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The unaccountability of tax devolution:

A case study of business rates

Dominic de Cogan and Penelope Tuck

Abstract

A key justification for tax devolution is that it enhances sub-central accountability. The meaning of ‘accountability’ in this context is not always clear, but it seems to embody two linked claims. First, that sub-central institutions make better decisions if given responsibility, not only for substantive policies, but for raising and spending the necessary revenues. Second, that devolution incorporates local preferences into the tax system, a task sometimes though not invariably assisted by local electoral democracy. We refer to these as the ‘fiscal responsibility’ and ‘local preferences’ arguments, though terminology varies.

These arguments are rhetorically powerful but are easier asserted than substantiated. In this article, we examine business rates, the most deeply devolved of UK taxes, and show that the accountability arguments for rates devolution are weak. They are undermined by the economic incoherence of the tax, the complexity of devolved powers and the sometimes-extreme lack of transparency around the use of powers. The consequence is that rates devolution is only fully understood by a small network of experts. Though the skill and experience of these experts guarantees a minimum standard of decision-making, this is a weak argument for devolution given that most of the same individuals would be working as rating experts in any event.

These concerns resonate with a widespread belief that rates ought to be repealed and replaced with a more carefully designed tax, especially in light of the additional pressures placed on the system by the COVID crisis. We are not hostile to these ideas but doubt the likelihood of rapid implementation, and therefore focus on the existing system, paying special regard to the important COVID reliefs of 2020 and 2021. We suggest incremental improvements that could reinforce the accountability justifications for devolution; these might be useful even in the event that radical reforms are enacted.

1. Accountability arguments for tax devolution

There is no inherent virtue in devolving responsibilities over taxes. The tax systems of some countries are operated on a federal basis, whilst in others almost all tax powers are exercised by central government. Tax devolution does not justify itself. Nevertheless, there are various reasons why it might be desirable, which are summarised in a key OECD/KIPF report under the headings of autonomy, accountability, resource mobilisation, sustainability and political economy.¹ Accountability is defined in terms of electoral democracy, while autonomy and resource mobilisation express the idea that sub-central authorities should be given room to develop their own distinctive policies. Sustainability and political economy require that those authorities should be held responsible for the downside as well as the upside of their own decisions.

The discussion in Boadway and Shah’s seminal textbook *Fiscal Federalism* is complementary though it is expressed in slightly different terms. The authors state that ‘the decentralization of responsibilities may induce more fiscal responsibility or accountability as well as more political accountability in the federation’.² These concepts are not defined precisely but the ensuing discussion confirms that fiscal

¹ OECD and KIPF, *Fiscal Federalism 2016: making decentralisation work* (Paris, OECD Publishing, 2016) 94.

² Robin Boadway and Anwar Shah, *Fiscal Federalism: Principles and Practice of Multiorder Governance* (Cambridge, CUP, 2009) 73.

responsibility relates to the discipline exerted when ‘states must finance their expenditures out of their own-source revenues’ and when dissatisfied persons can leave ‘a jurisdiction that behaves irresponsibly’.³ Political accountability, in contrast, relates to the opportunities of making ‘provision ... at a level of government that is “closer” to the people served’,⁴ as well as the challenges of ensuring that lower-tier decisions genuinely reflect local preferences.⁵

This variance in the usage of the word ‘accountability’ is unhelpful but is hardly unfamiliar in the wider accountability literature. Bovens, Schillemans and Goodin note that the word tends to be used loosely and even without definition,⁶ though often with an implicit meaning that corresponds to Auel’s definition: ‘Accountability in its fundamental sense means being answerable for one’s actions to some authority and having to suffer sanctions for those actions’.⁷ As Rock explains, this is often elaborated into a series of mechanical questions, including ‘who is to be held to account’, ‘to whom an account is rendered’, ‘about what an account is rendered’ and ‘how accountability is enforced’.⁸ The question of whether accountability implies any normative position on the distribution of public power is more controversial,⁹ though less so in the fiscal federalism field, where much of the discussion can indeed be simplified into the two fundamental beliefs outlined by Boadway and Shah. First, sub-central authorities ought to spend within their means, and second, the tax system ought to have some space for the reflection of local preferences.

The centrality of these two propositions to the discussion of accountability in fiscal federalism debates becomes more apparent when we turn to the devolution policy literature. The Calman Commission on Scottish Devolution emphasised political accountability to voters, though in a way that also implies fiscal responsibility:

Tax devolution is the funding mechanism that can best deliver accountability. It should enable voters to see the effect of the Parliament’s decisions on spending reflected in their tax bills, as well as on the services they receive.¹⁰

The Holtham Commission on Funding and Finance in Wales took a similar approach:

[T]he case for devolution of tax-varying powers to Wales is based on the need to enhance the accountability of the Assembly Government to citizens in Wales. Tax devolution should enable Welsh Ministers ... to increase or reduce the overall size of the Assembly Government’s budget, and to do so in a manner that is apparent to Welsh citizens.¹¹

³ *ibid.*

⁴ *ibid.*

⁵ *ibid.*, 69.

⁶ Mark Bovens, Thomas Schillemans and Robert E Goodin, ‘Public Accountability’ in Bovens, Goodin and Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford, OUP, 2014) 2.

⁷ *ibid.* 6, citing Katrin Auel, ‘Democratic Accountability and National Parliaments: Redefining the Impact of Parliamentary Scrutiny in EU Affairs’ (2007) 13 *European Law Journal* 487-504, 495.

⁸ Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge, CUP, 2020) 18-20.

⁹ *ibid.*, 20-24.

¹⁰ Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century, Final Report*, 15 June 2009, www.qmul.ac.uk/law/maccormick/media/maccormick/timeline/15_06_09_calman.pdf, 79 [3.36].

¹¹ Independent Commission on Funding & Finance for Wales, *Final report: Fairness and accountability: a new funding settlement for Wales*, July 2010, <https://gov.wales/sites/default/files/publications/2018-10/fairness-and-accountability.pdf>, 42 [4.20].

The transfer of fiscal powers to English regions and localities is shallower than devolution to Scotland, Wales and even Northern Ireland,¹² but engages similar justifications. In the words of the Select Committee for Communities and Local Government:

30. Fiscal devolution presents an opportunity to improve accountability, to hold local politicians to account for their successes and failures and, therefore, to improve democracy. By giving politicians outside Westminster the responsibility for raising, as well as spending, money locally, fiscal devolution would bring decisions on how that money is generated and spent much closer to local people—and make those who make such decisions much more visible.¹³

The focus on democracy here is interesting because it fits awkwardly with business rates, a tax that involves significant local authority discretion but is almost invisible to many voters. A Green Paper produced by the Conservative Opposition in 2009, which contained many ideas later incorporated into the Localism Act 2011, explained the benefits of giving local authorities flexibility over rates but instructively omitted any mention of democracy:

We will legislate to give local authorities a new discretionary power to levy business rate discounts ... as long as they can fund them from other local income or avoided costs. ...

This will allow councils to apply local solutions to local problems, whether by averting the gratuitous demolition of office buildings, encouraging the reuse of empty rural buildings, supporting local post offices, or preventing the closure of vital village pubs or shops.¹⁴

This raises a wider question: to whom should local authorities be accountable to in the exercise of their business rates powers, if not to voters? The conclusion reached in parts 4 and 5 of this article is that rating operates within expert networks. This is reassuring in view of the skill and expertise of these experts, but undermines accountability as an independent justification for devolution given the likelihood that most of them would be working in the rating field even in the absence of devolution. Nevertheless, the discretionary relief proposed in the Green Paper was enacted in section 69 of the Localism Act 2011. Taken together with existing local authority powers to levy rate supplements,¹⁵ this introduced significant local flexibility into the rating system. The amounts involved are often small, but this is not always the case.¹⁶

Rates devolution has only deepened in the years since the Localism Act. In 2015, rating in Wales was transferred to the Welsh devolved administration,¹⁷ and more recently, 'rates retention' schemes have proliferated in England. As the name suggests, the idea is that rates revenues collected by local authorities should be retained locally rather than being contributed to a national pool and then redistributed under a centralised mechanism. Without more, this could undermine local fiscal responsibility by leaving individual councils excessively vulnerable to events beyond their control, such as a key ratepayer closing its operations or leaving the area. In consequence, retention schemes have usually operated within groups of authorities, which spreads risk but also attenuates the link between tax decisions and local elections. One possible response to this tension is to enhance the role of regional democracy in general, and regional elected Mayors in particular. In DCLG's words,

¹² Dominic de Cogan, *Tax Law, State Building and the Constitution* (Oxford, Hart, 2020) 53-57.

¹³ Communities and Local Government Committee, *Devolution in England: the case for local government* (HC 2014-15, 503) <https://publications.parliament.uk/pa/cm201415/cmselect/cmcomloc/503/503.pdf>, 17 [30].

¹⁴ Conservative Party, *Control Shift: Returning Power to Local Communities*, Responsibility Agenda, Policy Green Paper No. 9, <https://businessdocbox.com/Government/73053928-Control-shift-returning-power-to-local-communities.html>, 12.

¹⁵ Business Rates Supplement Act 2009, also Localism Act s.68.

¹⁶ The Crossrail project in London has been funded using similar powers, though in a different statutory context.

¹⁷ See part 2 of this article for an overview of the position in Scotland and Northern Ireland.

Directly elected Mayors have democratic accountability to their area, and we know that some have expressed a wish to be given greater responsibility for the distribution of resources within the Combined Authority area.¹⁸

This is not the place to attempt a full evaluation of retention schemes. Yet they illustrate our wider point that tax devolution does not justify itself and is only as desirable as the justifications that can be given in favour. In this instance, the tension between fiscal responsibility and local preferences has been compromised through regional democracy initiatives that have nevertheless failed to ignite much enthusiasm outside Greater London and Greater Manchester. More generally, if devolution is not supported by its underlying justifications, then it ought to be reconsidered or at least reformed in a way that strengthens the justifications. In this article, we focus on accountability justifications for rates devolution to local authorities, because of their special vulnerability to this type of analysis, but similar arguments could be applied to other aspects of tax devolution.

We expand our argument as follows. In part 2, we introduce business rates, not in comprehensive detail but only so far as necessary to understand the problems of accountability. These problems are discussed in parts 3 to 5, which look at the weak economic rationale of rates; the extreme complexity of the devolution arrangements; and the scarcity of accessible information on how rating powers are used. We illustrate these latter points with the important COVID relief, the consequences of which are far removed from its underlying legal structure. In parts 6 to 8, we consider possible responses to the weaknesses in the accountability justifications for rates devolution. Part 6 deals briefly with radical reform proposals, whilst part 7 looks at incremental ways of improving the existing system, drawing on the literature on the use of tax reliefs for public spending ('tax expenditures'). Part 8 observes that greater transparency would be welcome even in the context of radical reform, and part 9 concludes.

2. Brief overview of business rates

At first sight, business rates are simple. They are applied to the occupiers of non-domestic properties unless those properties fall within an exemption, for example the exemption for agricultural land. The liability is calculated by taking the open market rental value of property at a specified date (the 'rateable value') and multiplying it by a tax rate known as the 'multiplier' or 'poundage'. At the time of writing the standard multiplier for England is 51.2p. This amount is then reduced by reliefs, such as the relief for charities, to produce the overall rates liability.

Many rating functions are devolved to sub-central authorities. Rates have been devolved to Northern Ireland since 1922, occasionally complicated by the fluctuating fortunes of the Stormont institutions, and business rates have been devolved to Scotland since 1998, building on earlier experience in the Scotland Office. The legislation differs from England in both instances, and in Scotland engages with a distinctive underlying system of land law. Devolution of business rates to Wales took place in 2015 and there has been a parallel but weaker process of transferring powers over reliefs and certain other matters to sub-central institutions in England. The devolution of rates to Northern Ireland, Scotland and Wales is reflected by a deduction from the allocation of central government funds under the 'Barnett formula'. Similar, though more complex, mechanisms have been developed to allow English

¹⁸ Department for Communities and Local Government, *Self-sufficient local government: 100% Business Rates Retention Consultation Document*, July 2016, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/535022/Business_Rates_Retention_Consultation_5_July_2016.pdf, 27 [4.24]

councils to enjoy some of the risks and rewards of their own decisions whilst providing safety nets for less fortunate areas.¹⁹

In contrast to council tax, periodic property revaluations are carried out for business rates, and are in principle intended to be revenue-neutral. In other words, revaluations are not intended to affect overall revenues but only the distribution of liabilities between ratepayers. This can have profound systemic effects. For example, if property price increases are concentrated in one region of England (say, London) then NDR revaluations are likely to increase the fiscal burden on that region. If there is substantial redistribution of revenues between localities ('equalisation') then the consequence is to make England more dependent on the region with increasing prices.²⁰ If there is more limited equalisation, as is implied by rates retention schemes, then the consequences may be a widening divide in the public services that authorities are able to provide.

A final general point is that rates can increase significantly the costs of affected businesses relative to competitors with lower or no liabilities, such as online retailers and charity shops. This has long caused consternation but has come to the forefront during the COVID pandemic in view of the restrictions on entering shops and the consequent boom in online retailing and delivery businesses. One of the government's responses has been to implement an extremely wide COVID relief, which we examine in detail in parts 4 and 5 of this article. Another is to float the idea of an online sales tax, which would be levied on top of existing taxes including the Digital Services Tax and would help to redress the balance between physical and online retailers.²¹ Detailed analysis of this idea is beyond the scope of the present article, but it highlights a key problem with business rates, which is that their underlying economic rationale is not clear.

3. Weakness of economic rationale

The essence of this objection to business rates is that they are charged on a narrow and incoherent range of activities. They generate heavy costs for businesses in already expensive city-centre locations and much lower costs for out-of-town and online businesses. Farms and Northern Irish industrial premises are not liable to rates at all, and charities pay little or nothing despite controversy around the position of independent schools.²² If the tax is underinclusive in the types of property covered, it is arguably overinclusive in applying not only to the rental value of land but also of land improvements, buildings and some plant and machinery. This notoriously disincentivises development, especially considering that rates represent a fixed cost that must be paid regardless of profitability or cashflow. In turn, this seriously complicates the task of authorities hoping to use devolved rating powers either to raise revenues or to improve the built environment.²³

The patchwork incidence of business rates also creates problems of accountability by obscuring the counterfactual of what would have happened, had devolved power not been exercised. This greatly complicates the task of demonstrating that local authorities are taking the full consequences of their

¹⁹ See de Cogan, above n 12, 55.

²⁰ See David Phillips, 'Business rates revaluation reveals growing gap between London and the North' (*IFS Observation*, 30 September 2016), <https://ifs.org.uk/publications/8689>.

²¹ See HM Treasury, *Business Rates Review: Interim Report*, March 2021, <https://www.gov.uk/government/consultations/hm-treasury-fundamental-review-of-business-rates-call-for-evidence> 26-28.

²² See eg Rosemary Bennett, 'Private schools' £100m rates relief at risk', *The Times*, 14 March 2020, <https://www.thetimes.co.uk/article/private-schools-100m-rates-relief-at-risk-6z5mnpw2>. See also Non-Domestic Rates (Scotland) Act 2020, s 17, which removes relief from Scottish independent school.

²³ Refer to discussion of Land Value Tax in part 6 of this article, below.

decisions (fiscal responsibility) or taking account of the views of citizens and business (reflection of local preferences). This is best illustrated with an example. Let us imagine that a local authority wishes to 'boost local business', which is admittedly vague but not too unrepresentative of local election promises. If the boost comes in the form of £100,000 grants to local businesses, the comparison is straightforward. £100,000 has been granted which otherwise would not have been granted. If instead the boost were provided by altering the rate of a broad-based tax, say in an imaginary system in which local authorities could alter income tax rates, we might come to a similar conclusion. There would be multiple complexities in understanding the consequences of this decision,²⁴ but at least at a crude level we could see that an income tax rate of x% had been reduced to x-1%.

The important point is that these decisions can be explained in an intuitive and abstract manner even if detailed modelling and empirical work would be needed to determine their full consequences. At first sight the same could be said of a boost provided by a business rates relief, on the basis that in its absence there would have been no relief. On closer inspection, though, the counterfactual is much more difficult to articulate than in our first two examples. Instead of a £nil grant or an x% income tax rate, the counterfactual for rates relief depends on various factors including whether the premises in question comprise a farm (not rateable), a factory (rateable in GB but not NI), a charity shop (rateable at up to 20% of the usual level) or contain plant and machinery (may be part of the rateable value).

This means that the consequences of a rates relief cannot be understood even in principle without a detailed and concrete knowledge of both the local property market and the mechanics of the tax. It is hardly surprising that expressions of the 'local preferences' justification for devolution tend not to emphasise democratic control through local elections.²⁵ It is too complicated for these purposes, especially for a tax that most voters do not even pay. The patchwork incidence of rates has even more serious consequences for the 'responsibility' justification for devolution, in that it makes the amount of revenues collected in some localities heavily dependent on a very few ratepayers, perhaps a power station or a handful of large factories. This would not have mattered under the old system of pooling rates revenues nationally and then redistributing them to local authorities according to need. Under a partial rates retention system, though, the consequence is to make authorities vulnerable to revenue shocks lying outside their control. If, for example, a large factory closes, revenues within an area could collapse without any fault on the part of local officials. As noted above, regionalism mitigates these risks, but at the cost of weakening the link between local decisions and revenue consequences.

To summarise, rating law awaits a convincing way of tying local decisions to local consequences, in a way that protects authorities from events outside their control and that is reasonably comprehensible to non-experts. The position is not helped by extreme complexity, to which we now turn.

4. Complexity

Some complexity is inevitable in devolved taxes, for the obvious reason that devolution allows for divergences between sub-central jurisdictions and hence increases the number and variety of rules. It is also obvious that complexity is not fatal to either the 'local preferences' or 'responsibility' justifications for devolution. For example, the Scottish devolved administration has used its powers to create a more progressive income tax system than the rest of the UK. This decision has created complexities for taxpayers, but it is an integral and visible part of the SNP's wider programme that can be readily understood by voters and then either accepted or rejected in future elections.

²⁴ See Jennie Bunt, *An assessment of the feasibility of a local income tax to replace council tax in Wales* (Welsh Government, Social Research Number 74/2020, 10 November 2020).

²⁵ Refer to text at n 14, above.

Our complaint with rates devolution is therefore not that it is complex, but that it is so complex that only a small community of experts has any robust understanding of how the systems across the UK operate and interact. There are two aspects to this complexity. The first is the multiplicity of rules, discretionary powers, soft law frameworks, discussion forums and personal relationships that can affect business rates outcomes, as well as the ability of central government to override any of the above. This might be done by exercising Parliamentary sovereignty, or by restricting fiscal transfers to sub-central authorities. The second point is that it is often difficult to find reliable and helpful information about business rates law, administration and practice. We consider only the first type of complexity here and address the second in part 5, below.

The multiplicity of rules and practices is easiest explained using a topical example. On 11 March 2020, the Chancellor of the Exchequer announced a rates relief as part of a broader set of measures to assist businesses and individuals with the unfolding COVID-19 crisis:

The government has already announced the Business Rates retail discount will be increased to 50% in 2020-21. To support small businesses affected by COVID-19 the government is increasing it further to 100% for 2020-21.²⁶

It will be noticed immediately that this is not a new relief, but an adaptation of an existing initiative to help high-streets known as the retail relief, or retail discount. This scheme was announced in 2018 as a reduction of 'one-third for retail properties with a rateable value below £51,000, benefiting up to 90% of retail properties, for 2 years from April 2019, subject to state aid limits'.²⁷ On 27 January 2020, well before the full consequences of the pandemic were widely appreciated, the Financial Secretary to the Treasury announced an increase in the relief to 50%.²⁸ The first curiosity of the 'COVID relief', then, is that for the first year of its existence it had nothing to do with COVID.

The second curiosity becomes apparent when one searches for the legislation introducing the relief in late 2018 or early 2019. There is no such legislation, for the following reason. In legal terms, the retail discount is not a statutory relief at all, but merely an invitation to English local authorities to provide discretionary relief in return for a promise of full reimbursement from central government.²⁹ The legislative basis for this discretion is in section 47 of the Local Government Finance Act 1988. This permits any local authority to grant rates relief provided that 'it is satisfied that it would be reasonable to do so, having regard to the interests of persons liable to pay council tax set by it' (s 47(5A)) and that regard is paid 'to any relevant guidance issued by the Secretary of State' (s 47(5C)).

The plot thickens further because, in its original form, section 47 was subject to strict conditions that would have prevented their use for such a wide COVID relief. The conditions were removed by section 69 of the Localism Act 2010, which is described as follows by the Explanatory Notes:

Section 69 amends section 47 of the Local Government Finance Act 1988 to replace the limited circumstances in which local authorities can currently give discretionary relief with a power to grant relief in any circumstances.

The overall aim of the Localism Act, according to the Explanatory Notes, is

²⁶ HM Treasury, *Budget 2020: delivering on our promises to the British people* (2019-20 HC 121) 40.

²⁷ HM Treasury, *Budget 2018* (2018-19 HC 1629) 46.

²⁸ HC Deb 4 February 2020, vol 671, cc 278-79 (Jesse Norman), referring to the earlier written statement.

²⁹ Ministry of Housing, Communities and Local Government, *Business Rates Expanded Retail Discount 2020/21: Coronavirus Response – Local Authority Guidance* (2 April 2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919752/Expanded_Retail_Discount_Guidance_02.04.20.pdf, 4 [7].

to devolve more powers to councils and neighbourhoods and give local communities greater control over local decisions like housing and planning.

So, to summarise, the government implemented the 2020 COVID relief by amending a 2018 decision to coordinate a 1988 local discretionary relief that had been widened in 2010 with a view to *decreasing* central control over local government. Moreover, the guidance to this relief emphasises what local authorities 'should' do.³⁰ No sense is given that a local authority might decide to refuse an explicitly discretionary relief, though this is realistic given the central government promise to reimburse costs.

There is an interesting comparison with Scotland, where COVID reliefs are contained in dedicated secondary legislation.³¹ The reliefs are not discretionary but are set out explicitly in the Regulations, and no reimbursement of local authorities is needed in the absence of rates retention in Scotland. This is a simple and sensible approach, but also illustrates the multiple complexities of business rates, with jurisdictional differences compounding the mismatch of form and substance in the English relief.

A further aspect of complexity consists of the potential for legal outcomes to depend on interpersonal and interinstitutional relationships, as well as on published rules. The most obvious example is that the power of local authorities to grant discretionary relief incentivises negotiation. The retailer Debenhams, presumably already in serious financial difficulty, was reported in early 2020 to have threatened to close certain stores unless relief was granted,³² which was indeed followed by offers of relief by some councils.³³ This behaviour is understandable in the light of the liquidation of Debenhams later in 2020, yet the episode illustrates the vulnerability of councils to pressure from ratepayers. This pressure is likely to be more intense for authorities heavily dependent on a few large ratepayers and may affect deprived areas disproportionately.

It need hardly be emphasised that providing relief in response to threats raises serious questions of accountability. It corrodes fiscal responsibility because funds available for spending in the locality are reduced in a way that is realistically outside the local authority's control. It offends 'local preferences' accountability because it responds to ratepayer demands rather than to the needs or wishes of local businesses or residents, let alone reflecting democratic processes. The problem here is fundamental. The devolution of discretionary relief to local authorities was justified, in part, on the basis that it would enhance the accountability of those authorities. If it has not done so, the obvious inference may be that it is unjustified.

Even short of explicit pressure to provide reliefs, rates administration involves a strong emphasis on interpersonal and interinstitutional contact, which overlays though it does not always contradict the strict application of the law. This is partly a function of the dispersal of powers across a wide array of institutions, which makes the system unmanageable without coordination and negotiation.³⁴ These strategies are particularly visible in the provision of reliefs within the special economic zones known as Enterprise Zones. To use the Cambridgeshire zones as an example, they are governed by a committee of businesspeople and officials known as a Local Enterprise Partnership but derive most of

³⁰ Eg *ibid*, 9 [24].

³¹ Non-Domestic Rates (Coronavirus Reliefs) (Scotland) Regulations 2020, SSI 2020/101, as well as some more limited amending regulations.

³² Sahar Nazir, 'Debenhams to give local councils ultimatum over store closures', *Retail Gazette*, 26 February 2020, <https://www.retailgazette.co.uk/blog/2020/02/debenhams/>.

³³ Richard Youle, 'Debenhams pledges its future in Swansea after council chiefs suspend anchor store's business rates', *Wales Online*, 22 May 2020, <https://www.walesonline.co.uk/news/wales-news/debenhams-swanea-shopping-council-news-18298985>. The difference between Welsh and English law is not relevant for present purposes.

³⁴ Refer to text at n 56, below.

their legal powers from the Cambridgeshire and Peterborough Combined Authority.³⁵ The underlying statutory framework is not far from unintelligible but at least some reliefs appear to be provided by participating councils using the familiar discretionary relief under section 47 LGFA 1988.³⁶ The government's own literature acknowledges that agreeing on reliefs is likely to involve negotiation:

Although the use of the power is entirely a matter for the relevant billing authority, we would encourage authorities to discuss this with the Local Enterprise Partnership that has overall responsibility for the zone.³⁷

Readers alarmed that we have greatly *simplified* our explanation of the statutory framework may appreciate the next point, which is that rates administration involves deep expertise even by usual tax standards. The number of people with some familiarity with substantial, reflecting the wide range of properties subject to the tax. However, the pool of policy specialists with deep understanding of how rating operates in the sub-jurisdictions of the UK, how to find and interpret the legislation and how to navigate the political complexities seems miniscule in comparison with other major taxes.

Indeed, devolved rating powers resemble a 'governance network'³⁸ in which decision-making and even statutory interpretation can depend heavily on the shared understandings of deep experts.³⁹ We do not intend this pejoratively and there is obvious value in the efforts of these experts, notably in raising stable and predictable revenues from a tax that would be unworkably complex in the absence of their professional skills. Nevertheless, as Papadopoulos observes, networks are not always easily reconciled with democratic control.⁴⁰ This is particularly relevant to the example of Enterprise Zone reliefs, where it is extremely difficult to imagine decision-makers being held accountable to electors in relation to their reflection of local preferences. To put the point bluntly, nobody else understands these reliefs. These problems are compounded by a frequent lack of accessible information, and it is to this that we now turn.

5. Transparency

There are overlaps between transparency, complexity and the types of accountability detailed above, but they are not exact. For instance, the complexity of many rating issues and the scarcity of accessible literature limits the level of understanding amongst non-specialists, including the general public but potentially also elected officials. However, this may not be fatal to accountability if devolved powers

³⁵ See further Cambridgeshire and Peterborough Combined Authority, *The Constitution (March 2021)*, <https://mk0cpcamainsitehdbtm.kinstacdn.com/wp-content/uploads/documents/key-documents/constitution/Cambs-Pboro-CA-Constitution-1.pdf>, 4 and Appx 5.

³⁶ It is not easy to find evidence for this, but see Explanatory Memorandum to the Non-domestic Rating Contributions (England) (Amendment) Regulations 2012, SI 2012/664, https://www.legislation.gov.uk/ukxi/2012/664/pdfs/ukxiem_20120664_en.pdf, [4.3], [7.2], [7.3].

³⁷ Department for Communities and Local Government, *Business Rates Information Letter (5/2012): Interest Rates for 2012/2013 and Discounts in Enterprise Zones*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/249212/Business_Rates_Information_Letter_5-2012.pdf, 2 [6].

³⁸ See Yannis Papadopoulos, 'Problems of democratic accountability in network and multilevel governance' (2007) 13(4) *European Law Journal* 469-486; Yannis Papadopoulos, 'Accountability and multi-level governance: more accountability, less democracy?' (2010) 33(5) *West European Politics* 1030-49; Ian Bache, Ian Bartle and Matthew Flinders, 'Multi-level governance' in Christopher Ansell and Jacob Torfing (eds), *Handbook on Theories of Governance* (Cheltenham, Edward Elgar, 2016).

³⁹ See also Mai'a K Davis Cross, 'Rethinking epistemic communities twenty years later' (2013) 39(1) *Review of International Studies* 137-160.

⁴⁰ Papadopoulos, 'Problems', above n 38, 472 ff; Papadopoulos, 'Accountability', 1033 ff.

are subject to specialist oversight that ensures they are used responsibly and consistently with local preferences. Likewise, the simplicity of some aspects of rating does not guarantee accountability if the published data are incomplete, presented confusingly or unreflective of real-world practice.

These complex relationships are best understood by returning to the examples of COVID-19 relief and enterprise zones discussed in the previous part of this article. It will be remembered that COVID-19 reliefs are substantively directed by central government but are formally local and discretionary. At first sight, this seems damaging for transparency. It is confusing and obscures which institutions are responsible for the relief. However, on further inspection, the government's *ratepayer facing* literature unambiguously presents the relief as an entitlement provided by central government, stating that 'your local council will apply the relief automatically'.⁴¹ It is only when one turns to the *local authority facing* literature that it becomes obvious that the relief's legal basis is a local discretion, which technically a council would be within its right to refuse.⁴² The upshot is that most ratepayers and members of the public are likely to identify the relief correctly as a central initiative, will hold central government responsible for its operation and will not expect local preferences to be reflected.

If in this instance transparency and accountability can be maintained despite unnecessary complexity in the underlying law, it is harder to be sanguine about enterprise zone reliefs. A particular problem is how to carve enterprise zones out of the ordinary rating system so that special incentives can be provided exclusively within the zone and not outside. The initial provisions achieving this were enacted in 1980.⁴³ These still apply in Scotland but were repealed in 1990 for England and Wales.⁴⁴ It is difficult to follow the trail at this point, but we have located some Regulations of 1992 that perform the same task as the old rules, adjusted for the then new arrangements for pooling rates revenues nationally.⁴⁵ These were enacted under powers conferred by LGFA 1988,⁴⁶ which were repealed in 2012 but only for England.⁴⁷ In England the matter seems to be governed by Regulations issued under a new Schedule to LGFA 1988, inserted in 2012.⁴⁸ These adapt the rules to accommodate local rates retention in England and do not refer directly to Enterprise Zones but rather to 'Designated Areas'.⁴⁹

This analysis took the authors of this article several hours and we are still not confident beyond doubt that it is correct. Indeed, we have found documents from 2015 purporting to apply the English Regulations of 1992 and signed by representatives of HMT and Redcar and Cleveland Council.⁵⁰ This is particularly odd given that the Council is specifically mentioned in the 2013 Regulations.⁵¹ Hence,

⁴¹ Ministry of Housing, Communities and Local Government, 'Guidance: Check if your retail, hospitality or leisure business is eligible for business rates relief due to coronavirus (COVID-19)' (18 March 2020), <https://www.gov.uk/guidance/check-if-your-retail-hospitality-or-leisure-business-is-eligible-for-business-rates-relief-due-to-coronavirus-covid-19>.

⁴² Refer to n 29, above.

⁴³ Local Government, Planning and Land Act 1980, Sch 32, Parts IV and V.

⁴⁴ Local Government Finance (Repeals, Savings and Consequential Amendments) Order 1990, SI 1990/776, Art 3 and Sch 1.

⁴⁵ Non-Domestic Rating Contribution (England) Regulations, SI 1992/3082, and Non-Domestic Rating Contributions (Wales) Regulations, SI 1992/3238.

⁴⁶ Local Government Finance Act 1988, Sch 8.

⁴⁷ Local Government Finance Act 1992, s 5 and Sch 3.

⁴⁸ Local Government Finance Act 1988, Sch 7B, inserted by Local Government Finance Act 2012, s 1 and Sch 1.

⁴⁹ See eg Non-Domestic Rating (Designated Areas) Regulations 2013, SI 2013/107.

⁵⁰ HM Treasury and Redcar and Cleveland Borough Council, 'Memorandum of understanding' (16 June 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/485159/160617_RCBC_Prairie_MOU_signed.pdf.

⁵¹ SI 2013/107, above n 49, Sch 1, para 3.

either the parties to the document have made a mistake, the present authors have done so,⁵² or we are all in error and the real answer is somewhere else. It is not important for present purposes to assign fault. The point is that there is a specialist but not especially obscure piece of law that is so hard to locate that HMT, a large local authority, a Professor of Accounting and an Associate Professor of Law cannot agree on where to find it, let alone its content. This has accountability implications but also offends widely-held understandings of the rule of law relating to accessibility of legal material.⁵³

These accessibility problems are both alleviated and exacerbated by the interpersonal dimension of rates administration. They are alleviated because rates disputes tend to fall into a small number of predictable categories such as valuation, small business relief and empty property relief. There is a large body of guidance on these matters, professional advice is easy to secure, and negotiation is built into the system especially in relation to discretionary relief.⁵⁴ Even in the most complicated example above, a business seeking relief by relocating to an Enterprise Zone should usually be able to access that treatment without difficulty. Even if disputes arise between authorities concerning the funding of Enterprise Zone reliefs, they should be resolvable out of sight and without troubling ratepayers with the details of the Designated Area Regulations.

If the interpersonal and interinstitutional aspects of rating help to improve the ‘user experience’ for ratepayers,⁵⁵ they can greatly exacerbate the challenge in locating and understanding the legal basis of decisions about rates. Some of the most important inter-institutional arrangements are well-known and easily accessed, notably the *Fiscal Frameworks* that articulate the shared understandings of the UK’s constituent nations on public finances.⁵⁶ Unfortunately, these are light on detail, and there is no specific mention of rates in the Scottish framework though there are several in the Welsh.⁵⁷ At a lower level of visibility, the UK government has concluded various memoranda of understanding (MoUs) and ‘devolution deals’ with English local and regional authorities setting out mutual expectations on the use of devolved fiscal powers. These often include rating provisions and are reasonably accessible, though they appear not to be collated in any one place.⁵⁸ They also do not, and are not designed to, provide any comprehensive overview of the interaction between central, local and regional governance; nor do they typically reflect recent developments such as the 2020 COVID relief.

⁵² We note that the post-2012 Regulations were designed to replace the 1992 Regulations at least for England (see the Explanatory Memorandum to the Non-Domestic Rating (Designated Areas) Regulations 2013, SI 2013/107, 3 [7.1]), though we have not located any provision repealing the older Regulations.

⁵³ See eg Tom Bingham, *The Rule of Law* (London, Penguin, 2011) Ch 3.

⁵⁴ Refer to text at n 34, above.

⁵⁵ This language can be seen frequently in OTS reports: see eg Office of Tax Simplification *Annual Report 2017-18: Simplifying the tax system to make it easier for the taxpayer to use* (July 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/726264/OTS_Annual_Report_2017-18_print_.pdf, 4.

⁵⁶ HM Government and The Scottish Government, *The agreement between the Scottish Government and the United Kingdom Government on the Scottish Government’s fiscal framework* (February 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/503481/fiscal_framework_agreement_25_feb_16_2.pdf.

⁵⁷ HM Government and Welsh Government, *The agreement between the Welsh Government and the United Kingdom Government on the Welsh Government’s fiscal framework* (December 2016), <https://gov.wales/sites/default/files/publications/2018-11/agreement-on-welsh-government-fiscal-framework.pdf>.

⁵⁸ See eg HM Treasury, Department for Communities and Local Government, Mayor of London and London Councils, *Memorandum of Understanding on further devolution to London* (8 March 2017), <https://www.gov.uk/government/publications/memorandum-of-understanding-on-further-devolution-to-london>.

Less transparent still are the personal contacts between policy professionals. As noted above, these are significant in the rates context given the technicality and inaccessibility of aspects of the underlying legislation, and the overlaps between tiers of government. Once again, the picture is mixed. In respect of some technical issues, notably valuation techniques, it is easy to find basic information on how rating professionals operate.⁵⁹ In respect of broader questions of how rating policy and administration is coordinated across the UK and between central and sub-central institutions, it is not easy to find any information at all. For instance, we know from discussions with experts that there are forums in which policy issues are discussed across jurisdictions, but it is difficult to locate any publicly available information about the existence of these forums, let alone their deliberations and conclusions.

In summary, the transparency of rating policy and administration is decidedly mixed. On some matters there is plenty of high-quality and readily available information. On other matters, especially those involving expertise or interpersonal and interinstitutional relationships, relevant information can be extremely difficult to find, let alone to understand. The present authors have encountered significant difficulty in locating such information and have relied heavily on the generosity of rating professionals in helping us to develop our understanding. This experience has left us confident that rating is in good hands, but also unconvinced that the availability of information on many policy decisions is sufficient to allow for credible accountability in the sense of 'being answerable for one's actions to some authority and having to suffer sanctions for those actions'.⁶⁰

6. Repealing the tax

To summarise so far, the weaknesses of rating include the absence of a convincing economic rationale, the over-complication of a fundamentally simple tax, and the scarcity of information about aspects of policy and administration. These problems ought to prompt a general reconsideration of whether the tax is capable of generating the advertised accountability and other benefits of devolution whilst also raising sufficient revenues in a reasonably equitable manner. One well-known view is that rates should be repealed, along with council tax and perhaps other taxes, and replaced with a new Land Value Tax ('LVT'). This would be levied on landowners and calculated by reference to land value, including any increased value flowing from location advantages or planning status but not including the value of site improvements or buildings.⁶¹ The idea derives from the work of nineteenth-century American economist Henry George,⁶² which has gained a devoted following ever since though limited success in terms of practical implementation. The more radical proponents argue that the LVT should replace not only existing land and property taxes but all other taxes, and are accordingly known as 'single taxers'.⁶³ Others take a more modest view, with the Mirrlees Review recommending LVT as a replacement for business rates but supporting a different approach to housing wealth.⁶⁴

⁵⁹ See eg Valuation Office Agency, 'Guidance: How non-domestic (business) properties are valued' (5 August 2014), <https://www.gov.uk/guidance/how-non-domestic-property-including-plant-and-machinery-is-valued>; Scottish Assessors Association, 'Non domestic valuation', <https://www.saa.gov.uk/non-domestic-valuation/>; Department of Finance (NI), 'Non Domestic valuation', <https://www.finance-ni.gov.uk/topics/property-valuation/non-domestic-valuation>.

⁶⁰ Refer to text at n 7.

⁶¹ There is a helpful review of the arguments in Institute for Fiscal Studies, *Tax by Design: the Mirrlees Review* (Oxford, OUP, 2011) 370-78.

⁶² See Henry George, *Progress and Poverty* (London, JM Dent, 1879).

⁶³ See John HN Pearce, 'Lloyd George's Land Values Duties' in Peter Harris and Dominic de Cogan (eds), *Studies in the History of Tax Law, Volume 9* (Oxford, Hart 2019) 283.

⁶⁴ Institute for Fiscal Studies, above n 61, Ch 16.

The key attraction of an LVT is not accountability so much as the minimisation of economic distortion, the fairness advantage in taxing such a limited, important and unequally distributed resource, and the scope for underutilised land to be converted to more productive use.⁶⁵ There is also wide variation between LVT proposals, with some readier to accept localised discretion than others.⁶⁶ Nevertheless, there are reasons to suppose that an LVT might also be preferable to existing arrangements from an accountability perspective. Most importantly, an LVT would establish a coherent and comprehensible tax base, contrasting favourably with the discussion of rating in part 3 of this article. If sub-central authorities were given powers to modify the tax base, for instance by providing discretionary reliefs, it would be much easier to distinguish between the standard liability and the treatment as modified by the lower-tier authority. This in turn would make it easier to provide transparent information that explains which institutions are responsible for which decisions and hence who can properly be held accountable for what.

7. Tax expenditure analysis

Whilst we note these potential advantages, the establishment of an LVT would represent a leap into the dark, abandoning predictable revenue streams from admittedly flawed taxes in favour of uncertain revenue streams from admittedly well-designed taxes. It would be a courageous government that took such a step, and the examples of successful replacement of substantial taxes in the UK are not numerous.⁶⁷ The likelihood of clean implementation of an LVT is further limited by administrative complexities such as the valuation of all land without reference to improvements or buildings and the potential for the tax to bear heavily on a few well-resourced and potentially vocal landowners. There is also a distinct scarcity of successfully implemented LVTs in comparable jurisdictions despite the long pedigree of the idea.

If we are therefore agnostic about the adoption of an LVT, the accountability challenges discussed in this article nevertheless indicate the potential value in looking for less drastic ways of improving rates devolution. An obvious option is to draw on the 'tax expenditure' literature. The key insight of this literature is that the difference between tax reliefs and public spending can be a matter of form rather than substance. To return to the example of an attempt to 'boost local business' given in part 3 of the article, the grant of £100,000 and the tax reliefs worth £100,000 are just alternative ways of allocating public resources to the chosen recipients. It follows that if there are procedures for calculating and overseeing public spending, these procedures should apply equally when that spending is provided in the form of tax reliefs. Tax expenditure management, then, is about recognising tax reliefs as an analogy to ordinary public spending and applying the same standards of scrutiny to both.⁶⁸

Tax expenditure analysis is not universally admired, in part because of its association with small-state ideology, or more precisely, uncovering and eradicating public spending 'hidden' within tax practices. Indeed, much of the pioneering work in this area was explicitly motivated by a desire for 'tax spending retrenchment' and a belief that many tax expenditures 'would fail to survive the same level of scrutiny faced by direct spending programmes.'⁶⁹ Nevertheless, whilst the concept of tax expenditures has

⁶⁵ For a helpful overview of the intellectual history of these arguments, see Iain McLean, 'The politics of land tax – then and now' in Dominic Maxwell and Anthony Vigor (eds), *Time for Land Value Tax?* (London, IPPR, 2005).

⁶⁶ Compare McLean's support for a local LVT (above n 65, 25), with John Muellbauer's insistence that an LVT be imposed on a national basis ('Property Taxation and the Economy' in Maxwell and Vigor, above n 65, 43).

⁶⁷ The most obvious are the introduction of income tax (1799-1803), estate duty (1894) and VAT (1973). There are of course ways of managing this resistance to reform, as Stephen Daly pointed out to me in correspondence.

⁶⁸ For a helpful overview, see Mark Burton and Kerrie Sadiq, *Tax Expenditure Management: a Critical Assessment* (Cambridge, CUP, 2013) Ch 2.

⁶⁹ Burton and Sadiq, above n 68, 59.

gained traction and is now used widely by governments and international organisation, there is little evidence to suggest that the early small-state ambitions have been realised.⁷⁰ Put shortly, the spread of tax expenditure management has not correlated with actual reductions in public spending. Instead, the key reason for its ongoing use seems to be the essentially procedural one of improving the quality of information about the raising and spending of public funds.⁷¹ Burton and Sadiq usefully subdivide this task into three categories, comprising the quality of data fed into the government's budgetary processes, the transparency of information presented to the public and the standardisation of data for international comparison purposes.⁷²

It is in this contemporary guise as a technique for improving information, rather than in the small-state ambitions of early proponents, that the relevance of tax expenditure analysis to rating becomes fully apparent. The point is that if a local authority offers discretionary relief either in pursuit of its own policy objectives, as part of a nationally coordinated COVID relief, or as a response to pressure from powerful ratepayers, this can be expressed as a tax expenditure. Looking past legal form, public funds have been arranged favourably for the policy objective or the powerful ratepayers. In principle, therefore, this ought to be recognised for the purposes of financial management, political scrutiny and public transparency just like any tax expenditure at the national level.

Although subjecting the exercise of devolved rating powers to tax expenditure analysis makes sense in principle, various objections might be raised. The most obvious is that compiling data of sufficient quality for scrutiny purposes, let alone public consumption, is costly and time-consuming. In the context of the COVID crisis and after years of cuts in central funding, local authorities have scarcely ever been less able to absorb such costs and need to prioritise their remaining resources to frontline services. The task is further complicated by the influence of UK government guidance and incentives, which may make it difficult to isolate the consequences of genuinely local decisions. There be some reticence to provide data that will enable the UK government more easily to identify and interfere in sub-central decisions that do not fully replicate its own policy priorities.

Nevertheless, it is vital to recall the point made at the outset of the article, that the policy literature cites accountability as a key justification for tax devolution, in turn associating accountability with fiscal responsibility and the reflection of local preferences. We saw subsequently that the complexity and relatively low visibility of rating limits the scope for democratic accountability and instead shifts the emphasis to the skill and experience of a small network of experts. This is understandable, except that accountability is usually thought to require answerability to some actor external to the decision-making process.⁷³ Without at least basic information on what decisions are being taken locally and what their consequences are, it is almost impossible to see how this type of external scrutiny can be arranged. The background implication is that if a devolution process justified by accountability turns out to be unaccountable, then perhaps it ought not to be taking place at all. Tax expenditure analysis suggests one possible route for avoiding this negative conclusion. It is not the only one, but it is well-known in the academic literature and benefits from extensive practical experience amongst officials both in the UK and elsewhere.

8. Expenditures in a reformed tax

We have assumed that wholesale reform of rates is not inevitable and have presented tax expenditure analysis as a method of reinforcing the accountability justifications for devolution within the confines

⁷⁰ Burton and Sadiq, above n 68, 60.

⁷¹ See, for example, OECD, *Tax Expenditures in OECD Countries* (Paris, OECD Publishing, 2010).

⁷² Burton and Sadiq, above n 68, 29.

⁷³ Refer to discussion in text at n 7, above.

of the existing system. Even if rates are replaced by an LVT or undergo some other fundamental reform, however, the tax expenditure concept may still remain relevant. We have already seen in part 6 of this article that LVT proposals reflect a variety of opinions on the balance between centralisation and devolution. To the extent that a new or restructured tax includes devolved powers, whether in order to support local democracy, to make best use of local expertise or otherwise, it will be important to provide some assurance that the actual use of these powers reflects their reasons for existing. This accountability exercise requires a minimum quality of data on the exercise of devolved powers; once again, tax expenditure analysis might offer a helpful starting point.

9. Concluding comments

There is a deep and well-known mismatch between the high expectations placed on English local and regional authorities, and the limited powers and resources available to them. This mismatch has not yet led to a rerun of the direct confrontation between local and central government that characterised the 1980s, but it has been brought into sharp focus by the austerity programme of the 2010 Coalition government as well as by the exigencies of the COVID crisis. Against this background, it seems almost churlish to question whether tax devolution is a good idea in principle. Nevertheless, the merits of devolution are not beyond question. Instead, as with most other policies, it needs to be justified, and in turn those justifications can be interrogated. If the justifications either do not stand up to scrutiny or are not reflected in real-world administration, then the principle of devolving powers ought to be considered, at least in relation to local and regional authorities. It may be that the disadvantages of devolution (eg duplication, complexity, coordination problems and vulnerability to undue pressure) outweigh a supposed gain in accountability that in any case is undermined by inadequate data.

None of this is to suggest that accountability is a panacea for good governance or that it represents the only important values in a tax system. Nor do we assume that there is only one way of achieving accountability or that the prominence of expert networks in rating is necessarily undesirable. Our point has been the narrower but critically important one that accountability (in the fiscal responsibility and local preference senses emphasised in the policy literature) requires some level of answerability to external actors and that it is obscure whether and how this is achieved under present arrangements. The implication is that the accountability justifications for rates devolution have not yet been made out and that this requires urgent attention before further powers are transferred.

The focus of this chapter has been on rates devolution to English localities and regions, mainly because this is the area of tax devolution that we perceive to be the most complex, least studied and least well justified within the UK tax system. There is scope for further work on the accountability justifications for tax devolution to Scotland, Wales and Northern Ireland. It is of course conceivable that, on closer inspection, the accountability arrangements in these jurisdictions might contain features from which the central UK tax system could usefully learn. It would not be the first time.