

Final Business and Regulatory Impact Assessment

Title of Legislation: The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 11) Regulations 2020

Purpose and intended effect:

The UK Coronavirus Act 2020 received Royal Assent on 25 March 2020. The Scottish Government immediately used powers conferred by that Act to bring forward the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (“the Principal Regulations”), to ensure that action to implement physical distancing and impose restrictions on gatherings, events and operation of business activity could be enforced. The Principal Regulations came into force on Thursday 26 March.

The Principal Regulations are reviewed at least once every 21 days and as soon as the Scottish Ministers consider that any restriction or requirement set out in these Regulations are no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in Scotland with coronavirus, the Scottish Ministers must revoke that restriction or requirement.

Policy Objectives:

On 21 May 2020 the Scottish Government published a route map setting out a phased approach to easing lockdown restrictions while still suppressing coronavirus (COVID-19). The route map recognises that the restrictions have a negative impact on people’s lives, such as increasing loneliness and social isolation, deepening inequalities and damaging our economy. And that, subject to the available data and evidence, these restrictions should be gradually and carefully eased.

Some changes to the lockdown restrictions are made by this instrument and are described below. Other changes have been made through Scottish Government guidance, available at www.gov.scot/collections/coronavirus-covid-19-guidance.

Title of proposal: Mandatory collection of visitor (including customer, staff and volunteer) contact details in the hospitality sector to assist contact tracing as part of NHS Scotland’s Test and Protect

Purpose and intended effect:

Background – sector guidance for tourism and hospitality was published on 18 June (and updated on 10 July in connection with amendments to provide for 1m physical distancing as the minimum required distance in certain premises) with outdoor areas in certain premises opening on 6 July in phase 2 and indoor areas on 15 July in phase 3. Further guidance was published on 3 July, detailing advice to collect visitor contact details in support of contact tracing as part of NHS Scotland’s Test and Protect. Alongside other measures being brought in for the hospitality sector, a decision has been made to mandate the collection of these minimal contact details, and to require their sharing with a public health officer if so requested.

Objective – to enhance compliance by mandating through legislation the collection of minimal contact details to enable contact tracers to trace possible close contacts of individuals who have tested positive for Covid-19, and offer appropriate public health advice to prevent the onward spread of the virus.

Rationale for Government intervention – Emerging evidence since certain hospitality venues reopened on 6 July outdoors and 15 July indoors shows that adherence to the guidance by businesses has been relatively low. Survey results conducted on behalf of Scottish Government have indicated that while the public shows a high degree of willingness to provide contact details in support of Test and Protect, compliance by some settings in providing a means by which to provide this data is markedly lower. Since the sector reopened, less than half of people surveyed report being asked for

their contact details in every setting where the guidance applies. With additional focus at this time on the hospitality sector proving a high risk setting, there is a case to mandate the collection of the required data in high risk settings such as hospitality, to assist contact tracers with the management of outbreaks when they are linked to specific venues.

Further, several examples have also emerged of hospitality establishments putting in place data collection systems which are inaccessible to customers, either because they rely on digital solutions, such as the downloading of mobile apps excluding those who cannot or do not want to use apps, or because the data collection is not actively enforced or advertised to customers who may wish to have their contact details recorded. In effect, these businesses are therefore not achieving the objective of the guidance.

Consultation:

Business: the hospitality sector was involved in, and consulted on, the development of guidance prior to the sector reopening outdoors on 06 July 2020. Following that process, the requirement to collect customer details was also included in multi-sector guidance that was published on 14 July. At the time of consultation, it was made clear by the Scottish Government that it would be kept under review whether compliance with the guidance would necessitate a mandatory approach. This was broadly welcomed by industry representatives. The move to a mandatory regime was considered via a call with industry leads on 12 August 2020, reflecting the urgent need to legislate in light of reported poorer levels of compliance within the wider sector. Feedback from the sector acknowledged the need to place this on a statutory footing as part of a range of measures designed to enable the sector to remain open during the pandemic. The industry responded positively to the fact that this is being clearly set out in legislation, especially with regard to enforcement, when compared to a voluntary-only approach.

It was noted that there is a need for supportive communications around this, specifically on:

- Making clear that the data will only be shared with a public health officer and not with Scottish Government,
- Ensuring public awareness about behavioural expectations i.e. promoting the role that the public has in safeguarding 'their' hospitality venues.

It was agreed that any legal obligations should be minimally burdensome on staff wherever possible. There was discussion about the proportionality of making it an offence to provide fake contact details, or mandating the provision of supporting ID in order to verify visitors to premises. Neither of these options is within the scope of these regulations on the basis that the measure is designed to tackle poor compliance with guidance by premises, and not to increase compliance among the public, where it is understood that desire to provide details to support contact tracing is high. It was also highlighted by Environment Health Officers that establishing who had provided fake information would in many instances be practically impossible from an enforcement perspective.

Options: Alongside applying a mandatory approach, previously considered additional steps such as increased/renewed marketing and communications will be actioned in order to drive awareness of the legal requirement. Work is also ongoing to explore digital and other innovations to help reduce the burden on business and drive up compliance. While these options may in part help address take-up, poor compliance under a voluntary regime means it is not considered sufficient in and of itself without stronger action being taken. Given the need to ensure chains of transmission are rapidly broken and outbreaks are avoided in order to avoid a 'second wave' of Covid-19 in Scotland, the importance of driving up compliance with the data collection requirement further necessitates this stronger approach. As such, while supplementary efforts will be continued, including marketing, communications and consideration of future novel digital solutions, increasing compliance with urgency was the priority, best achieved through a minimal mandatory system. To raise awareness of the new legal obligation, alongside formal announcements from Scottish Government, revised guidance will be promoted via

policy colleagues who are engaged directly with sector trade bodies, to allow promotion amongst their members.

Scottish Firms Impact Test: This mandatory requirement will affect all hospitality businesses operating in Scotland. However, it will disproportionately affect those settings which have not already implemented a system to collect visitor contact details since guidance was initially published for the sector on 03 July. It is these settings the legislation is targeted towards, where compliance is important to enable contact tracing in the event of outbreaks linked to specific premises. Settings which already have systems in place in line with the guidance will see minimal changes to their procedures and operations. Premises covered by the regulation must handle the data in line with relevant data protection and GDPR requirements. In order to gather and store customer information securely, businesses may need to be registered with the Information Commissioner's Office (ICO). This will be the case if premises are using an electronic system to gather and store data. The cost of the data protection fee depends on the size and turnover of the business, but for most businesses it will cost £40 or £60. The form will take around 15 minutes to complete and can be completed online at the ICO's website.

Competition Assessment: The mandatory regime will apply equally to all restaurants, cafes, bars and public houses in which food or drink are sold for consumption on the premises. This may have a disproportionate effect on e.g. smaller, independent premises who may be required to develop novel systems to comply, even if this is via a manual, physical system. However, this is considered proportionate in terms of the desired public health outcome being achieved and we are not mandating a particular system or approach that businesses must adopt, that is left to their own discretion (and can be a simple paper based recording system). As detailed at the Options section, above, work will continue to establish whether digital solutions could have a role to play in enabling easier compliance where appropriate, secure, and useful in supporting contact tracing.

Consumer Assessment: We are aware that the public has reported a high willingness to comply with the requirement to provide minimal contact details to support contact tracing, as well as the wider Test and Protect system. The current disconnect is settings not implementing systems to allow the provision of this data. It is not proposed to mandate individuals to provide contact details, only on premises to collect the required data via established systems. High levels of compliance from both premises and individuals will also provide the public health benefit intended by the measure. Therefore it is considered that the regulation will not affect the consumer, or their behaviour, in a negative manner.

Test run of business forms: The legislation does not mandate the use of a specific form for data collection and a test run is therefore not applicable. More broadly, as the guidance has already been in place since 3 July, evidence exists that the data collection can be achieved in a proportionate manner that meets the objectives of the guidance and legislation.

Digital Impact Test: Certain systems introduced by premises may introduce a digital inequality i.e. if the only means by which to leave contact details is via a smartphone app. In that case, it is expected that settings will also ensure provision of a manual system for those visitors who cannot comply with a digital-only implementation of the mandated requirement. These proposals do not mandate which type of system a business needs to implement and there are no digital specific requirements to the proposals.

Legal Aid Impact Test: n/a

Enforcement, sanctions and monitoring: Standard enforcement processes and procedures as detailed within the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 apply to

this amendment. Further detail on practical implications of this is contained within guidance, including role of Local Authority Environmental Health Officers and Police Scotland, where necessary.

Implementation and delivery plan and post-implementation review: These amendments will come into force on 14 August. The provision made by the amendments will be reviewed every three weeks in line with the standard review period of the requirements and restrictions in the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020. The scope of any review will include widening the regulations to include other sectors, if required, or revoking the requirement in its entirety if it is considered that the regulation is no longer required.

Summary and recommendations: This requirement will increase the effectiveness of the collection of visitor contact details in hospitality settings, of possible close contacts of people who have tested positive for Covid-19. This will allow Test and Protect contact tracers to obtain this information as required, to facilitate more effective outbreak control management to take place, and in turn shut down possible chains of virus transmission, allowing more people to live more freely at any one time. High levels of compliance will allow more premises to remain open, and allow the public to support these businesses as they continue to reopen. On this basis, it is assessed that the proposal is proportionate given the public health need, but as with all COVID related measures this will be kept under regular review.

Declaration and publication

Sign-off for BRIA:

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the measures set out in the regulations and guidance. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed: Michael Russell

Date: 13/08/20

Minister's name: Michael Russell

Minister's title: Cabinet Secretary for Constitution, Europe and External Affairs.