result of bargaining for the hereditament; in the light of competition or its absence in both demand and supply, as a result of the higgling of the market\(^6\). That requires consideration of all matters at the AVD but only consideration of allowable MCCs post the list coming into force.

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\(^2\) The valuation date for the current 2017 rating lists is 1st April 2015
\(^3\) The 2017 rating lists commenced on 1st April 2017
\(^4\) It is difficult to carry out a valuation that accounts for certain changes whilst ignoring matters that are fixed by the valuation date such as the economy
\(^5\) Antecedent valuation date
\(^6\) Scott LJ in Robinson Bros (Brewers) Ltd v Houghton and Chester-le-Street Assessment Committee [1937] 2 KB
But what is an Allowable Material Change in Circumstances?

The language employed by the statute in defining allowable MCCs is arcane. In simple terms, the allowable matters that may be relevant are:

i. Matters affecting the physical state of the property or affecting its physical enjoyment.

ii. The use of the property.

iii. Matters affecting the physical locality in which the property sits which in turn affect the enjoyment of the occupation of the property.

iv. The use or occupation of other premises in the locality of the property.

The valuer is to take those allowable matters as they are at the relevant date.

The Problem with Demand

One of the factors to be taken at the valuation date (AVD) is the market generally. If the economic environment is more difficult or more positive at the point of the alleged material change in circumstances, that effect on a rating valuation is to be dis-regarded.

A general change in the market does not alter the attributes of the property to be considered; if fewer shoppers visit a store because of an economic recession, whilst that may, in the real world affect the value of the property that economic change is not an allowable matter. It must be dis-regarded.

Is Brexit itself a change affecting the physical state or physical enjoyment of the property? Is Brexit itself a wider change that affects the physical locality in which the property sits?

The ratepayer only needs to succeed on either of these propositions for the question to move to one of valuation.

Brexit is a political change with economic consequences. It does not result in a law that prevents or restricts the occupation or use of property. Its economic effects may cause general economic change, but such change is precisely what the legislation disallows.

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7 Allowable matters are set out in Schedule 6 para 2(7) of the Local Government Finance Act 1988
8 Allowable matters also include changes in the amount of minerals or waste at certain specialist properties
9 For example, if the property is altered or if part of it cannot be used
10 For example, if the property changes from a shop to a pub
11 For example, if new buildings are built nearby, the road network changes or the frequency of transport services changes
12 For example, increased vacancy or the loss of an anchor tenant in a shopping centre
13 In rating this date is known as the “material day”
14 Such as The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020
Whilst the general effects of Brexit may fall to be ignored that does not mean that Brexit evaporates as an issue for those concerned with rating valuation. First, Brexit is perfectly timed for the new 2023 revaluation where the valuation date is 1 April 2021. Therefore, Brexit forms part of the economic context for that revaluation. Secondly, whilst Brexit itself may not be considered as an allowable MCC itself, the symptoms of Brexit may well cause allowable MCCs.

Whilst the potential effects of Brexit are as yet unknown, changes in demand may cause:

- Increased vacancy
- Changes in the use of premises
- Changes in the intensity of use of premises
- General reductions in footfall, traffic in the locality
- General reductions in train, shipping and airline services to Europe.

Whilst there may be examples of changes that affect the property itself to be considered the most likely changes will be in the locality in which a property sits or the use or occupation of other properties in that locality.

Although the word “locality” might be said to carry connotations of a limited area, it seems reasonable that the locality of a property is the area within which change might affect the value of that property. There seems to be little justification for saying that changes in the streets around a hereditament can be taken into account but changes beyond some arbitrary boundary cannot. The locality of a property will be different depending on the type of property being considered, a corner shop, a supermarket, a fibre network, a port or an airport are all examples of properties where the term “locality” is likely to mean something different.

Every valuation is a balance between supply and demand. Supply-side alterations are allowable as an MCC. Where there is an excess of supply in the locality of the subject property the task is to determine the rent that would be paid at the AVD if demand were as it was at the AVD, but with excess supply as it was at the material day.

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15 See Dinwiddy [VO] v Anderson [1995] RA 14
16 See Scottish & Newcastle Retail Ltd v Williams (VO) [2000] RA 119
17 Consider allowable MCCs such as the smoking ban
18 See Wigan Football Club Ltd v Cox [VO] [2019] RA 61
19 See Merlin Entertainments Group Ltd v Cox [VO] [2018] RA 24
20 Such as more border force accommodation at an airport or port
21 See Jafton Properties v Prisk [1997] RA 137
But care has to be taken to ensure that the effects of the MCC are not a feature of the business or occupier itself. The volume of trade or level of profit of a particular occupier is not necessarily a characteristic of the property. Those personal characteristics of the occupation fall to be ignored when considering the effects of the MCC on the level of rateable value.

Is the MCC relevant to all hypothetical tenants? Is that MCC, that matter, a characteristic of the hereditament itself? Is it intrinsic to the hereditament? If it is, it is likely to be allowable.

Is the MCC something external to the hereditament? In Addis v Clement [VO] CA [1987] RA 1 the Court of Appeal determined that the designation of an enterprise zone and the benefits conferred on occupiers within the zone were intangible matters. No physical changes had occurred in the locality, and therefore the designation fell to be ignored. Whilst the House of Lords had a different view, Parliament changed the law to confirm the Court of Appeal’s interpretation.

Once the MCC is identified the issue becomes one of valuation. The change must be capable of being measured, calculated or even estimated. It is not necessary for it to be ‘clearly revealed to the eye’ or any other sense but there needs to be evidence of the change to assist the tribunal in determining the effect on value. If the effects are masked by other issues any appeal may fail because there must be a clear causal link between the MCC and the valuation being proposed. That may present real problems when distinguishing the effects of Brexit from the general ebb and flow of business, Coronavirus or any other matter present at the material day.

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22 See Orange PCS v Bradford (VO) [2004] EWCA Civ 155
23 See Merlin Entertainments Group Ltd v Cox (VO) [2018] UKUT 0406 (LC)
24 See Appeal of Kendrick [2009] RA 145
The three stages of the process are:

i. **Check** – identify the cause which has affected the property, i.e. the material change in circumstances (MCC).

ii. **Challenge** – comprises 3 elements: -
   
   a. Description of the property and the MCC (the facts)
   
   b. Evidence of the effect of the MCC [those matters affecting value\(^{25}\)]

   c. Pleadings that draw i and ii together with the law.

iii. **Appeal** – if matters are not agreed the case is presented to the valuation tribunal.

The proposal documentation (the Challenge) is the ratepayer’s main opportunity to make its case, not just to the valuation officer but also to the valuation tribunal. Once the appeal stage is reached, there are only limited circumstances in which the ratepayer can add to the evidence it wants the valuation tribunal to consider.

There is considerable scope for confusion whether a feature relied on is in itself a material change in circumstances or is a symptom of a material change in circumstances (see the discussion above about demand). Careful drafting of the documents is therefore required.

**CONCLUSION**

The best approach is to make the grounds of proposal as uncontroversial as possible and particularly to ensure that the alleged material change in circumstances is clearly an allowable matter.

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\(^{25}\)Changes in rental value, changes in footfall, changes in the level of trade etc.
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