

POLICY MEMORANDUM

THE REGISTERS OF SCOTLAND (DIGITAL REGISTRATION etc.) REGULATIONS 2017

SSI 2017/Draft

INTRODUCTION

These Regulations are made by the Scottish Ministers in exercise of the powers conferred by sections 34(2), 43(7), 56(4), 99(3), 100, 115 and 116(1) of the Land Registration etc. (Scotland) Act 2012 (“the Land Registration Act”), section 9G(3) and (5)(a) of the Requirements of Writing (Scotland) Act 1995 (“the Requirements of Writing Act”) and all other powers enabling them to do so. They are subject to the affirmative procedure.

POLICY OBJECTIVES

Summary

One of the policy aims of the Land Registration Act was to permit all types of land deed and contracts relating to land (known as missives) to take an electronic form.

The Regulations support this policy objective by facilitating the introduction of new digital registration services that may be provided by Registers of Scotland (“RoS”), and extending the range of deeds currently “digitally registrable” electronically in the Land Register of Scotland to include all deeds registrable under any enactment currently existing or future created and to all categories of land for which applications are received.

The Regulations also provide for a presumption in favour of the use of new digital registration services, after an appropriate notice period and consultation, except in certain defined circumstances.

The Regulations additionally provide for RoS to offer a full range of digital Advance Notice products, which cover the risk buyers of land take before registering title, including Sasine Register Advance Notices and streamline the prescriptive claimant process (introduced for *a non domino* dispositions used in practice where the ownership of land is unclear).

To support the efficient introduction of new digital registration services, the Regulations provide for the partial digital enablement of the Sasine Register to allow the recording of digital deeds in that Register where required for the purposes of ‘dual-registration’ and provide for a limited relaxation of the “One-Shot Rule” to assist with digital First Registration applications.

Lastly, the Regulations remove the existing registration application form from the rules regulating land registration in Scotland. This will allow RoS to respond more quickly to changing customer and business needs and to new technological developments by publishing

that application form on an administrative basis and revising it from time to time following consultation.

The Regulations fulfil these policy objectives by amending those rules regulating land registration in Scotland, principally the Land Register Rules etc. (Scotland) Regulations 2014¹ (“the Land Register Rules”) and the Land Register of Scotland (Automated Registration) etc. Regulations 2014² (“the ARTL Regulations”), using the regulation-making powers provided for that purpose in the Land Registration Act.

Extending scope of Digital Registration

The Regulations extend the existing legislative framework underpinning digital registration by amending the ARTL Regulations to:

- extend digital registration services to cover all registered (including parts of registered) and unregistered plots³ of land; and
- extend the list of deeds which can be registered using digital registration services to include any other kind of deeds whose use in the digital registration system has been published on the Keeper’s website in accordance with the requirements stipulated in the Regulations.

These changes are designed to facilitate the development and introduction of a digital registration service for dispositions over parts of registered Titles and over subjects still recorded in the Sasine Register (First Registrations - “FR”).

Presumption of use of Digital Registration Services

A key policy intention of the Regulations is to provide for a presumption in favour of the use of digital registration services subject to certain defined exceptions.

The intention is that the use of digital registration services should be compulsory from a date determined by the Keeper, unless certain specific exceptions apply. Where an exception applies, the applicant will be able to submit a traditional paper application to register a traditional paper deed as at present.

Using powers to regulate the procedure in relation to applications for registration, and prescribe forms to be used in relation to the register, the Regulations stipulate that the Keeper must give a minimum 6 months’ notice of the date a new digital registration services becomes compulsory and must consult with Scottish Ministers before doing so.

The Regulations specify exceptions which mirror, retain and extend corresponding exceptions to the mandatory use of Land Register Advance Notices (which are currently set out in regulation 3 of the Land Register Rules). Where the Keeper is satisfied that exceptional

¹ <https://www.legislation.gov.uk/ssi/2014/150/contents/made>.

² <https://www.legislation.gov.uk/sdsi/2014/9780111024607>.

³ Where that unregistered plot is to be transferred into the Land Register as a result of a conveyance or lease.

circumstances make it impractical, the requirement to use the digital registration services shall not apply and a traditional paper application and a traditional paper deed would be accepted (this includes where the application to register a deed is submitted by a natural person(s) not engaging the services of a solicitor or other legal advisor).

Extension of Digital Advance Notice service

Advance Notices were introduced by section 56 of the Land Registration Act and protect deeds about to be registered in the land register for a period of 35 days against competing deeds and the risk that the grantor may be inhibited.

The current Land Register Rules only allow and require Advance Notices to be submitted digitally over the *whole of registered plots* of land using the Keeper's Advance Notice System, but not over *parts of registered plots* of land or *unregistered plots* of land.

For Advance Notices relating to parts of registered plots of land, currently regulation 3(3) of the Land Register Rules instead requires digital *completion* using the Advance Notice System but *manual* printing, signing and paper submission.

The Regulations eliminate this gap by disapplying the provision that limited the requirement for digital applications for Advance Notices to *the whole of registered plots* of land.

For Advance Notices over unregistered plots of land, currently a submission to the Keeper must be made in paper format *outside* the Advance Notice System⁴. The Regulations provide for Advance Notices over unregistered land to be submitted digitally using the Advance Notice System and then recorded in the Sasine Register.

Property description in Sasine Register advance notice

Regulation 4(2) of the Land Register Rules provides that, where an Advance Notice affects an unregistered lease or unregistered plot of land, the description must identify the subjects of the lease or plot of land by reference to a description in a deed recorded in the Sasine Register and postal address (if any).

Whilst the vast majority of properties are already registered in the Land Register or remain recorded in the Sasine Register, there are some property types which are neither – such as foreshore, salmon fishings and land deriving from barony titles or Crown Charters.

In such cases, it is not possible for an Advance Notice to comply with regulation 4(2) as there is no Sasine Register-recorded deed to refer to. The lack of a valid description in terms of regulation 4(2) prevents such an Advance Notice from being recorded in the Sasine Register.

⁴ Rules 2 and 6 and Part 2 of the Schedule to the Register of Sasines (Application Procedure) Rules 2004 (as amended by section 7 of, and the Schedule to, the Land Registration etc. (Scotland) Act 2012 (Incidental, Consequential and Transitional Order 2014).

Section 57(4)(b) of the Land Registration Act provides that an Advance Notice that does not relate to a registered plot of land must, *in any other case*, be recorded in the Sasine Register. However, as demonstrated, the lack of a valid description in terms of regulation 4(2) of the Land Register Rules would prevent such an Advance Notice over property which is neither registered in the Land Register nor recorded in the Sasine Register from being registered in the Sasine Register.

The Regulations resolve this anomaly by disapplying the requirement for an Advance Notice to refer to a Sasine Register description where either subjects of lease or a plot of land have not been previously recorded in that register and by providing for the valid means of description in such circumstances to be by deed plan.

De-prescription of registration application forms

The Regulations revoke the application form prescribed by the Land Register Rules for Land Register registration applications (both paper and ARTL). Instead, the Keeper will publish new registration application forms and may revise them from time to time without the need for further rules changes. The Keeper will no longer be entitled to refuse applications on the basis that they are not in the prescribed form. (Applications will still require to otherwise meet the general application conditions, which include ‘enabling the Keeper to comply with her duties under Part 1 of the Act’.) The new administrative forms will be an administrative assist for submitting agents.

This will serve to allow registration application forms to be amended quickly and easily as necessary to allow RoS to respond promptly to changing customer, business and technological needs and developments.

Digital enablement of the Sasine Register for limited purposes

There are instances where the overall aim of a fully digital registration environment intersects with the operation of the Sasine Register. For instance, where a digital deed requires to be dual registered simultaneously in both the Land and Sasine Registers in order to create real burdens and/or servitude rights⁵ (i.e. over both registered and unregistered land), and achieving a fully digital range of Advance Notice products, including for unregistered plots of land.

Accordingly the Regulations digitally enable the Sasine Register to allow certain digital deeds to be recorded.

The Regulations amend the Land Registers (Scotland) Act 1868 to make provision for digital applications made to the Keeper to record digital documents in the Sasine Register.

The Regulations also amend regulation 6 of the Electronic Documents (Scotland) Regulations 2014 to establish criteria for electronic documents to be recorded in the Sasine Register

⁵ As required by sections 4(5) and/or 75(1) of the Title Conditions (Scotland) Act 2003 ("TCA").

(which are restricted to the circumstances of dual registration but otherwise mirror the criteria for ARTL documents to be registered in the Land Register).

The Regulations also amend the Register of Sasines (Application Procedure) Rules 2004 to provide that an Advance Notice may be recorded in the Sasine Register from a date to be notified by the Keeper.

Relaxation of “One-Shot Rule”

One of the main drivers of the Land Registration Act was that applicants should get their applications for registration in the Land Register right first time - known as the "One-Shot Rule". The Regulations provide for a limited relaxation of this rule for FR applications submitted through a future digital channel.

The relaxation extends to historic conveyancing deeds containing property rights and/or title conditions. Current practice is that the Keeper requires such deeds to accompany a FR application unless the application relates to a property within what the Keeper terms a ‘research area’. (A research area is where the Keeper has previously examined generic burdens deeds and so does not require those deeds to be submitted.)

In many instances, paper copies of supporting deeds will not require to be submitted in support of a digital FR application as the Keeper will already have seen, and will hold within her systems, good quality copies of the required deeds. However, exceptions will remain, such as where an original deed plan is necessary.

The Regulations relax the One-Shot Rule for such applications. Where the Keeper determines a deed is required the applicant will be allowed a period of 10 days in which to provide it. This approach opens up digital registration to all transfers of title.

Streamlining the Prescriptive Claimant process

The prescriptive claimant provisions of the Land Registration Act provide a statutory framework for the acceptance of *a non domino* dispositions (where the grantor of the disposition is not the owner) for registration.

This statutory framework provides for a double notification process which requires:

- the prescriptive claimant (the grantee in an *a non domino* disposition and applicant for registration) to notify the proprietor of the land or other appropriate person as specified in section 43(4) of the Land Registration Act, with regulation 18 of the Land Register Rules requiring this to be at least 60 days before the prescriptive claimant application can be submitted.
- the Keeper, upon *receiving* the application for registration, to notify the same relevant person(s) in terms of section 45(1) of the Land Registration Act before *accepting* the

application, with section 45(5) of that Act allowing that person(s) 60 days in which to object to the application.

No legislative provision allows either of these 60 day clocks to stop ticking in uncontested cases – for example, where the relevant person confirms in writing that the person does *not* object to the prescriptive claimant application.

The Regulations achieve the policy intention of streamlining this unduly cumbersome notification, which results in some cases in a 120 day wait for the prescriptive claimant and registration process for uncontested prescriptive claimant applications, by dispensing with the 60 day non-submission period in those limited circumstances where written confirmation of non-objection has been received from all relevant person(s) notified by the *applicant* and written evidence of this is received by the Keeper.

The Regulations ensure that the period for objection following the *applicant's* notification applies separately to each person who must be notified under section 43(4) of the Land Registration Act. Where written confirmation of non-objection is received in respect of any person to be notified, the 60 day non-submission period will be dispensed with only in relation to that person who confirmed non-objection.

(Related provision is made in the Land Registration etc. (Scotland) Act 2012 (Amendment) Order 2017 (SSI/Draft) about notification by the *Keeper*.)

The Digital Scotland agenda

The Regulations are firmly in line with the Scottish Government's Digital Scotland policy⁶. They will promote the use of digital technology by permitting its use for digital registration services and provide a "Digital Future" for Scottish conveyancing by ensuring that all involved therein can access high quality digital registration services.

The Regulations will accordingly facilitate improved, user-focused digital services and drive innovation and efficiency in this important sector of the Scottish economy and benefit conveyancers, customers and citizens of Scotland alike.

RoS and the National Records of Scotland are considering the long-term digital preservation of registers and records in accordance with their respective responsibilities under the Public Registers and Records (Scotland) Act 1948.

CONSULTATION

On behalf of the Scottish Ministers, the Keeper carried out a public consultation on the on the next steps in the journey towards digital transformation which took place between 30 November 2016 and 22 February 2017. 44 written responses were received and they have been taken into account when finalising this instrument. A series of six public events were

⁶ <http://www.gov.scot/Topics/Economy/digital>

held to support the consultation process in various locations throughout Scotland and these were attended by 180 individuals.

Where respondents gave permission for their responses to be made public, these were published on the Registers of Scotland and Scottish Government websites.

The consultation, and a report on the consultation, are available on the Registers of Scotland website⁷.

The Scottish Ministers have consulted the Keeper of the Registers of Scotland, the Keeper of the Records of Scotland and the Lord President of the Court of Session in accordance with requirements under sections 99(4), 100(4) and 115(2) of the Land Registration Act and section 9G(4) of the Requirements of Writing Act.

IMPACT ASSESSMENTS

No Business and Regulatory Impact Assessment has been prepared for these Regulations as no significant financial effect or impact on the private, voluntary or public sector is foreseen.

An Equalities Impact Assessment has been prepared and published on the RoS website.

No Environmental Assessment has been prepared for these Regulations as they will not impact on environmental issues.

Registers of Scotland on behalf of the Scottish Government

October 2017

⁷ https://www.ros.gov.uk/_data/assets/pdf_file/0012/54030/Digital_transformation_consultation.pdf.