

Draft Order laid before Parliament under section 115 of, and paragraphs 1, 2 and 3 of Schedule 7 to, the Scotland Act 1998 for approval by resolution of each House of Parliament. This Draft Order supersedes the draft laid on 12 July 2005.

DRAFT STATUTORY INSTRUMENTS

2005 No.

**CONSTITUTIONAL LAW
DEVOLUTION, SCOTLAND
WATER SUPPLY**

**The Water Services etc. (Scotland) Act 2005
(Consequential Provisions and Modifications) Order 2005**

Made - - - - 2005
Coming into force - - 2005

The Secretary of State, in exercise of the powers conferred upon him by sections 104, 112(1) and 113 of the Scotland Act 1998(1), makes the following Order;

In accordance with section 115 of, and paragraphs 1, 2 and 3 of Schedule 7 to, that Act, a draft of this Order was laid before Parliament and approved by a resolution of each House of Parliament.

Citation, commencement and extent

1.—(1) This Order may be cited as the Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005 and shall come into force on the day after the day on which it is made.

(2) Articles 2 to 10 extend to Scotland only.

(3) The modifications specified in the Schedule have the same extent as the provisions being amended or repealed.

Interpretation

2.—(1) In this order—

“the 2002 Act” means the Water Industry (Scotland) Act 2002(2);

(1) 1998 c. 46.

(2) 2002 asp 3, as amended by the [Water Services etc. \(Scotland\) Act 2005 \(asp 3\)](#) (“the 2005 Act”).

- “the 2005 Act” means the Water Services etc. (Scotland) Act 2005⁽³⁾;
- “article 3(2) or (3) reference” means a reference under article 3 following a request under article 3(2) or (3) and includes any variation of any such reference under article 3(8);
- “article 3(4) reference” means a reference under article 3 following a request under article 3(4) and includes any variation of any such reference under article 3(8);
- “the Commission” means the Competition Commission;
- “the Convener of the Water Customer Consultation Panels” means the Convener of the Water Customer Consultation Panels appointed under paragraph 5 of Schedule 1 to the 2002 Act;
- “determination” means the WIC’s determination of maximum amounts of charges under section 29B(1)(a) of the 2002 Act⁽⁴⁾;
- “revised determination” means a determination as revised under section 29F(3)(b) of the 2002 Act⁽⁵⁾;
- “sewerage services licence” means a licence granted under section 6(3) of the 2005 Act;
- “sewerage services provider” means a person who holds a sewerage services licence;
- “water services licence” means a licence granted under section 6(1) of the 2005 Act;
- “water services provider” means a person who holds a water services licence; and
- “the WIC” means the Water Industry Commission for Scotland.

(2) A reference in this Order to anything done in writing or produced in written form includes a reference to an electronic communication, as defined in the Electronic Communications Act 2000⁽⁶⁾, which has been recorded in written form and is capable of being reproduced in that form.

References to the Commission

3.—(1) Where paragraph (2), (3) or (4) applies, the WIC shall, as soon as practicable, make a reference to the Commission in accordance with this article.

- (2) This paragraph applies where—
- (a) a water services licence or a sewerage services licence has been granted; and
 - (b) the person to whom it is granted or Scottish Water has, within one month of the date on which a copy of the licence was sent under section 7(6) of the 2005 Act, requested in writing that the WIC makes a reference.
- (3) This paragraph applies where—
- (a) a condition included in a water services licence or a sewerage services licence has been modified in terms of paragraph 2 of Schedule 2 to the 2005 Act; and
 - (b) a water services provider or a sewerage services provider whose licence has been modified or Scottish Water has, within one month of the date on which the modification has effect, requested in writing that the WIC makes a reference.
- (4) This paragraph applies where—
- (a) the WIC has—
 - (i) made a determination;
 - (ii) made a revised determination; or
 - (iii) decided not to revise a determination; and

(3) 2005 asp 3.

(4) Section 29B was inserted by the 2005 Act, section 21.

(5) Section 29F was inserted by the 2005 Act, section 21.

(6) 2000 c. 7.

(b) Scottish Water has, within 2 months of the date on which—

- (i) a determination was sent to it under section 29B(1)(b) of the 2002 Act;
- (ii) a revised determination was notified to it under section 29F(7) of that Act; or
- (iii) it received notification of a decision not to revise a determination under section 29F(6) of that Act,

requested in writing that the WIC makes a reference.

(5) An article 3(2) or (3) reference shall be so framed as to require the Commission to investigate and report on the questions—

- (a) whether any matters which—
 - (i) relate to the carrying out of activities authorised or regulated by or under a water services licence or a sewerage services licence, as the case may be; and
 - (ii) are specified in the reference, operate, or may be expected to operate, against the public interest; and
- (b) if so, whether the effects adverse to the public interest which those matters have, or may be expected to have, could be remedied or prevented by modification of the conditions of such a licence.

(6) An article 3(4) reference shall be so framed as to require the Commission to investigate and report on such questions as are specified in the reference and which relate to whether a different determination or revised determination shall be substituted for that of the WIC.

(7) In determining, for the purposes of—

- (a) an article 3(2) or (3) reference whether any particular matter operates, or may be expected to operate, against the public interest, the Commission shall take account of the WIC's powers and duties set out in section 1 of the 2002 Act and sections 7 and 11 of, and Schedule 2 to, the 2005 Act; and
- (b) an article 3(4) reference that a different determination or revised determination should be substituted for that of the WIC, the Commission shall do so in accordance with the WIC's powers and duties set out in sections 1 and 29C(2)(7) of the 2002 Act.

(8) The WIC may at any time, by notice given to the Commission, vary a reference by—

- (a) adding to the matters specified in the reference; or
- (b) excluding from the reference some of the matters so specified,

and on receipt of any such notice the Commission shall give effect to the variation.

(9) The WIC may specify in a reference, or a variation of a reference, for the purpose of assisting the Commission in carrying out an investigation—

- (a) in relation to an article 3(2) or (3) reference—
 - (i) any effects adverse to the public interest which, in its opinion, the matters specified in the reference have or may be expected to have; and
 - (ii) any modifications of the conditions of a water services licence or a sewerage services licence by which, in the WIC's opinion, those effects could be remedied or prevented; or
- (b) in relation to an article 3(4) reference, any modifications of the determination or the revised determination, which, in the WIC's opinion, would answer the questions specified in the reference.

(7) Section 29C was inserted by the 2005 Act, section 21.

(10) As soon as practicable after making a reference or a variation of such a reference, the WIC shall—

- (a) serve a copy of the reference or variation of that reference on—
 - (i) all water services providers and sewerage services providers;
 - (ii) Scottish Water;
 - (iii) the Scottish Ministers; and
 - (iv) the Convener of the Water Customer Consultation Panels; and
- (b) publish particulars of the reference or variation in such manner as it considers appropriate for the purpose of bringing the reference or variation to the attention of persons likely to be affected by it.

(11) The WIC shall, for the purpose of assisting the Commission in carrying out an investigation on a reference, give to the Commission—

- (a) any information in its possession which relates to matters falling within the scope of the investigation and which is either—
 - (i) requested by the Commission for that purpose; or
 - (ii) information which, in the WIC's opinion, it would be appropriate for that purpose to give to the Commission without any such request; and
- (b) any other assistance which the Commission may require, and which it is within the WIC's power to give, in relation to any such matters.

(12) The Commission, for the purpose of carrying out any investigation on a reference, shall take account of any information given to it for that purpose under paragraph (11).

References: Time Limits

4.—(1) In respect of every reference, the WIC shall specify a period (not longer than 6 months beginning with the date of receipt of the reference) within which a report on the reference is to be made.

(2) A report of the Commission on a reference shall not have effect (and no action shall be taken in relation to it under article 8) unless the report is made before the end of the period specified in the reference, or such further period (if any) as may be allowed by the WIC under paragraph (3).

(3) The WIC may, if it has received representations from the Commission on the matter, and is satisfied that there is good reason why the report cannot be made within the period specified in the reference, extend that period by not more than 6 months; and no more than one extension is possible in respect of the same reference.

(4) The WIC shall, in the case of an extension made by it under paragraph (3)—

- (a) serve notice of the extension on—
 - (i) all water services providers and sewerage services providers;
 - (ii) Scottish Water;
 - (iii) the Scottish Ministers; and
 - (iv) the Convener of the Water Customer Consultation Panels; and
- (b) publish details of the extension in such manner as it considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it.

References: powers of investigation

5.—(1) The following sections of Part 3 of the Enterprise Act 2002⁽⁸⁾ shall apply, with the modifications referred to in paragraphs (2) to (4), for the purposes of references under article 3 as they apply for the purposes of references under that Part—

- (a) section 109 (attendance of witnesses and production of documents etc.);
 - (b) section 110 (enforcement of powers under section 109: general);
 - (c) section 111 (penalties);
 - (d) section 112 (penalties: main procedural requirements);
 - (e) section 113 (payments and interest by instalments);
 - (f) section 114 (appeals in relation to penalties);
 - (g) section 115 (recovery of penalties);
 - (h) section 116 (statement of policy);
 - (i) section 117 (false or misleading information)⁽⁹⁾; and
 - (j) section 125 (offences by bodies corporate).
- (2) Section 110 shall, in its application by virtue of paragraph (1), have effect as if—
- (a) subsection (2) were omitted;
 - (b) in subsection (7), for the words “statutory maximum” there were substituted “amount specified as level 5 on the standard scale”; and
 - (c) in subsection (9), the words from “or section” to “section 65(3)” were omitted.
- (3) Section 111 shall, in its application by virtue of paragraph (1), have effect as if—
- (a) for subsection (4) there were substituted—
 - “(4) No penalty imposed under section 110(1) shall—
 - (a) in the case of a fixed amount, exceed £20,000;
 - (b) in the case of an amount calculated by reference to a daily rate, exceed £5,000; and
 - (c) in the case of a fixed amount and an amount calculated by reference to a daily rate, exceed—
 - (i) in respect of a fixed amount, £20,000; and
 - (ii) in respect of an amount calculated by reference to a daily rate, £5,000.”;
 - (b) in subsection (5)(b)(ii)—
 - (i) for the words “published (or, in the case of a report under section 50 or 65, given)” there were substituted “made”;
 - (ii) for the words “published (or given)”, in both places where they appear, there were substituted “made”; and
 - (iii) the words “by this Part” were omitted; and
 - (c) for subsection (6) there were substituted—
 - “(6) No penalty imposed under section 110(3) shall exceed £20,000.”.
- (4) Section 117 shall, in its application by virtue of paragraph (1), have effect as if—
- (a) in each of subsections (1)(a) and (2)—

⁽⁸⁾ 2002 c. 40. There have been amendments to Part 3 which are not relevant to this Order.

⁽⁹⁾ Section 117 has been amended by the Communications Act 2003 (c. 21) (“the 2003 Act”), section 389 and Schedule 16, paragraph 20.

- (i) the words “the OFT, OFCOM,” and “or the Secretary of State” were omitted;
 - (ii) for “their” there were substituted “its”; and
 - (iii) for “this Part” there were substituted “the Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005”; and
- (b) in subsection (3), for the words “statutory maximum” there were substituted “amount specified as level 5 on the standard scale”.
- (5) Provisions of Part 3 of the Enterprise Act 2002 which have effect for the purposes of sections 109 to 117 and 125 of that Act shall, for the purposes of the application of those sections by virtue of paragraph (1), have effect in relation to those sections as applied by virtue of that paragraph.

Commission to consult on proposals

- 6.—(1) Before making its report under article 7, the Commission—
- (a) shall, so far as practicable, consult—
 - (i) as the case may be, the water services provider or sewerage services provider or Scottish Water, who made the request under article 3 to which the reference relates; and
 - (ii) the WIC; and
 - (b) may, so far as practicable, consult such other persons as it considers appropriate, on the matters the Commission proposes to include in its report.
- (2) In considering what is practicable for the purposes of paragraph (1), the Commission shall, in particular, have regard to—
- (a) the time limit for making a report referred to in article 4; and
 - (b) the following considerations before disclosing any information—
 - (i) the need to exclude from disclosure (so far as practicable) any information whose disclosure the Commission thinks is contrary to the public interest;
 - (ii) the need to exclude from disclosure (so far as practicable) any commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the person to which it relates;
 - (iii) the need to exclude from disclosure (so far as practicable) any information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual’s interests; and
 - (iv) the extent to which the disclosure of the information mentioned in paragraph (ii) or (iii) is necessary for the purposes of the consultation.
- (3) For the purposes of the law relating to defamation, absolute privilege attaches to any consultation undertaken by the Commission pursuant to this article.

Reports on References

- 7.—(1) A report of the Commission on a reference shall be made to the WIC.
- (2) For the purpose of carrying out any investigation in relation to the making of a report on a reference, and subject to paragraph (3), the Commission may disclose any information held by it for the purpose of facilitating its consideration of the reference.
- (3) In making a report on a reference, including any investigation carried out in relation to such a report, the Commission must have regard to the following considerations before disclosing any information—

- (a) the need to exclude from disclosure (so far as practicable) any information whose disclosure the Commission thinks is contrary to the public interest;
 - (b) the need to exclude from disclosure (so far as practicable) any commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the person to which it relates;
 - (c) the need to exclude from disclosure (so far as practicable) any information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual's interests; and
 - (d) the extent to which the disclosure of the information mentioned in sub-paragraph (b) or (c) is necessary for the purposes of the report.
- (4) In making a report on a reference, the Commission—
- (a) shall include in the report definite conclusions on the questions or, as the case may be, the matters comprised in the reference together with such an account of its reasons for those conclusions as in its opinion is expedient for facilitating a proper understanding of those questions and its conclusions; and
 - (b) in respect of an article 3(2) or (3) reference—
 - (i) where it concludes that any of the matters specified in the reference operate, or may be expected to operate, against the public interest, shall specify in the report the effects adverse to the public interest which those matters have or may be expected to have; and
 - (ii) where it concludes that any adverse effects so specified could be remedied or prevented by modifications of the conditions of a water services licence or a sewerage services licence to which the reference relates, shall specify in the report modifications by which those effects could be remedied or prevented; or
 - (c) in respect of an article 3(4) reference, where it concludes that a different determination or revised determination should be substituted for that of the WIC, shall specify in the report, modifications of the determination or revised determination required in consequence of its conclusions.
- (5) The Commission shall, at the time it makes its report on a reference, advise the WIC as to the matters, if any, it considers should be excluded from the report on publication, having regard to paragraph (3); and the WIC shall have regard to any advice from the Commission in that regard.
- (6) A conclusion contained in a report of the Commission is to be disregarded if the conclusion is not that of at least two thirds of the members of the group constituted, in connection with the reference, under paragraph 15 of Schedule 7 to the Competition Act 1998⁽¹⁰⁾.
- (7) If a member of a group so constituted disagrees with any conclusions contained in a report made on a reference as the conclusions of the Commission, the report shall, if the member so wishes, include a statement of his disagreement and of his reasons for disagreeing.
- (8) For the purposes of the law relating to defamation, absolute privilege attaches to any report made by the Commission on a reference.
- (9) Subject to paragraphs (10) to (12), the WIC shall, as soon as practicable after receiving a report on a reference—
- (a) serve a copy of it on—
 - (i) all water services providers and sewerage services providers;
 - (ii) Scottish Water;
 - (iii) the Scottish Ministers; and

⁽¹⁰⁾ 1998 c. 41.

- (iv) the Convener of the Water Customer Consultation Panels; and
 - (b) publish a copy of the report in such manner as the WIC considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it.
- (10) Where it appears to the WIC that publication of any matter in the Commission's report on a reference would be against the public interest or against the interests, including legitimate business interests, of any person to which it relates, the WIC shall, as soon as practicable—
- (a) serve a copy of the report on—
 - (i) where appropriate, the water services provider or sewerage services provider who made the request under article 3 to which the reference relates; and
 - (ii) Scottish Water; and
 - (b) notify that person that they may make representations to the WIC on any matter the publication of which in the report that person considers would be—
 - (i) against the public interest;
 - (ii) against their interests, including legitimate business interests; or
 - (iii) against the interests, including legitimate business interests, of any other person,
- and any such representations shall be made to the WIC within 14 days of the date upon which notification was given by the WIC.
- (11) If the WIC receives any representations within the period specified in paragraph (10), it shall take those representations into account when complying with its duty under paragraph (9).
- (12) The WIC shall not publish the report of the Commission on a reference until after the expiry of the period for making representations specified in paragraph (10).

Modifications following report

- 8.—**(1) Where a report of the Commission on an article 3(2) or (3) reference—
- (a) includes conclusions to the effect that any of the matters specified in the reference operate, or may be expected to operate, against the public interest;
 - (b) specifies effects adverse to the public interest which those matters have or may be expected to have;
 - (c) includes conclusions to the effect that those effects could be remedied or prevented by modification of the conditions of a water services licence or a sewerage services licence; and
 - (d) specifies modifications by which those effects could be remedied or prevented,
- the WIC shall, subject to paragraphs (3) to (8), make such modifications of those conditions as appear to the WIC to be necessary for the purpose of remedying or preventing the adverse effects specified in the report.
- (2) Where a report of the Commission on an article 3(4) reference—
- (a) includes conclusions to the effect that a different determination or revised determination should be substituted for that of the WIC; and
 - (b) specifies modifications of the determination or revised determination,
- the WIC shall, subject to paragraphs (3) to (8), make such modifications of the determination or the revised determination as appear to the WIC to be necessary for the purpose of giving effect to the Commission's conclusions.
- (3) Before making modifications, the WIC shall have regard to the modifications specified in the Commission's report.

- (4) Before making modifications, the WIC shall give notice—
- (a) stating that it proposes to make the modifications and setting out their effect;
 - (b) stating the reasons why it proposes to make the modifications; and
 - (c) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made,
- and shall consider any representations or objections which are duly made and not withdrawn.
- (5) A notice under paragraph (4) shall be given—
- (a) by serving a copy of the notice on—
 - (i) all water services providers and sewerage services providers;
 - (ii) Scottish Water;
 - (iii) the Scottish Ministers; and
 - (iv) the Convener of the Water Customer Consultation Panels; and
 - (b) by publishing the notice in such manner as the WIC considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by the making of the modifications.
- (6) After considering any representations or objections made in response to proposals set out in a notice under paragraph (4), the WIC shall give notice to the Commission—
- (a) setting out the modifications it proposes to make—
 - (i) in respect of an article 3(2) or (3) reference, to remedy or prevent the adverse effects specified in the report; or
 - (ii) in respect of an article 3(4) reference, to give effect to the conclusions specified in the report; and
 - (b) stating the reasons for making the modifications.
- (7) The WIC shall include with the notice under paragraph (6), a copy of any representations or objections received in relation to the notice under paragraph (4).
- (8) Subject to article 9(2), if the period of 4 weeks from the date on which the notice under paragraph (6) is given elapses without a direction under article 9(1)(a) having been given to the WIC—
- (a) the WIC shall make the modifications set out in the notice; or
 - (b) if a direction under article 9(1)(b) has been given to the WIC, the WIC shall make the modifications which are not specified in the direction.
- (9) Modification under this article of part of a condition of a water services licence or a sewerage services licence shall not prevent any other part of the condition from continuing to have effect for the purposes of Part 2 of, and Schedule 2 to, the 2005 Act.
- (10) Modification under this article of part of a determination or revised determination shall not prevent any other part of the determination or revised determination from continuing to have effect for the purposes of sections 29B and 29F of the 2002 Act⁽¹¹⁾.

Commission's power of veto following report

- 9.—**(1) Subject to paragraph (2), the Commission may, within the period of 4 weeks after the date on which it is given a notice under article 8(6), direct the WIC—
- (a) not to make the modifications set out in that notice; or

⁽¹¹⁾ Sections 29B and 29F were inserted by the 2005 Act, section 21.

- (b) not to make such of the modifications set out in that notice as may be specified in the direction,
- and the WIC shall comply with any such direction.
- (2) Before the expiry of the period of 4 weeks after the date on which it is given a notice under article 8(6), the Commission may, if it believes there is good reason why it is unable to issue a direction within that period, notify the WIC of its reason for that belief, and extend that period by not more than 2 weeks.
- (3) The power to give a direction may only be exercised in respect of such of the modifications set out in the notice under article 8(6)(a) as appear to the Commission not to be the modifications which are requisite—
- (a) in relation to an article 3(2) or (3) reference, for the purpose of remedying or preventing all or any of the adverse effects specified in the report by virtue of article 7(4)(b)(i); or
 - (b) in relation to an article 3(4) reference, for the purpose of giving effect to the modifications specified in the report by virtue of article 7(4)(c).
- (4) Where the Commission gives a direction, it shall—
- (a) give notice setting out the modifications proposed by the WIC, the terms of the direction and the reasons for giving it; and
 - (b) on an article 3(2) or (3) reference, make such modifications of, as the case may be, the conditions of the water services licence or sewerage services licence to which the reference relates as appear to the Commission to be requisite for the purpose of remedying or preventing—
 - (i) where the direction is given under paragraph (1)(a), the adverse effects specified in the report as effects which could be remedied or prevented by modifications; or
 - (ii) where the direction is given under paragraph (1)(b), such of those adverse effects as are not remedied or prevented by the modifications proposed to be made by the WIC; or
 - (c) on an article 3(4) reference, make such modifications of the determination or revised determination to which the reference relates as appear to the Commission to be requisite for the purpose of giving effect to—
 - (i) where the direction is given under paragraph (1)(a), the conclusions specified in the Commission’s report; or
 - (ii) where the direction is given under paragraph (1)(b), the conclusions specified in the Commission’s report which are not given effect by the modifications proposed to be made by the WIC.
- (5) In making modifications under paragraph (4)(b) or (c), the Commission shall take into account the matters specified in article 3(7).
- (6) Before making modifications under paragraph (4)(b) or (c), the Commission shall give notice—
- (a) stating that it proposes to make the modifications and setting them out;
 - (b) stating the reasons why it proposes to make them; and
 - (c) specifying the period (not being less than 28 days from the date of publication of the notice) within which representations or objections with respect to the proposed modifications may be made,
- and shall consider any representations or objections which are duly made and not withdrawn.
- (7) A notice under paragraph (4)(a) or (6) shall be given—
- (a) by serving a copy of the notice on—

- (i) the WIC;
 - (ii) all water services providers and sewerage services providers;
 - (iii) the Scottish Ministers;
 - (iv) Scottish Water; and
 - (v) the Convener of the Water Customer Consultation Panels; and
- (b) by publishing the notice in such a manner as the Commission considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by the making of the modifications.

(8) After making modifications under this article the Commission shall publish a notice stating that the modifications have been made and setting them out, together with the reasons for making them by publishing the notice in such manner as the Commission considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by the making of the modifications.

(9) Modification under this article of part of a condition of a water services licence or a sewerage services licence shall not prevent any other part of the condition from continuing to have effect for the purposes of Part 2 of, and Schedule 2 to, the 2005 Act.

(10) Modification under this article of part of a determination or revised determination shall not prevent any other part of the determination or revised determination from continuing to have effect for the purposes of sections 29B and 29F of the 2002 Act.

Article 9: supplementary

10.—(1) For the purposes of the law relating to defamation, absolute privilege attaches to any notice given under article 9(4)(a) or (6), or published under article 9(8).

(2) In giving any notice under article 9(4)(a) or (6), or publishing any notice under article 9(8), the Commission must have regard to the following considerations before disclosing any information—

- (a) the need to exclude from disclosure (so far as practicable) any information whose disclosure the Commission thinks is contrary to the public interest;
- (b) the need to exclude from disclosure (so far as practicable) any commercial information whose disclosure the Commission thinks might significantly harm the legitimate business interests of the person to which it relates;
- (c) the need to exclude from disclosure (so far as practicable) any information relating to the private affairs of an individual whose disclosure the Commission thinks might significantly harm the individual's interests; and
- (d) the extent to which the disclosure of the information mentioned in sub-paragraph (b) or (c) is necessary for the purposes of the notice.

(3) The following sections of Part 3 of the Enterprise Act 2002(12) shall apply, with the modifications referred to in paragraphs (4) to (6), for the purposes of any investigation by the Commission for the purposes of the exercise of its functions under article 9, as they apply for the purposes of any investigation on references under that Part—

- (a) section 109 (attendance of witnesses and production of documents etc.);
- (b) section 110 (enforcement of powers under section 109: general);
- (c) section 111 (penalties);
- (d) section 112 (penalties: main procedural requirements);

(12) 2002 c. 40. There have been amendments to Part 3 which are not relevant to this Order.

- (e) section 113 (payments and interest by instalments);
 - (f) section 114 (appeals in relation to penalties);
 - (g) section 115 (recovery of penalties);
 - (h) section 116 (statement of policy);
 - (i) section 117 (false or misleading information)(**13**); and
 - (j) section 125 (offences by bodies corporate).
- (4) Section 110 shall, in its application by virtue of paragraph (3), have effect as if—
- (a) subsection (2) were omitted;
 - (b) in subsection (4), for the words “the publication of the report of the Commission on the reference concerned” there were substituted “the publication by the Commission of a notice under article 9(8) of the Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005 in connection with the reference concerned or, if no direction has been given by the Commission under article 9(1) of that Order in connection with the reference concerned and within the period permitted for that purpose, the latest day on which it was possible to give such a direction within the permitted period”;
 - (c) in subsection (7), for the words “statutory maximum” there were substituted “amount specified as level 5 on the standard scale”; and
 - (d) in subsection (9), the words from “or section” to “section 65(3))” were omitted.
- (5) Section 111 shall, in its application by virtue of paragraph (3), have effect as if—
- (a) for subsection (4) there were substituted—
 - “(4) No penalty imposed under section 110(1) shall—
 - (a) in the case of a fixed amount, exceed £20,000;
 - (b) in the case of an amount calculated by reference to a daily rate, exceed £5,000; and
 - (c) in the case of a fixed amount and an amount calculated by reference to a daily rate, exceed—
 - (i) in respect of a fixed amount, £20,000; and
 - (ii) in respect of an amount calculated by reference to a daily rate, £5,000.”;
 - (b) for subsection (5)(b)(ii) there were substituted—
 - “(ii) if earlier, the day on which a notice is published by the Commission under article 9(8) of the Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005 in connection with the reference concerned or, if no direction is given by the Commission under article 9(1) of that Order in connection with the reference concerned and within the period permitted for that purpose, the latest day on which such a direction may be given within the permitted period.”; and
 - (c) for subsection (6) there were substituted—
 - “(6) No penalty imposed under section 110(3) shall exceed £20,000.”.
- (6) Section 117 shall, in its application by virtue of paragraph (3), have effect as if—
- (a) in each of subsections (1)(a) and (2)—
 - (i) the words “the OFT, OFCOM,” and “or the Secretary of State” were omitted;
 - (ii) for “their” there was substituted “its”; and

(13) Section 117 has been amended by the 2003 Act, section 389 and Schedule 16, paragraph 20.

(iii) for “this Part” there is substituted “the Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005”; and

(b) in subsection (3), for the words “statutory maximum” there were substituted “amount specified as level 5 on the standard scale”.

(7) Provisions of Part 3 of the Enterprise Act 2002 which have effect for the purposes of sections 109 to 117 and 125 of that Act shall, for the purposes of the application of those sections by virtue of paragraph (3), have effect in relation to those sections as applied by virtue of that paragraph.

Modifications

11. The modifications specified in Parts 1 and 2 of the Schedule shall have effect.

Dover House,
London
2005

Parliamentary Under Secretary of State, Scotland
Office,
Department for Constitutional Affairs

SCHEDULE

Article 11

PART 1

MODIFICATIONS OF PUBLIC GENERAL ACTS

The House of Commons Disqualification Act 1975 (c. 24)

1. In Part 2 of Schedule 1 to the House of Commons Disqualification Act 1975 (bodies of which all members are disqualified)(**14**), insert at the appropriate place–

“The Water Industry Commission for Scotland.”.

The Race Relations Act 1976 (c. 74)

2. In Part 2 of Schedule 1A to the Race Relations Act 1976 (bodies and other persons added after commencement of general statutory duty)(**15**), in the list headed “Other Bodies, etc.”, insert at the appropriate place–

“The Water Industry Commission for Scotland.”.

The Competition Act 1998 (c. 41)

3. In the Competition Act 1998–

(a) in paragraph 19A(9) of Schedule 7 (performance of the Commission’s general functions: procedure)(**16**), in the definition of “special reference group”–

(i) the “or” at the end of paragraph (n) is omitted; and

(ii) after paragraph (o) there is added–

“; or

(p) article 3 of the Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005.”; and

(b) in paragraph 1 of Schedule 7A (the Competition Commission: procedural rules for mergers and market references etc.)(**17**), in the definition of “special investigation”, for “, (n) and (o)” substitute “and (n) to (p)”.

The Utilities Act 2000 (c. 27)

4. In section 104(1) of the Utilities Act 2000 (appointment of members of the Competition Commission)(**18**)–

(a) the “or” at the end of paragraph (b) is omitted, and

(b) after paragraph (c) there is added–

“; or

(14) There have been amendments to Schedule 1 which are not relevant to this Order.

(15) Schedule 1A was inserted by the Race Relations (Amendment) Act 2000 (c. 34), section 2(2) and Schedule 1 and was amended by S.I. 2001/3457.

(16) Paragraph 19A was inserted by the Enterprise Act 2002 (c. 40), section 187(3) and amended by the 2003 Act, section 406 and Schedule 17, paragraph 153.

(17) Schedule 7A was inserted by the Enterprise Act 2002 (c. 40), section 187(4) and Schedule 12 and amended by the 2003 Act, section 406 and Schedule 17, paragraph 154.

(18) Section 104(1) was amended by the Water Act 2003 (c. 37), section 53.

- (d) article 3 or 9 of the Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005.”.

PART 2

MODIFICATION OF SUBORDINATE LEGISLATION

The Public Interest Disclosure (Prescribed Persons) Order 1999

5. In the Schedule to the Public Interest Disclosure (Prescribed Persons) Order 1999(19), there is inserted in the appropriate place the following entry–

“The Water Industry Commission for Scotland	The supply of water and the provision of sewerage services.
The Convener of the Water Customer Consultation Panels and any member of those Panels	The supply of water and the provision of sewerage services.”.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provisions and modifications in consequence of the Water Services etc. (Scotland) Act 2005 (“the 2005 Act”).

The Order provides for a right of reference for Scottish Water, enabling it to require the Water Industry Commission for Scotland (“the WIC”) to refer its determination of Scottish Water’s charges under the Water Industry (Scotland) Act 2002 to the Competition Commission (“the Commission”). The Order also provides for a right of reference to the Commission for water and sewerage services providers against the conditions of their licences granted under the 2005 Act, or against any modification of those conditions. The Order also modifies enactments as a consequence of the creation of the WIC in the 2005 Act, and to reflect the functions of the Commission in considering a reference under this Order.

Article 3 provides for the WIC to refer licence conditions, or the modification of such conditions, or a determination or a revised determination of Scottish Water’s charges to the Commission, and provides for the terms in which a reference is to be framed. Article 4 sets out the time limits within which the Commission’s report on a reference is to be made. Article 5 provides the Commission with powers of investigation in relation to references, by applying provisions in the Enterprise Act 2002, subject to the modifications specified in the article. Article 6 places a duty on the Commission to consult on the conclusions it proposes to include in its report on a reference.

(19) [S.I. 1999/1549](#); the relevant amending instrument is [S.I. 2003/1993](#).

Draft Legislation: This is a draft item of legislation. This draft has since been made as a UK Statutory Instrument:
The Water Services etc. (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005 No. 3172

Article 7 requires the Commission to report to the WIC on a reference and requires the WIC to publish it. The Commission and WIC are obliged to consider any issues of public interest, or commercial or personal sensitivity which may arise.

Article 8 enables the WIC to propose modifications of a water services licence or a sewerage service licence, or a determination or a revised determination of Scottish Water's charges in consequence of the Commission's report. Article 9 enables the Commission to veto the modifications proposed by the WIC and to replace these in whole or in part with its own modifications. Article 10 obliges the Commission to consider any issues of public interest, or commercial or personal sensitivity before publishing modifications made under article 9. Article 10 also provides the Commission with powers of investigation for the purposes of article 9.

Article 11 and the Schedule provide for the modification of primary and subordinate legislation. The modifications either insert references to the WIC or the Convener and any member of the Water Customer Consultation Panels or refer to the powers of the Commission to consider references under this Order.