

EXPLANATORY MEMORANDUM TO
THE CROWN ESTATE TRANSFER SCHEME 2017

2017 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to devolve to Scotland the management of the wholly-owned assets of the Crown Estate in Scotland.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Scotland and Northern Ireland.

4. Legislative Context

- 4.1 Section 90B of the Scotland Act 1998 (“the 1998 Act”), which was inserted by section 36(1) of the Scotland Act 2016 (“the 2016 Act”), provides for the devolution to Scotland of the functions of managing the Crown Estate's current wholly-owned assets in Scotland (“the Scottish assets”), the revenue arising from those assets and competence to legislate about those functions going forwards.
- 4.2 Section 90B(1) of the 1998 Act enables the Treasury to make a scheme transferring all the existing Scottish functions of the Crown Estate Commissioners (“the Commissioners”) to the transferee. Section 90B(2) defines these functions by reference to functions of the Commissioners in relation to property, rights and interests in land in Scotland and rights in relation to the Scottish zone¹.
- 4.3 After the transfer, section 90B(5) of the 1998 Act requires the management of the Scottish assets to continue to be on behalf of the Crown. In addition, whilst section 90B(6) and (7) allows the disposal and acquisition of property, all acquired property (excluding hereditary revenues) must also be managed on behalf of the Crown.
- 4.4 In order that there is a clear statement of the starting position for devolution purposes, the scheme may specify any property, rights and interests that appear to the Treasury to be relevant to the transfer (section 90B(9) of the 1998 Act).
- 4.5 The scheme must provide for the transfer of associated rights and liabilities of the Commissioners and it must include provision ensuring that no person in Crown

¹ The term “the Scottish zone” is defined in section 126(1) of the 1998 Act.

employment is adversely affected by the transfer (section 90B(10) and (11) of the 1998 Act).

- 4.6 The scheme must also include such provision as the Treasury consider necessary or expedient in relation to defence or national security, telecommunications, oil and gas, and the interests of consumers in relation to electricity networks (section 90B(12) of the 1998 Act). The transfer will take effect subject to this provision (section 90B(13)).
- 4.7 The scheme must be agreed with the Scottish Ministers before it can be made (section 90B(17) of the 1998 Act).
- 4.8 The scheme will transfer certain functions of the Commissioners under the Crown Estate Act 1961 to the transferee. Section 36(7) of the 2016 Act makes provision modifying the Crown Estate Act 1961 in its application to the transferee for these purposes.
- 4.9 After the transfer, the Scottish Parliament will also have competence to legislate about the management of the Scottish assets. Section 36(3) of the 2016 Act amends the 1998 Act in relation to this purpose.
- 4.10 The instrument is the scheme for the purposes of section 90B of the 1998 Act.
- 4.11 Crown Estate Scotland (Interim Management) has been specifically established for the purposes of the transfer and will be the transferee under the instrument. On the transfer date specified in the instrument the existing Scottish functions, and the associated rights and liabilities, will vest in the transferee in accordance with the scheme (section 90B(15) of the 1998 Act).

5. Extent and Territorial Application

- 5.1 An amendment made by Schedule 5 to the instrument has the same extent as the enactment to which it relates. Otherwise, the extent of this instrument is the United Kingdom (see paragraph 1(3) and (4) of the instrument).
- 5.2 An amendment made by Schedule 5 to the instrument has the same territorial application as the enactment to which it relates. Otherwise, the territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

- 6.1 The Commercial Secretary to the Treasury has made the following statement regarding Human Rights:

“In my view the provisions of the Crown Estate Transfer Scheme 2017 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 The report of the Smith Commission for further devolution of powers to the Scottish Parliament (Nov 2014) recommended that “Responsibility for the management of the Crown Estate’s economic assets in Scotland, and the revenue generated from these assets, will be transferred to the Scottish Parliament. This will include the Crown Estate’s seabed, urban assets, rural estates, mineral and fishing rights, and the Scottish foreshore for which it is responsible.”

- 7.2 The 2016 Act provides for the devolution of responsibility for managing the Scottish assets, the associated rights and liabilities and the revenue arising from those assets. This will be done through a transfer scheme, which must be agreed by both the Scottish and UK Governments.
- 7.3 The instrument is the secondary legislation required to complete the transfer. It lists the property, rights and interests the management of which, in the Treasury's view, will transfer on the transfer date. It also provides protections for Crown Estate staff in Scotland. In addition, it includes provisions in the interests of defence and national security, access to land for telecommunications, exploitation of resources and distribution of electricity or use of electricity interconnectors.
- 7.4 An early draft of the scheme was prepared in October 2015 for the Commons Report stage and the Lords stages of the Scotland Bill. Since then, the Scottish and UK government have discussed the contents of the instrument in order to come to an agreement on the provisions included in it.
- 7.5 The scheme has subsequently been amended in consultation with the Scottish government and has been agreed by the Scottish Ministers and the UK government.
- 7.6 Paragraph 3 of the instrument transfers the existing Scottish functions to Crown Estate Scotland (Interim Management), a body specifically established by the Scottish Ministers for the purposes of the transfer.
- 7.7 Paragraph 4 and Schedule 1 specify the property, rights and interests the management of which will, in the Treasury's view, transfer under the Scheme on the transfer date.
- 7.8 Paragraph 5 and Schedule 2 specify the rights and liabilities which will transfer under the Scheme.
- 7.9 Paragraph 6 and Schedule 3 make provision in relation to the transfer of staff from the Crown Estate to the transferee. In particular, protections are included in relation to dismissal, contract variation and pensions. The provisions are modelled on, but apply instead of, the Transfer of Undertakings (Protection of Employment) Regulations 2006.
- 7.10 Paragraph 7 and Schedule 4 make provision about the protection of certain UK-wide interests.
- 7.11 Part 1 of Schedule 4 makes provision in relation to defence and national security. This includes provision regarding existing rights of the Secretary of State for Defence, new rights required by the Secretary of State, the acquisition of third party rights by the Secretary of State and use of the Scottish assets by the manager where they impact on defence and national security. The Secretary of State is required to pay market value for the renewal of existing rights, the grant of new rights and the acquisition of third party rights and provision is made for resolving disagreements. Each reporting year in which the Secretary of State has exercised these powers, the Secretary of State is required to prepare a report.
- 7.12 Part 2 of Schedule 4 makes provision in relation to the electronic communications code, and the amount payable in connection with an agreement between an operator and the manager regarding tidal waters. It sets out the process for resolving any disagreement about the consideration payable.
- 7.13 Part 3 of Schedule 4 makes provision in relation to certain pipeline payments. It provides for an independent expert to determine market value where an operator has

submitted an objection to the Treasury and the Treasury consider that the payment may exceed market value.

- 7.14 Part 4 of Schedule 4 makes provision in relation to certain electricity infrastructure payments. If the Treasury considers that the payment required may be more than market value, provision is made for an independent expert to determine market value.
- 7.15 Paragraph 8 and Schedule 5 make consequential amendments to certain Acts of the UK Parliament, Acts of the Scottish Parliament, Local Acts, UK Statutory Instruments and Scottish Statutory Instruments.
- 7.16 Paragraph 9 requires the preparation of a statement of income account and a statement of capital account by the Commissioners for the period starting on 1st April 2016 and ending immediately before the transfer date.
- 7.17 Paragraphs 10 to 13 make provision in relation to the treatment of certain receipts after the transfer date.
- 7.18 Paragraph 14 makes supplementary provision in relation to matters such as the continuity of functions.
- 7.19 Paragraph 15 requires the transferee to publish a notice of the transfer in the Edinburgh Gazette and the London Gazette.
- 7.20 There have been a number of changes to the original draft seen by Parliament in October 2015, which have arisen through the negotiation between the UK government and Scottish Ministers. The most significant changes are with regards to the process for resolving any disputes under Parts 2, 3 and 4 of Schedule 4. Determinations are now to be made by independent experts.

Consolidation

- 7.21 This is the first instrument to be made under section 90B.

8. Consultation outcome

- 8.1 The instrument has been prepared in consultation with the Scottish Government and the Crown Estate. It has been agreed by the Scottish Ministers, as required by the 1998 Act.

9. Guidance

- 9.1 No guidance is being issued, but a MoU is being agreed with the Scottish Ministers which will provide further clarity to the provisions in the instrument.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 The impact on the public sector is that, on and after the transfer date, Crown Estate Scotland (Interim Management) will be responsible for managing the Scottish assets.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The instrument does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 No monitoring or review is planned.

13. Contact

13.1 Susan Mangles at HM Treasury Telephone:020 7270 7803 or email:
susan.mangles@hmtreasury.gsi.gov.uk can answer any queries regarding the
instrument.