

POLICY NOTE

THE CROWN ESTATE SCOTLAND (INTERIM MANAGEMENT) ORDER 2017

SSI 2017/36

1. The above instrument was made in exercise of the powers conferred by section 36(9) and (10) of the Scotland Act 2016 ('the 2016 Act').
2. The instrument is subject to the affirmative procedure.

Background

3. This Order establishes an interim body to manage those Crown Estate assets in Scotland which will be transferred to the body as part of a Scheme made by the Treasury. The name of this interim body is Crown Estate Scotland (Interim Management) (referred to in this note as 'CES(IM)').
4. Currently, the management of the Crown Estate is a reserved matter. The Crown Estate Commissioners are a unique body which administers certain property, rights and interests which historically belong to the Crown. The Crown Estate Commissioners exercise powers under The Crown Estate Act 1961 ('the 1961 Act') in managing the Crown Estate on a UK-basis, and currently transfer surplus revenues to the UK Government. In Scotland, the Crown Estate Commissioners manage leasing of the seabed out to 12 nautical miles and rights to renewable energy, cables and pipelines on the Continental Shelf; 37,000 hectares of rural land; gold and silver mining; and approximately half of Scotland's foreshore including 5,000 licensed moorings, 750 aquaculture sites, and salmon fishing rights. It has been a long-standing policy of the Scottish Government that there should be reform of the administration of the Crown Estate in Scotland.
5. The Smith Commission Report¹ recommended that responsibility for the management of the Crown Estate's economic assets in Scotland, and the revenue generated from those assets be devolved. The resulting Scotland Act 2016 provided for this in section 36 of that Act. The 2016 Act gained Royal Assent on 23 March 2016. When section 36 of the 2016 Act is fully commenced the Scottish Parliament will have legislative competence for the management and revenue of the Crown Estate in Scotland. For this to happen, the existing Scottish functions of the Crown Estate Commissioners must first be transferred to Scotland.
6. The transfer of function to Scotland is to be made through a statutory transfer scheme. Section 36 of the 2016 Act inserts section 90B(1) of the Scotland Act 1998 ('the 1998 Act'). Under section 90B, the Treasury may make a scheme transferring all the existing Scottish functions of the Crown Estate Commissioners² to the Scottish Ministers or a

¹ The Smith Commission, 'Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament', 27 November 2014 (available at: http://webarchive.nationalarchives.gov.uk/20151202171017/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf)

² The 'Scottish functions' are defined in section 90B(2) and (3) of the 1998 Act as the Commissioners' functions relating to the part of the Crown Estate that, immediately before the transfer date, consists of the property, rights or interests in land in Scotland and rights in relation to the Scottish zone. However, subsection (3) excludes the

person nominated by the Scottish Ministers ('the transferee'). Scottish Ministers have decided to nominate CES(IM) as the transferee. The Scheme will specify a transfer date on which the transfer will occur. The transfer scheme has not yet been made by Treasury but will require agreement from Scottish Ministers as well as the approval of the UK Parliament.

7. After the transfer and the full commencement of section 36 of the 2016 Act, the Scottish Parliament will have the power to legislate on the new framework for managing Crown Estate assets in Scotland.
8. Section 36(9) and (10) of the 2016 Act provide that provision may, by Order in Council, be made in connection with the exercise by the transferee of functions transferred by the transfer scheme. This includes provision establishing a body for the purposes of being nominated to receive the transfer. This is the present draft Order, which establishes CES(IM) to be the body nominated to receive the transfer.
9. Section 36(7) of the 2016 Act applies the 1961 Act (with modifications) in relation to the transferee as it applied immediately before the transfer date to the Crown Estate Commissioners. This means that the 1961 Act will apply to CES(IM) (with modifications). This draft Order makes further modifications to the application of the 1961 Act to CES(IM).
10. The 2016 Act amends section 1(2) of the Civil List Act 1952 to provide that the revenues from the Scottish assets must be paid into the Scottish Consolidated Fund.
11. Section 90B(8) of the 1998 Act provides that the property, rights and interests to which the existing Scottish functions relate must be maintained as an estate in land or as assets in land managed separately (with any proportion of cash or investments that seems to the person managing the estate to be required for the discharge of functions relating to its management).

Policy Objectives

12. This Order establishes CES(IM). As stated above, it is intended that Scottish Ministers will nominate CES(IM) as the transferee for the purposes of any transfer scheme made under section 90B of the 1998 Act. This means that on transfer, the functions of CES(IM) will be the existing Scottish functions³ of the Crown Estate Commissioners immediately before the transfer date. As stated above, section 36(7) of the 2016 Act applies the 1961 Act, in a modified form, to the transferee, which means that it will apply to CES(IM) subject to those modifications. Additionally, this Order makes further modifications to the 1961 Act as it applies to CES(IM).
13. CES(IM), as established by this Order, will be a body corporate, separate from Scottish Ministers. CES(IM) will have Crown status and enjoy the fiscal, tax and other benefits normally available to the Crown.

property, rights or interests of the Crown Estate held by, or in a member of, a limited partnership registered under the Limited Partnership Act 1907.

³ See footnote 2 above

14. The interim body will be managed and led by a Chairing member and up to 8 other board members, appointed by Scottish Ministers. The period of appointment is unspecified in the Order, but Scottish Ministers may determine terms and conditions of appointment, including the period of appointment. Members and former members may be reappointed. Appointments to CES(IM) will be within the remit of the Commissioner for Ethical Standards in Public Life in Scotland.⁴
15. Members will need to have relevant skills, expertise and experience. This Order excludes MSPs, MPs, Members of the House of Lords and MEPs from becoming members and members of staff of CES(IM).
16. Members may resign from office, and a person's membership ends if they become an MSP, MP, Member of the House of Lords, or an MEP. This Order also provides that a member may be removed from office by Scottish Ministers under the following circumstances:
 - a. insolvency;
 - b. absenteeism from meetings for more than 3 consecutive months without permission from CES(IM); and
 - c. if Scottish Ministers consider that the member is unable to exercise the functions of a member or is unsuitable to continue as a member.
17. CES(IM) will have a Chief Executive. The first Chief Executive will be appointed by Scottish Ministers, and subsequent Chief Executives will be appointed by CES(IM), with the approval of Scottish Ministers. CES(IM) may employ and appoint such employees as it considers appropriate.
18. CES(IM) will have committees, one of which must be an audit committee. There may be sub-committees.
19. The Order does not specify the quorum for meetings of members, including committees, to provide flexibility. CES(IM) will regulate its own procedure.
20. Proceedings will not be invalid by reason of any vacancy of membership or defect in the appointment of the Board.
21. The Order provides for a loan making power for Scottish Ministers, subject to any conditions the Scottish Ministers may determine, including repayment. Section 2 of the 1961 Act, as it applies to CES(IM), is modified to read as if new subsections (4F) and (4G) were inserted. The effect of these is that any loan made to CES(IM) by the Scottish Ministers is to be repaid from the account into which CES(IM) puts the sum it receives under the loan. A loan paid into the capital account is to be repaid from that account, and a loan paid into the income account must be repaid from the income account.

⁴ The Public Appointments and Public Bodies etc. (Scotland) Act 2003 (Treatment of Crown Estate Scotland) (Interim Management) as Specified Authority) Order 2016 (S.S.I. 2016/311) enables the Commissioner for Ethical Standards in Public Life in Scotland to regulate appointments to CES(IM) before it is formally established by this Order.

22. Scottish Ministers will have a direction making power whereby they can direct CES(IM) in writing with regards to the exercise of its functions. The Order also requires the interim body to have regard to guidance issued by Scottish Ministers.
23. CES(IM) will report on its performance and activities annually and submit this report to Scottish Ministers, who will lay the report before Parliament. In addition, CES(IM) must prepare a corporate plan which will set out the main objectives, outcomes, activities and risks for the planning period. This plan will be sent to Scottish Ministers who may approve the plan, approve the plan with modifications agreed by CES(IM), or reject the plan. If it is rejected, CES(IM) must prepare and submit a revised plan by a date specified by Scottish Ministers. Once a plan has been approved, CES(IM) must publish the plan.
24. The Order modifies the application of the 1961 Act to CES(IM). Section 2(4)(b) of the 1961 Act will apply as if a new paragraph (b) were substituted for the existing paragraph (b). This will enable Scottish Ministers to direct the apportionment of revenues from mining between capital and income accounts. Section 2 is further modified in that it applies as if new subsections (4D) and (4E) are inserted. These enable CES(IM) to move sums from its income account to its capital account, and to repay such sums from its capital account to its income account. The Order also modifies the application of 1961 Act to CES(IM) with regards to investments, inserting a new section 3(4)(aa) to allow CES(IM) to invest sums in interest-bearing accounts.
25. The Order amends other legislation relating to public bodies in Scotland, meaning that CES(IM) will be appropriately regulated – for instance, freedom of information legislation will apply to CES(IM), as will legislation relating to ethical standards in public life, the Scottish Public Services Ombudsman, public appointments, public services reform, and public records in Scotland.

Consultation

26. A public consultation took place from 30 June to 26 August 2016. As a result of that consultation the following general themes emerged:
 - Support for the proposed criteria and principles⁵ for the most appropriate delivery model including the single entity approach.
 - Requests for incorporation of ‘community benefit’ as part of the guiding principles and ‘community engagement’ to be part of governance principles and operational procedures.
27. The following specific key points were made:
 - Request for management statement to reflect angling and fishing interests.
 - Board members to be an odd number to avoid deadlock.
 - Additions to the eligibility criteria for board members such as local government experience; and / or direct prior involvement with The Crown Estate.
 - Clarity on how the board would provide opportunities for community representation.
 - The Chief Executive should not be a member.
 - The ‘conflict of interests’ provision regarding appointments was too stringent.

⁵ The criteria and principles were not part of the proposals we consulted on.

- Suggestions for ensuring that how the board conducts its business is transparent and accessible.
- That the body should have a rural sub-committee.

28. Partly as a result of the consultation, and during the time of the public consultation when we continued to engage with stakeholders and develop the draft Order, we amended the draft Order as follows:

- Removed the requirement for Scottish Ministers to appoint a deputy Chair. The consultation responses made us re-consider the appointments which should be specified in legislation, although it is worth noting that changing the maximum number of members to an odd number does not require an odd number to actually be appointed.
- Removed a ‘conflict of interests’ provision from the criteria for appointments. Potential conflict of interests will be covered through the body’s Code of Conduct.
- Confirmed that the Chief Executive will not to be member of board.

29. Several responses are being addressed as part of the corporate planning arrangements, with the intention that the Order sets the overall, strategic framework for governance but that the body ‘sets its own procedures’. Other points were about the long-term arrangements on which a public consultation is due to commence later this year.

30. A full list of those consulted and who agreed to the release of this information is attached to the consultation report due to be published on the Scottish Government website; it includes COSLA, NFU Scotland, Scottish Carbon Capture & Storage, Scottish Environment Link and the Association of Scottish Shellfish Growers.

Impact Assessments

31. Pre-screening for a Strategic Environmental Assessment (SEA) on the draft Order concluded that an SEA was not necessary because there were no significant environmental impacts as a result of the policy. A Privacy Impact Assessment (PIA) report on the draft Order has been completed which concluded that privacy impacts as a result of the policy were minor and are effectively dealt with through an Information Sharing Protocol and a Data Sharing Agreement in place between the organisations concerned. Screening for a Child Rights and Wellbeing Impact Assessment (CRWIA) on the draft Order concluded that a CRWIA was not necessary because there were no significant impacts on children’s rights as a result of the policy. Screening for an Equality Impacts Assessment (EQIA) on the draft Order concluded that an EQIA was not necessary because there were no significant equalities impacts as a result of the policy.

Financial Effects

32. A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The likely impact of this policy on businesses that are customers of the Crown Estate will be neutral.