

COVID-19 · BUSINESS SUPPORT GRANT FUNDING

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1. In its Budget on 11 March 2020 the Government announced that it would assist businesses affected by the COVID-19 crisis. That assistance has included two grant schemes in England:
 - (1) the Small Business Grant ('**SBG**')
 - (2) the Retail, Hospitality, and Leisure Grant ('**RHLG**').
2. In summary, both schemes may give rise to claims
 - (1) by businesses against local authorities about the way in which they implement the schemes (which are the most likely claims)
 - (2) by businesses against central Government about the way in which the schemes were formulated
 - (3) by local authorities against central Government about the way in which the schemes are funded.
3. This note gives an overview of the grant schemes and their eligibility criteria and considers each type of potential claim.

Overview of the grants

4. The Government's 'technical frequently asked questions (FAQ) for local authorities' (the '**FAQs**') notes that the Government estimates that around 730,000 businesses in England will be eligible for an SBG.
5. Both grants are administered by local authorities, so it is to local authorities that businesses should apply for the grants and local authorities who determine eligibility for and distribute the grant funds. But the cost of the grants is met by central Government, by grants made in turn to local authorities under s. 31(1) of the Local Government Act 2003.
6. It is s. 31(4) that allows the Government to set the eligibility criteria for the grants and to instruct local authorities as to how they are to be administered, as that sub-section provides, 'A grant under this section may be paid on such conditions as the person paying it may determine.'

7. The additional, administrative cost of administering the grants is also met by central Government but via the New Burdens Doctrine rather than s. 31. As the Department for Business, Energy, and Industrial Strategy's 'Small Business Grant Fund and Retail, Hospitality and Leisure Grant Fund guidance' (March 2020) (the '**Guidance**'), para. 8, explains, 'We are committed to meeting the delivery costs to Local Authorities for this scheme, and will meet associated New Burdens costs. A New Burdens Assessment will be completed and funding then provided to authorities.'

Eligibility for the grants

8. Both grants depend on the business's being registered for business rates on 11 March 2020, as follows.

SBG

9. Under the SBG all business with a hereditament in England that was eligible on 11 March 2020 for either Small Business Rates Relief or Rural Rates Relief in the business rates system are eligible for a single grant of £10,000.
10. Paragraphs 21–23 of the Guidance set out exclusions from eligibility for an SBG:
- (1) hereditaments occupied for personal purposes (*e.g.* as private stables, beach huts, or moorings)
 - (2) car parks and parking spaces
 - (3) businesses that on 11 March were in liquidation or dissolved.
11. Though whether a hereditament is a car park or parking space is (at least in most cases) likely to be ascertained relatively easily, whether a hereditament is occupied for private purposes gives rise to more obvious scope for dispute.
12. It is even conceivable that the question whether a business was dissolved on 11 March 2020 could give rise to dispute: a dissolved company may be restored to the register of companies by the court and, if it is, the effect of s. 1032 of the Companies Act 2006 is that it is 'deemed to have continued in existence as if it had not been dissolved or struck off'; in other words, we may see companies applying to be restored to the register after 11 March 2020 and then arguing that, by virtue of s 1032(1) they were 'in existence' at that date and therefore eligible for an SBG.

RHLG

13. The RHLG is mutually exclusive with the SBG (Guidance, para. 26) but a business can claim one RHLG per property (whereas SBGs are limited to one per business).
14. Under the RHLG, businesses in England that would have received the Expanded Retail Discount on 11 March 2020 and
 - (1) have a rateable value up to and including £15,000 are eligible for a grant of £10,000 or
 - (2) have a rateable value over £15,000 and less than £51,000 are eligible for a grant of £25,000.
15. Charities that would otherwise meet these criteria but whose bill for 11 March 2020 had been reduced to nil by a local discretionary award should still be considered for an RHLG.
16. The same exclusions apply as for the SBG.

Potential claims

17. First, and much the likeliest, are claims by businesses that local authorities have wrongfully withheld or sought to recover grants. These could be brought as claims for judicial review against local authorities for, *e.g.*, failure to take into account relevant information, to adopt a fair procedure, or even properly to apply the Guidance which, on the face of it, circumscribes their powers in respect of the grants.
18. It is fair to say that the Guidance leave some room for doubt as to its application. Paragraphs 32–40 of the Guidance note particular areas where disputes may arise between businesses and local government. But these may be open to difficult questions of interpretation (albeit not intended to be read as a statute) on what a local authority may do when there are doubts as to eligibility. For example:
 - (1) paragraph 33 states that where the local authority ‘has reason to believe’ that information it holds on a business is inaccurate, they may withhold or recover a grant
 - (2) but paragraph 44 states that, though no changes to the rating after 11 March 2020 should be taken into account, where ‘it was factually clear to the local authority on the 11 March 2020 that the rating list was inaccurate on that date’, they may withhold the grant and award the grant ‘based on their view of who would have been entitled to the grant had the list been accurate’.

19. Read literally, this suggests that only the apparently lower threshold of ‘reason to believe’ need be met to entitle a local government to ‘recover’ a grant, whereas ‘factual clarity’ is required to award the grant to a business who—likewise ‘factually clearly’—is entitled to it. Especially in light of the urgency of the situation it is likely that disputes will arise about local authorities’ entitlement to withhold or recover grant money where eligibility is in dispute.
20. Businesses’ grounds for review may also include challenges based on Convention grounds, though these may be more difficult to establish. One example may be that a local authority had breached a business’s rights under art. 6 ECHR by failing to provide a fair hearing in determining eligibility (though in the Convention context this would require the business to establish that the decision as to eligibility was a determination of its civil rights). Another may be a claim under art. 1 of Protocol 1 for interference with the peaceful enjoyment of the business’s possessions. This could have two dimensions though both are challenging: the business could argue that its claim to a grant amounted to a possession such that any refusal to grant it was an unlawful interference with that right; or it could argue that the business itself was a possession the enjoyment of which the local authority was under a positive duty to protect by paying the grant (though it is fair to say that the Convention case law does not yet go this far).
21. Secondly, businesses may envisage claims against central Government on the basis that the policy itself, expressed in the Guidance, has been, *e.g.*, formulated irrationally. They may also argue that, contrary to art. 14 ECHR, it wrongly discriminates based on the rateable value of the business (such value being an ‘other status’ for the purposes of that article) in the enjoyment of rights under art. 1 of Protocol 1. The Government would then have to show that, if there was any discrimination with a Convention right on the basis of rateable value, that was objectively and reasonably justified by the need to place some limit on the cost of the assistance and to target it to businesses most in need.
22. Thirdly, there may perhaps even be claims by local authorities on the basis that central Government has not fully funded the cost of the grants themselves (albeit that under s. 31 of the 2003 Act the ‘Secretary of State has a very wide discretion, both as to whether to award a grant and as to the calculation of its amount’—*R (Slough Borough Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1977 (Admin), [6]) or of administering them (on the basis that they have a legitimate expectation of full funding under the New Burdens Doctrine—*cf. R (Liverpool City Council) v Secretary of State for Communities and Local Government* [2017] EWHC 986 (Admin)).

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