

Heat Networks (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Heat Networks (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Outline Of Bill Provisions

3. The Bill comprises 85 sections in 8 Parts, as follows:

- Part 1 which makes it an offence to supply thermal energy by means of a heat network without a heat networks licence. The licensing system is to be administered by a new licensing authority.
- Part 2 which makes it an offence to construct or operate a new (or extended) heat network without the consent of the Scottish Ministers.
- Part 3 which places a duty on local authorities to consider undertaking the designation of heat network zones – those areas most suited to a heat network. Local authorities are not required to undertake this process, only to consider it, and they may direct the Scottish Ministers to do this on their behalf.

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- Part 4 which requires a person to hold a permit to operate a heat network in a heat network zone that has been designated by notice by the permit authority. Permits would be awarded via competition to a single, winning bidder thereby providing 'exclusivity' for a number of years.
- Part 5 which places a duty on specified non-domestic building owners to undertake an assessment of the suitability of their buildings to connect to a heat network, and to provide a building assessment report to the relevant local authority and the Scottish Ministers for the purposes of heat network zoning and for encouraging connection of certain non-domestic buildings to heat networks.
- Part 6 which provides heat networks licence holders with compulsory purchase powers, 'network wayleave rights' and other powers over land.
- Part 7 which enables the Scottish Ministers to make a transfer scheme to transfer or create rights over key heat networks assets. This is to ensure that the operation of a heat network can be taken over by a third party (the Scottish Ministers, a local authority, or another heat network consent holder) in the event that there is a failure of supply of some kind e.g. due to the liquidation of the operator or revocation of a heat networks licence, consent or zone permit, or when a heat network zone permit comes to the end of its term.
- Part 8 which makes miscellaneous provisions, including provision for Crown application and the commencement of the Bill.

Rationale For Subordinate Legislation

4. The Scottish Government has had regard to, when deciding where and how provisions should be set out in subordinate legislation rather than on the face of the Bill, the need to:

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- make proper use of valuable Parliamentary time;

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- take account of the likely frequency of amendment;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation; and
- anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

5. The Scottish Government recognises that the Bill results in a significant number of delegated powers being created. Legislation to regulate other utility markets – such as electricity and gas – has been introduced over a number of years, and has itself been subject to amendment and other market reform. In comparison, the Bill seeks to create a new regulatory framework within a highly technical market, from scratch, and as such, the Scottish Government has thought it necessary to delegate a number of powers to allow for some flexibility as the nascent heat networks market develops in Scotland.

6. In particular, powers to provide detail such as the form and content of implementing regimes in regulations have been included to allow the system to take advantage of future developments in technology.

7. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power was taken in the Bill and, where relevant, why the selected form of Parliamentary procedure has been considered appropriate.

Delegated Powers

Part 1 – Heat networks licences

Section 1(7) – Meaning of “heat network”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

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Provision

8. Definitions of “heat network”, “district heating” and “communal heating” are set out in subsections (1) to (3) of section 1. Subsection (6) allows the Scottish Ministers, by regulations, to amend these definitions and to further define the meaning of those terms.

Reason for taking power

9. Regulations made under this section are intended to enable the Scottish Ministers to modify or further define the meaning of these definitions to be able take account of future developments in heat network technology, the detail of which is not yet known.

Choice of procedure

10. These definitions are central to the Bill and as such it is considered appropriate that this power is subject to affirmative procedure to afford the Parliament a high level of scrutiny in respect of any changes made to them.

Section 3(1) – Exemptions from requirement for heat networks licence

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

11. Subsection (1) enables the Scottish Ministers by regulations to specify exemptions from the requirement to hold a licence, in specified circumstances, and in relation to heat networks of a specified description. Subsection (4) provides that regulations may grant an exemption indefinitely or for a prescribed period, and unconditionally, or subject to conditions. Subsection (7) allows regulations to make different provision for different areas.

Reason for taking power

12. The Scottish Government has consulted stakeholders on exemptions to licensing but as yet there has been no consensus regarding which heat networks should be exempted. This, in part, is due to a lack of clear understanding of the current heat networks market in Scotland which has resulted from a lack of regulation. As such it is considered appropriate to

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specify exemptions by regulations to allow for detailed consultation and for further evidence on the composition of the market to emerge.

Choice of procedure

13. The choice of negative procedure reflects the fact that the power will not impose any additional obligations on market participants. On that basis a lesser degree of Parliamentary scrutiny is thought suitable and the negative procedure appropriate.

Section 3(2) – Exemptions from requirement for heat networks licence

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

Provision

14. Subsection (2) enables the Scottish Ministers to direct that the requirement to hold a heat networks licence does not apply to a particular person, to persons of a specified description, or to a particular heat network. Subsection (4) provides that a direction may grant an exemption indefinitely or for a prescribed period, and unconditionally, or subject to conditions. A direction may make different provision for different areas (subsection (7)).

Reason for taking power

15. It is considered appropriate that the licensing authority should administer exemptions from the need to hold a heat networks licence, following consultation and the implementation of regulations under subsection (1). However, it is also considered that the Scottish Ministers should be able to direct the licensing authority to exempt certain heat networks, or certain persons from the need to hold a heat networks licence as required.

16. The reasons for issuing the direction will be clearly set out in the direction itself but examples of the types of situation in which the Scottish Ministers may decide to exercise their power include in emergency situations. It is likely that most of the circumstances where an exemption will be authorised will be provided for in regulations. The direction-making power is only likely to be needed in relation to individual heat networks and in specific circumstances, that have not been captured by the regulations.

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Efforts will be made to ensure that most of the exemptions to the requirement to hold a heat networks licence will be set out in regulations, but since this is an evolving market, the direction-making power will enable the Scottish Ministers to react to situations that may develop where it is necessary to make exemptions on a case by case basis. Without this, there is a risk that suppliers of thermal energy via certain categories or sizes of heat network not considered as part of the development of regulations could find themselves in breach of the requirement to hold a heat networks licence (and face any consequences of that).

Choice of procedure

17. The decision as to when a direction of this kind should be made will depend on the facts and circumstances of each case and as such, it is not possible to predict or specify precisely the kinds of situation in which a direction might be issued on the face of the Bill. The procedure to trigger a direction by the Scottish Ministers would arise from circumstances which are unique to certain heat networks, or to certain persons, and as such an administrative power of direction is appropriate. Ministerial directions are not subject to Parliamentary scrutiny.

Section 4(b) – Meaning of “licensing authority”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

18. Section 4 is concerned with the identification of the licensing authority for the purposes of the Bill (i.e. the person(s) who will administer, monitor and enforce the licensing system, amongst other functions). Section 4 enables the Scottish Ministers to take on this role, but subsection (b) allows for the Scottish Ministers to designate another person or body as the licensing authority, by regulations.

Reason for taking power

19. Regulations made under this section are intended to allow the Scottish Ministers to retain flexibility regarding the person or body that will be responsible for the functions of the licensing authority in Scotland.

20. The UK Government has set out its intention to regulate the heat networks market in England and Wales and has indicated its intention to

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appoint the Office of Gas and Electricity Markets (—Ofgem) as the industry regulator. Although the Scottish Government remains open to appointing Ofgem as the licensing authority in the future, if appropriate, it is currently beyond the legislative competence of the Scottish Parliament to do so since Ofgem is a reserved body under paragraph 3, Part 3, of schedule 5 to the Scotland Act 1998 (as amended). The Bill enables the Scottish Ministers to designate the licensing authority through regulations, which safeguards the primary legislation from pre-empting any decision by the UK Government with regards to the further devolution of consumer protection in relation to heat networks (or legislating on a UK-wide basis for consumer protection) and the amendment of Ofgem's remit, which does not currently cover the heat networks sector. It may be that Ofgem is not the appropriate body to oversee heat networks regulation in Scotland, particularly when there are clear differences in the remit of the licensing authority as proposed in the Bill and those of the regulator set out in the UK Government's most recent consultation. The power under section 4(b) provides the Scottish Ministers with the flexibility to ensure that the licensing authority identified is best-placed to carry out the functions of the licensing authority conferred by the Bill, whether that be Ofgem or an alternative body deemed more appropriate for the role as industry regulator in Scotland. The ability of the Scottish Ministers to take on this role, enables the functions of the licensing authority to be carried out by them in the interim.

Choice of procedure

21. It is considered appropriate that this power should be subject to the affirmative procedure in order to allow the Parliament a high level of scrutiny in relation to the question of which person should be appointed as the licensing authority in Scotland.

Section 5(4)(c) – Heat networks licence applications

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

22. Section 5(4) provides that when a person applies for a heat networks licence, the licensing authority may grant a heat networks licence application only if it is satisfied that the applicant has the ability to perform the activities that would be authorised by the licence. Subsection (4) sets out the matters that the licensing authority must have regard to when

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assessing the applicant's ability to perform those activities, including the applicant's knowledge, experience and expertise and the applicant's ability to operate a heat network in a manner that minimises greenhouse gases. Subsection (4)(c) enables the Scottish Ministers to specify additional matters that the licensing authority must have regard to when assessing an applicant's ability to perform the activities that would be authorised by the licence.

Reason for taking power

23. It is appropriate for the Scottish Ministers to have flexibility to consider and respond to changing circumstances in the market and advancements in heat networks technology, which may result in the need to change the basis on which heat networks licences are granted. For example, emerging ownership and/or operating models may require the licensing authority to consider the financial acumen of – or the relationships between – new parties entering the sector in a different way.

24. The Scottish Government notes that in the gas and electricity markets, Ofgem has recently amended the matters it considers in determining licence applications it receives, in light of an exit of suppliers from the market. Learning from this, it is desirable to retain flexibility for the licensing authority to change its approach as may become necessary in future.

Choice of procedure

25. As the matters to be detailed in regulations are likely to be administrative in nature, it is considered appropriate that the negative procedure is to be used so as to achieve the best balance of Parliamentary time and resource on one hand and the nature and content of the regulations on the other.

26. The Bill specifies those matters that the Scottish Government identified to be the most important to the assessment of a heat networks licence application. These matters will be scrutinised by Parliament during the passage of the Bill. It is therefore felt that the negative procedure provides sufficient scrutiny of any subsequent matters which should be considered as the regulatory system develops.

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Section 13 – Regulations about determining applications under Part 1

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

27. Section 13 enables the Scottish Ministers, by regulations, to make provision about the procedure the licensing authority must follow in determining whether to grant a heat networks licence application (or modification application). This section also enables the Scottish Ministers, by regulations, to determine the way in which the outcome of a heat networks licence application should be published and how applicants should be notified.

Reason for taking power

28. The administration of heat networks licences will be a new process for both the licensing authority and for market participants and further consultation with stakeholders is desired to ensure a proportionate approach. Once the Bill is enacted and in light of the experience and greater understanding of the sector as it develops, it may be necessary to amend the procedure in relation to the determination of heat network licence applications (and modification applications), and the associated notification and publication procedures, in the future. This power will allow the Scottish Ministers some flexibility to make necessary changes to the procedures as required.

Choice of procedure

29. The regulations are to make detailed provisions about procedure in relation to the determination of heat network licence applications (and modification applications), and the associated notification and publication procedures to be followed by the licensing authority and it is expected that these will be uncontroversial in nature. In the circumstances, the Scottish Government considers that it is appropriate for the regulations to be subject to the negative procedure.

Section 14(1) – Guidance for licensing authority

Power conferred on: the Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: none

Provision

30. Section 14(1) enables the Scottish Ministers to issue guidance to the licensing authority about the exercise of its functions under Part 1 of the Bill. Subsection (2) sets out that any such guidance may, in particular, relate to how the licensing authority should assess the applicant's ability to perform the activities that would be authorised by a heat networks licence, when determining whether to grant a heat networks licence application.

31. For example, when assessing an applicant's ability to perform the activities that would be authorised by the heat networks licence, subsection 5(4)(b) requires the licensing authority to have regard to the applicant's ability to minimise greenhouse gas emissions from the heat network. Any guidance issued under section 14 could support the licensing authority by providing details about how applicants can demonstrate such ability.

Reason for taking power

32. Any guidance is likely to provide the licensing authority with technical and procedural information in relation to the exercise of its functions under Part 1. The guidance will be developed in consultation with interested stakeholders and may require to be updated to reflect evolving knowledge, the rate of deployment of heat networks and best practice.

Choice of procedure

33. This is an administrative power of the Scottish Ministers to issue guidance to the licensing authority. However, the Scottish Ministers are required under subsection (2) to publish any guidance issued. Any guidance issued is intended to complement the regulation-making powers under Part 1 of the Bill to provide assistance to both the licensing authority and heat network licence holders and to help promote consistency of approach in respect of those aspects where specifying matters by regulations would be inappropriate or disproportionate.

34. The guidance will set out what, for example, the principles and governance of the licensing authority. The guidance will be developed by

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the Scottish Ministers alongside stakeholders or other relevant parties and, as such, no Parliamentary procedure is to apply.

Section 15(3) – Register of heat networks licences

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

35. Section 15 requires the licensing authority to prepare and maintain a register of heat networks licences and sets out the information that the register must contain in respect of each licence. Subsection (3) allows the Scottish Ministers to specify by regulations, any other information that must be added to the register.

Reason for taking power

36. A register of heat networks licences will be necessary to effectively monitor and report on compliance, and will help facilitate enforcement action in the market. A regulation-making power to specify the type of information required on the register will provide the Scottish Ministers with the flexibility to include additional information as may be required as the licensing process and regulatory framework evolves.

Choice of procedure

37. The choice of the negative procedure and attendant level of scrutiny reflects the limited impact of the provision, which will neither significantly alter the purpose or effect of the register, nor impose substantial obligations on the licensing authority or other market participants. Negative procedure is considered appropriate for what is an administrative matter requiring additional information to be included in a register of heat networks licences.

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Part 2 – Heat network consent

Section 18(1) – Exemptions from requirement for heat network consent

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

38. Project specific regulation is to be achieved under Part 2 of the Bill by means of a consent to construct and operate a heat network. Such a consent will be referred to as a “heat network consent”. A person must not construct or operate a heat network without a heat network consent.

39. Subsection (1) enables the Scottish Ministers, by regulations, to make exemptions from the requirement to hold a heat network consent, in certain circumstances and in relation to heat networks of a specified description. The regulation-making powers under section 18 allow the Scottish Ministers to grant exemptions either indefinitely, or for a specified period, and either unconditionally, or subject to conditions and can make different provisions for different areas.

Reason for taking power

40. The Scottish Government’s view is that heat network consent is critical to a robust regulatory framework as it enables project-specific scrutiny to take place prior to the construction and operation of a heat network. The intention is to be proportionate wherever possible, however, in light of evidence provided by the Competition and Markets Authority (CMA) that detriment to end users in the heat networks sector is more likely for those supplied by smaller networks. However, it is not considered appropriate to exempt small scale networks in primary legislation without further consultation on this matter. The Scottish Government has consulted stakeholders on thresholds and proportionality, but there has been no consensus regarding which heat networks should be exempt from holding a heat network consent. As such, it is considered appropriate at this stage to use regulation-making powers to exempt certain heat networks from the need for a heat network consent once further evidence has been received and considered.

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Choice of procedure

41. The choice of the negative procedure reflects the fact that the power will not impose any additional obligations on persons. On that basis a lesser degree of Parliamentary scrutiny is thought suitable and the negative procedure is appropriate.

Section 24 – Revocation of heat network consent

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

42. Section 24 enables the Scottish Ministers to revoke a heat network consent in such circumstances and manner as may be specified by regulations.

Reason for taking power

43. The Scottish Government envisages that regulations under this section will set out the circumstances which would result in the revocation of a heat network consent and the procedure to be followed to revoke a consent. The particular circumstances of, and the procedure for, revocation will require detailed consultation with stakeholders and cannot be determined at this time. This regulation-making power will provide the Scottish Ministers with some flexibility to prescribe the circumstances and the procedure following further consultation with stakeholder and will enable the Scottish Ministers to take into account factors which are not currently apparent, but may become relevant as the heat network sector in Scotland matures. The power will also afford greater flexibility to modify the circumstances in which (and the manner in which) a heat network consent may be revoked should the need arise to take account of the evolving heat network market.

Choice of procedure

44. The regulations to be made under this power are of a procedural and technical nature and as such the negative procedure is considered to provide an appropriate level of Parliamentary scrutiny.

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Section 25(1) – Compensation on modification or revocation of heat network consent

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

45. Section 25 provides the Scottish Ministers with a power to make regulations about the compensation payable to a person following the revocation or modification of a heat network consent. Regulations under this section may, in particular, make provision for the circumstances in which compensation is payable, the calculation of compensation, and the procedure for claiming compensation and the review and appeal of decisions made under the regulations.

Reason for taking power

46. The detail in relation to the payment of compensation and the procedures by which compensation is to be claimed and assessed is at a level appropriate to regulations rather than being set out in primary legislation. This will also allow for greater flexibility in the event that amendment to the compensation provisions is required.

Choice of procedure

47. The power to make provision by regulations in respect of compensation payments will directly affect heat network consent holders and should therefore be subject to close scrutiny by the Parliament. The affirmative procedure is therefore considered to be the appropriate level of Parliamentary scrutiny.

Section 27(1) – Regulations about determining applications under Part 2

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

48. Section 27 enables the Scottish Ministers, by regulations, to determine the procedure the consenting authority must follow in

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determining whether to grant a heat network consent application (or modification). Regulations under this section may, in particular, make provision for the consideration to be given to the likely environmental effects of the construction or the operation of a heat network. The Scottish Ministers may also determine the way in which the outcome of a heat networks licence application should be published and the applicant notified.

Reason for taking power

49. The heat network consent application procedure will be a new process for both the consenting authority and for market participants, so further consultation with stakeholders is desired to ensure a proportionate approach. It is desirable to retain flexibility for the consenting authority to change its approach, as this may become necessary in future depending on the pace of deployment of heat networks in Scotland or any issues in the sector which may emerge in time.

Choice of procedure

50. The regulations are to make detailed provisions about processes to be followed by the licensing authority and market participants and it is expected that these will be uncontroversial in nature. In the circumstances, the Scottish Government considers that it is appropriate for the regulations to be subject to the negative procedure.

Section 28(b) – Meaning of “enforcement authority”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

51. Section 28 is concerned with the identification of the enforcement authority for the purposes of Part 2 of the Bill (i.e. the person who will administer the heat network consent process and who will monitor and enforce the conditions associated with heat network consents). Paragraph (a) enables the Scottish Ministers to take on this role, with paragraph (b) providing for the Scottish Ministers to designate by regulations any other person as the enforcement authority.

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Reason for taking power

52. Regulations made under this section are intended to allow the Scottish Ministers to retain flexibility regarding the designation of the enforcement authority for the purposes of Part 2 of the Bill. For example, it may be that, in time, the administration of enforcement functions is better achieved by a third party, particularly if it becomes appropriate for the person taking on the functions of the enforcement authority to also be responsible for the functions of the licensing authority, given that both persons will be undertaking the administration of regulatory functions in the same market.

Choice of procedure

53. It is considered appropriate that this power should be subject to the affirmative procedure in order to allow the Parliament a high level of scrutiny in relation to the designation of the enforcement authority responsible for the exercise of important functions of the enforcement authority under Part 2 of the Bill.

Section 32(1) – Appeals against enforcement notice

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

54. Section 32(1) confers power on the Scottish Ministers to, by regulations, make provision for or about appeals against enforcement notices, and sets out the matters which the regulations may make provision for, including who may appeal, the grounds of appeal and the way in which appeals are to be made.

Reason for taking power

55. Regulation-making powers in relation to appeals against enforcement notices are necessary given that, under section 28, the person acting as the enforcement authority in relation to heat networks, if not the Scottish Ministers, may be designated by regulations. Flexibility is therefore needed to identify the appropriate appeals process both in the circumstances where the Scottish Ministers are the enforcement authority and in the circumstances where another person has been designated as such.

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Choice of procedure

56. This is a detailed procedural issue, and as such, the negative procedure provides an appropriate level of Parliamentary scrutiny.

Section 35(2) – Deemed planning permission on granting or modifying heat network consent

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

Provision

57. Section 35 of the Bill amends section 57 of the Town and Country Planning (Scotland) Act 1997 and inserts new subsections (2C) and (2D). Subsection (2C) provides that, on granting or modifying a heat network consent under section 20(1)(a) or 23(1) of the Bill, the Scottish Ministers may give a direction for planning permission to be deemed to have been granted, subject to conditions (if any) to be specified in the direction. Planning permission will be granted under subsection (2C) for so much of the operation or change of use to which the consent relates as constitutes development and for any development ancillary to the operation or change of use.

58. Subsection (2D) provides that, on modifying a heat network consent under section 23(1) of the Bill, the Scottish Ministers may give a direction(s) (instead of, or as well as a direction under subsection (2C)) to vary an existing planning permission deemed to be granted under subsection (2C) and/or to vary conditions attached to an existing planning permission deemed to be granted.

Reason for taking power

59. Section 35 is intended to provide that a single planning regime will apply to heat network developments in order to reduce the administrative burden on the sector whilst also ensuring sufficient scrutiny of proposed developments. Deemed planning permission will be granted on a case-by-case basis and it is therefore impractical to specify which heat networks, or categories thereof, should be granted for on the face of the Bill.

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Choice of procedure

60. The number of heat network consent applications that will be made (and therefore the number of developments to which the Scottish Ministers may direct planning permission to be deemed to have been granted) is indeterminable. However, it is estimated that there are currently over 830 heat networks operating in Scotland and it would clearly create a significant burden on the Scottish Parliament for it to scrutinise whether deemed planning permission should be granted on a case-by-case basis. Since the power is to be used in relation to individual cases, it is appropriate that it is implemented by Ministerial direction.

Part 3 – Heat network zones

Section 38(6) – Duty on a local authority to review heat network zoning in area

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

61. Section 38(1) places a duty on local authorities to carry out a review to consider whether one or more areas in its area has the potential to be designated as a heat network zone. Subsection (5) requires local authorities, following such a review, to publish a statement stating what it has decided and the reasons for its decision. Subsection (6) confers power on the Scottish Ministers, by regulations, to specify the information that must be included in the statement, how it is to be published, the persons to whom copies of the statement are to be sent and such other requirements relating to the statement that they consider appropriate.

Reason for taking power

62. Statements made by local authorities as required by this section, in relation to the identification and designation of heat network zones and the reasons for such decisions, can provide helpful information to the heat network sector regarding the opportunities for heat network development in Scotland. The Scottish Government would like the designation of heat network zones to be undertaken as comprehensively as possible across Scotland by local authorities and local authority statements will help ensure that sufficient consideration is given to the opportunities for heat network zone designation in each local authority area. It would not be appropriate to

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set out the detailed requirements of such statements on the face of the Bill and a regulation-making power is considered to be a more suitable mechanism for this. A regulation-making power would also afford flexibility to amend the information to be included in such a statement and the procedure associated with it should the need arise as the process of heat network zoning evolves.

Choice of procedure

63. The choice of the negative procedure and attendant level of scrutiny reflects the administrative nature of the power, the exercise of which will not significantly alter the duties placed on local authorities under this section.

Section 39(1)(e) – Designation of a heat network zone by local authority

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

64. Section 39 sets out the list of matters that a local authority must consider when deciding whether to designate an area in its area as a heat network zone, including the potential for use of a heat network of thermal energy generated from renewable sources and the nature and extent of existing infrastructure that could assist in the development of a heat network. Subsection (1)(e) allows the Scottish Ministers, by regulations, to specify any other matters that must be considered.

Reason for taking power

65. The matters that the Bill states must be considered in determining whether to designate a heat network zone are based on the Scottish Government's current understanding of some of the parameters required for a viable heat network project to emerge. However, it may be that, as heat network technology advances and as the Scottish Government considers policies to achieve statutory climate change targets, other matters will affect the viability of heat network projects in the future. A regulation-making power will allow the Scottish Ministers to take these developments into account and require local authorities to consider them when deciding whether to designate a heat network zone.

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Choice of procedure

66. The choice of the negative procedure and attendant level of scrutiny reflects the administrative nature of the power, the exercise of which will not significantly alter the duties placed on local authorities under this section.

Section 39(2) – Designation of a heat network zone by local authority

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

67. Section 39(2) requires local authorities to consult such persons in such a manner as the Scottish Ministers may specify, by regulations, before deciding whether to designate an area within its area as a heat network zone.

Reason for taking power

68. Further consideration and discussion with stakeholders is required to identify the appropriate consultees, and over time, it may be necessary to amend the list of persons who are required to be consulted. The power therefore allows the flexibility to determine the relevant consultees and enables the list of specified persons to be amended from time to time if required.

Choice of procedure

69. In light of the administrative nature of this power, the negative procedure is considered appropriate.

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70. Section 39(4)(c) – Designation of a heat network zone by local authority

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

71. Where the local authority chooses to designate a heat network zone, subsection (4) provides that the local authority must identify the area in a document with reference to a map and specify the date on which the designation takes effect. Subsection (4)(c) requires this document to be published in a manner that the Scottish Ministers may specify by regulations.

Reason for taking power

72. The requirements specified regarding the manner in which a heat network zone is to be published must be flexible enough to be amended through time, for example to take into account changes in technology or public preferences. The Scottish Ministers should therefore have reasonable powers to set out and amend the publication requirements under this section.

Choice of procedure

73. The detail within the regulations is likely to be procedural in nature. As such, it is considered appropriate for these regulations to be subject to the negative procedure in order to make best use of Parliamentary time.

Section 41(3) – Variation of heat network zone by local authority

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

74. Section 41 provides a power for a local authority to vary the boundaries of a heat network zone that it has previously designated itself, and sets out the matters which a local authority must consider when considering such a variation. Subsection (3) requires the local authority to

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consult such persons and in such manner as the Scottish Ministers may specify by regulations.

Reason for taking power

75. It may become necessary or desirable to amend the list of persons who are required to be consulted as part of the determination to vary a heat network zone. The power allows the flexibility to determine the relevant consultees and enables the list of prescribed persons to be amended from time to time if required.

Choice of procedure

76. In light of the administrative nature of this power the negative procedure is considered appropriate.

Section 41(5)(c) – Variation of boundary of heat network zone by local authority

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

77. Section 41 provides a power for a local authority to vary the boundary of a heat network zone that it has previously designated itself. Where the local authority chooses to vary the boundary of a heat network zone, subsection (5) provides that the local authority must document this by reference to a map and specify in the document the date on which the variation will take effect. Subsection (5)(c) requires that the document must be published in a manner that the Scottish Ministers may, by regulations, specify.

Reason for taking power

78. The publication requirements in relation to documents under this section will be largely an administrative matter, the detail of which will be more appropriately delivered through secondary legislation. A regulation making power will also allow flexibility for the requirements to be amended from time to time, as required.

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Choice of procedure

79. The detail within the regulations is likely to be procedural in nature. As such, it is considered appropriate for these regulations to be subject to the negative procedure to achieve the best balance of Parliamentary time and resource on the one hand and the nature of the content of the regulations on the other.

Section 44(1)(a), (2) and (4) – Ministerial power of direction to designate or vary heat network zone

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

Provision

80. Section 44(1) allows the Scottish Ministers to direct a local authority to designate or vary the boundary of a heat network zone in its area. Subsection (2) enables the Scottish Ministers to direct two or more local authorities to jointly designate a heat network zone, while subsection (4) allows the Scottish Ministers to direct each of the local authorities involved in jointly designating a zone, to jointly vary the boundary of that zone.

Reason for taking power

81. It may be necessary for the Scottish Ministers to intervene in order to designate or vary a heat network zone. For example, where a local authority has carried out a review to consider whether one or more areas in its area has the potential to be designated as a heat network zone, under section 38, and chooses not to, the Scottish Ministers may, after making their own assessment, be of the view that there is a clear opportunity for a heat network zone to be designated and can use this direction-making power to instruct the local authority to do so. Taking the power to give a direction to the local authority enables the Scottish Ministers to take a flexible and proportionate action to do so when required.

Choice of procedure

82. The decision as to when a direction under section 44 should be made will depend on the facts and circumstances of each case and as such, it is not possible to predict or specify precisely the kinds of situation in which a direction might be issued on the face of the Bill. The procedure to trigger a direction by the Scottish Ministers would arise from circumstances which

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are unique a local level. Since the power is to be used in relation to individual cases, it is appropriate that it is implemented by direction. Ministerial directions are not subject to Parliamentary scrutiny.

Section 45(1) – Guidance

Power conferred on: the Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: none

Provision

83. Section 45 enables the Scottish Ministers to issue guidance about the designation and variation of heat network zones by local authorities. Local authorities must have regard to any such guidance when exercising their functions under Part 3 of the Bill. Guidance may be addressed to one or more local authorities or to all local authorities and must be published in a manner the Scottish Ministers consider appropriate.

Reason for taking power

84. The Scottish Ministers consider it would be appropriate to issue guidance to local authorities about the exercise of their new powers under Part 3. The Scottish Government has worked with local authorities to trial zoning for various heat decarbonisation technologies (including heat networks) as part of the Local Heat and Energy Efficiency Strategy (LHEES) pilots. This process has provided evidence that the practice of zoning varies significantly between authorities. Guidance can promote both consistency and good practice.

Choice of procedure

85. This is an administrative power of the Scottish Ministers to issue guidance to local authorities which local authorities must have regard to in exercising their functions under Part 3 of the Bill. The Scottish Ministers are required under subsection (4) to publish any guidance issued to ensure transparency.

Part 4 – Heat network zone permits

Section 46(b) – Meaning of “permit authority”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

86. Section 46 is concerned with the identification of the permit authority for the purposes of the Bill (i.e. the person(s) who will issue notices for heat network zone permits, and subsequently assess and award permit applications). Paragraph (a) enables the Scottish Ministers to take on the role of permit authority, unless the Scottish Ministers designate any other person as the permit authority by regulations made under paragraph (b).

Reason for taking power

87. The creation and implementation of heat network zone permits will be a new function of the public sector in Scotland. This is likely to result in resource implications which it is felt is best to be met by the Scottish Ministers, through the Scottish Government in the first instance. This approach will also allow for consistency to be created across Scotland as the ability to operate heat networks in certain heat network zones is initially competed for and implemented. However, as the understanding of the permit process and its administration develops over time, it may be that local authorities take on this role. As such, the regulations enable this to occur without the need to amend primary legislation in future.

Choice of procedure

88. It is considered appropriate that this power should be subject to the affirmative procedure in order to allow the Parliament a high level of scrutiny of the question of which person should be responsible for these important functions.

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Section 47(2)(a) and (b)– Requirement for heat network zone permit

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

89. Section 47(1) provides that the permit authority may by notice provide that no person may operate a heat network in a particular heat network zone, without a permit other than in circumstances specified by the Scottish Ministers by regulations, or if any procedure has not been complied with (subsection (2)).

Reason for taking power

90. The creation of heat network zone permits is viewed by the Scottish Government as critical to the growth of the market but, in order to ensure that they are granted on a competitive basis, the procedures for awarding them will need to be robust. Further consultation with stakeholders is therefore desired to ensure that they are implemented appropriately. It is desirable to retain flexibility for this to be changed in future, as may become necessary, given that this is a new process for which the permit authority will have responsibility.

Choice of procedure

91. The regulations are to make detailed provisions about processes to be followed by the permit authority and it is expected that these will be uncontroversial in nature. In the circumstances, the Scottish Government considers that it is appropriate for the regulations to be subject to the negative procedure.

Section 47(4)(a) and (b) – Requirement for heat network zone permit

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

92. Section 47(1) provides that the permit authority may by notice provide that no person may operate a heat network in a particular heat network zone, without a permit. Subsection (3) enables the permitting authority to revoke a notice which it has issued. However, subsection (4) prevents the permit authority from revoking a notice in circumstances specified by the Scottish Ministers by regulations, or if any procedure has not been complied with.

Reason for taking power

93. As with regulations made under section 47(2), further consultation with stakeholders is required to ensure that the processes for awarding heat network zone permits are appropriate. This is particularly important in instances where a notice seeking to award a permit is to be revoked, as such a revocation may be detrimental to market participants who may have incurred costs in the preparation of the application to that point. The award of heat network zone permits will be a new procedure and the process may need to be amended over time. The circumstances that may result in the revocation of a permit and point at which a notice from the permit authority may be revoked is also likely to require to be amended.

Choice of procedure

94. The regulations are to make detailed provisions about processes to be followed by the permit authority and it is considered uncontroversial in nature. In the circumstances, the Scottish Government considers that it is appropriate for the regulations to be subject to the negative procedure.

Section 47(5) – Requirement for heat network zone permit

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

95. Section 47(1) provides that the permit authority may by notice provide that no person may operate a heat network in a particular heat network zone, without a permit and subsection (3) enables the permit authority to revoke such a notice in certain circumstances. Under subsection (5), the permit authority is required to publish the notice and give notice of any revocation of the notice in a form and manner to be specified in regulations by the Scottish Ministers.

Reason for taking power

96. The requirements specified regarding the form and manner in which a notice or revocation of a notice is to be published must be flexible enough to be amended through time, for example to take into account changes in technology or public preferences. The publication requirements will be largely an administrative matter the detail of which will be more appropriately delivered through secondary legislation. A regulation-making power will also allow some flexibility for the requirements to be amended from time to time as required.

Choice of procedure

97. The detail within the regulations is likely to be procedural in nature. As such, it is considered appropriate for these regulations to be subject to the negative procedure to achieve the best balance of Parliamentary time and resource on the one hand and the nature of the content of the regulations on the other.

Section 48(1) – Applications for heat network zone permit

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

98. Section 48 enables the Scottish Ministers, by regulations, to set out the processes for inviting, making and determining applications for a heat network zone permit. Subsection (2) sets out the matters which the regulations, may in particular, make provision about including how the permit authority is to invite permit applications and the persons who may apply for a permit. Subsection (3) enables the processes for inviting, making and determining applications for a heat network zone permit to vary between different heat network zones.

Reason for taking power

99. These regulations are likely to set out how applications for a heat network zone permit are to be made, the information that the applicant has to provide, and the manner in which the applications are to be determined. The creation and implementation of heat network zone permits will be a new process for both the permitting authority and for market participants. As such, it is possible that in time, the information to be provided and the manner in which applications should be made, may require to be changed to help facilitate the application process.

100. In addition, given that the development opportunity potential of a heat network zone (and the potential climate change and fuel poverty outcomes that may be expected) is likely to vary depending on its geographical location, it may be necessary to adapt the process and manner in which applications should be made and assessed for heat network zone permits in different areas. It is not possible to determine the various processes for inviting, making and determining applications for such permits at this stage, and a regulation-making power will provide the ability to make changes to these processes without the need to amend primary legislation.

Choice of procedure

101. Considering the breadth of the matters the Scottish Ministers may provide for under this section and the importance of these processes to the regulation of the heat networks sector it is considered that the affirmative procedure affords an appropriate level of scrutiny.

Part 5 – Building assessment reports

Section 52(3) – Building assessment reports

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

102. Section 52 requires that a relevant person must provide a report which provides an assessment of the potential for each non-domestic building it has an interest in to connect to a heat network. The report must also provide confirmation of the expected lifespan of each non-domestic building's current heating system. Subsection (3) requires that such reports are undertaken in such a manner, and at such intervals, as the Scottish Ministers may determine by regulations.

Reason for taking power

103. The requirements specified regarding the manner in which a building assessment report is to be undertaken must be flexible enough to be amended through time, for example to take into account changes in heat network technology. These requirements will be largely administrative in nature and the relevant details will be more appropriately delivered through secondary legislation.

104. Building assessment reports are intended to inform the designation of heat network zones, and as such it will be necessary to ensure that any intervals at which they are to be conducted supports the effective implementation of other provisions within the Bill. It is also desirable for the intervals at which building assessment reports must be undertaken to be readily amended to reflect the pace at which the supply of heat to Scotland's building stock is being decarbonised.

Choice of procedure

105. The detail within the regulations is likely to be procedural and technical in nature. As such, it is considered appropriate for these regulations to be subject to the negative procedure to achieve the best balance of Parliamentary time and resource on the one hand and the nature of the content of the regulations on the other.

Section 52(4) – Building assessment reports

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

106. Section 52 requires that a relevant person must provide a report which provides an assessment of the potential for each non-domestic building it has an interest in to connect to a heat network. “Relevant person” is defined in section 56 as a Scottish public authority within the meaning of section 3(1)(a) of the Freedom of Information (Scotland) Act 2002 and such other person, or person of such description, as the Scottish Ministers may specify by regulations (see below for details on this regulation-making power). Subsection (4) provides that a relevant person has an interest in a non-domestic building if that person owns the building or has such other interest in the building as may be specified by the Scottish Ministers by regulations.

Reason for taking power

107. The overarching duty is potentially wide-ranging in its impact and must strike the balance between having a meaningful impact and not overburdening building owners, or persons with other specified interests in non-domestic buildings. The duty would initially be placed on public authorities with a right of ownership in a non-domestic building (in recognition of the ‘anchor load’ their buildings can potentially offer to a heat network project). However, flexibility is required to be able to provide for the duty to be extended to interests other than ownership in the future.

Choice of procedure

108. This power will allow the Scottish Ministers to specify interests, other than ownership, which will trigger the requirement for a relevant person to prepare a building assessment report in accordance with section 52(1). Given the administrative nature of the power, the Scottish Government considers that the negative procedure provides an appropriate level of Parliamentary scrutiny in the exercise of this power.

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Section 53(1) – Exemptions from duty to prepare building assessment reports

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

109. Section 53 enables the Scottish Ministers, by regulations, to provide exemptions from the requirement to prepare building assessment reports. Exemptions may apply to specified relevant persons and relevant persons of a specified description (as opposed to exemptions in respect of a building, which is provided for in subsection (2)).

Reason for taking power

110. It is considered appropriate to specify exemptions through regulations rather than on the face of the Bill as the provisions in respect of exemptions that relate to persons may well need to change over time as the market develops. For example, the way in which persons use a building could create a minimal level of expected heat demand (or expected profile of heat demand) which would warrant them being exempted from the duty.

Choice of procedure

111. The choice of the negative procedure reflects the fact that the power will disapply the existing duty to prepare building assessment reports from persons specified in the regulations rather than applying a new duty on persons. On that basis a lesser degree of Parliamentary scrutiny is thought suitable and the negative procedure is considered appropriate.

Section 53(2) – Exemptions from duty to prepare building assessment reports

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

112. Subsection (2) allows the Scottish Ministers by regulations to provide exemptions from the requirement to prepare building assessment reports

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for specified non-domestic buildings or non-domestic buildings of a certain type.

Reason for taking power

113. It is considered appropriate to specify exemptions through regulations as the types of buildings which can support the viability of a heat network may change over time, in light of changes to wider heat demand and supply in Scotland, the development of heat network technology, or the deployment rate of heat networks in the future. For example, it may be that those buildings without a certain level of expected heat demand (or expected profile of heat demand) could be exempted from the duty. Much of the detail relating to exemptions under this power is likely to be technical in nature and therefore better suited to subordinate legislation.

Choice of procedure

114. The choice of negative procedure reflects the fact that the power will not impose any additional obligations on market participants. On that basis a lesser degree of Parliamentary scrutiny is thought suitable and the negative procedure is considered appropriate.

Section 55(1) – Guidance about building assessment reports

Power conferred on: the Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: none

Provision

115. Section 55 provides that the Scottish Ministers may issue guidance about the preparation of building assessment reports. The guidance is to be published in a manner that the Scottish Ministers consider appropriate and relevant persons are to have regard to any guidance issued.

Reason for taking power

116. While the production of building assessment reports is envisaged to be light-touch, the Scottish Ministers recognise that this will be a new process for building owners etc. and as such it is appropriate to retain the ability to issue guidance which persons preparing reports must have regard to with a view to ensuring consistency of approach in the preparation of these reports.

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Choice of procedure

117. This is an administrative power of the Scottish Ministers to issue guidance to relevant person who must have regard to the guidance in preparing building assessment reports. The guidance is intended to complement the regulation-making powers and can be used to describe best practice and set out examples. It may be necessary to address the guidance, or different parts of it, to different persons or in relation to different building types. There are a broad range of building types, capacity and resourcing to undertake Building Assessment Reports and as such guidance is felt to be more proportionate than regulations as they may allow more flexibility of approach. The Scottish Ministers are required under subsection (3) to publish any guidance issued to ensure transparency.

Section 56 – Interpretation of Part 5 – definition of “relevant person”

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

117. Section 52 requires that a relevant person must provide a report which provides an assessment of the potential for each non-domestic building it has an interest in to connect to a heat network. “Relevant person” is defined in section 56 as a Scottish public authority within the meaning of section 3(1)(a) of the Freedom of Information (Scotland) Act 2002, and such other person, or persons of such description as the Scottish Ministers may specify by regulations.

Reason for taking power

118. The duty under section 52(1) would initially be placed on public authorities as relevant persons, however flexibility is required to be able to amend the definition of “relevant person” to expand the scope of the duty to other persons if required. This may be required, for example, should the rate of deployment of heat networks in Scotland not be sufficient to meaningfully contribute to Scotland’s climate change targets. A regulation-making power in this context would afford that flexibility.

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Choice of procedure

119. The power to change the meaning of “relevant persons” is to be subject to the negative procedure so as to strike a balance between the use of Parliamentary time and resource on one hand and the content of regulations on the other. The Scottish Parliament overwhelmingly passed the Climate Change (Emissions Reduction Targets) Act 2019 which places a statutory duty on Scotland to reach net-zero greenhouse gas emissions by 2045. It is therefore felt that the Scottish Parliament would accept that powers such as that under Part 5 may be necessary to reach these targets, but the negative procedure allows sufficient opportunity for scrutiny of the exercise of this power (but without requiring a positive vote by the Parliament in favour of it).

Part 6 – Powers of licence holders

Section 63(5) – Compensation in connection with network wayleave rights

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

120. Section 63 provides that where a necessary wayleave is granted to a licence holder under section 59(1), the occupier (and where the occupier is not also the owner, the owner) may recover compensation from the licence holder. Subsection (2) makes provision for compensation to be paid in the event that a licence holder causes damage to land (or property situated on it) or disturbs a person’s enjoyment of the land, in exercising a network wayleave right. Subsection (5) enables the Scottish Ministers to make further provision about compensation payable under section 63.

Reason for taking power

121. The detail in relation to the payment of compensation and the procedures by which compensation is to be claimed and assessed is at a level appropriate to regulations rather than being set out in primary legislation. This will also allow for greater flexibility in the event that amendment to the compensation provisions is required.

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Choice of procedure

122. The power to make provision by regulations in respect of compensation payments will directly affect owners and occupiers of land and should therefore be subject to close scrutiny by the Parliament. It is therefore considered that the affirmative procedure affords the appropriate level of Parliamentary scrutiny.

Section 67(4) – Compensation for damage or disturbance

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

123. Section 67 makes provision for compensation to be paid in the event that a licence holder (or a person authorised by a licence holder) causes damage to land (or property situated on it) in exercising its right to conduct a survey (under section 64) or in exercising its right to enter land to install, replace repair etc. apparatus (under section 65). Subsection (4) enables the Scottish Ministers to make further regulations regarding the payment of compensation under this section.

Reason for taking power

124. The detail in relation to the payment of compensation and the procedures by which compensation is to be claimed and assessed is at a level appropriate to regulations rather than being set out in primary legislation. This will also allow for greater flexibility in the event that amendment to the compensation provisions is required.

Choice of procedure

125. The power to make provision by regulations in respect of compensation payments will directly affect owners and occupiers of land and should therefore be subject to close scrutiny by the Parliament. It is therefore considered that the affirmative procedure affords the appropriate level of Parliamentary scrutiny.

Part 7 – Key heat network assets

Section 69(5)(d) – Identifying key heat network assets

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

126. Section 69 sets out that as part of a heat network consent application (or consent modification application), an applicant must identify and provide details about the “key assets” of the heat network in question. A “key asset” in relation to a heat network, means certain property which forms part of the heat network and is necessary to the operation of the heat network. Subsection (5) provides a list of the types of property that would constitute a key asset, and subsection (5)(d) enables the Scottish Ministers to specify other types of property by regulations.

Reason for taking power

127. It may be that through technological advancement, other types of property forming part of a heat network or necessary for its operation are considered to be a key asset. A regulation-making power will allow the Scottish Ministers to respond to such future developments thereby ensuring that the transfer scheme process which is fundamental to the regulatory framework (and which is enabled by the identification of key assets) can continue to operate effectively.

Choice of procedure

128. The question of whether a particular type of property should be a key asset which forms part of the heat network and is necessary to the operation of the heat network, is a technical and administrative matter. It is therefore considered appropriate that regulations made under subsection (5)(d) should be subject to negative procedure, which will achieve the best balance between use of Parliamentary time and resource in the one hand and the content of the regulations on the other.

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Section 70(6) – Preparing schedule of key heat network assets

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

129. Section 70 requires the Scottish Ministers to prepare a schedule that includes details of each key asset of a heat network, following receipt of an application for a heat network consent (or to an application seeking modification of a consent). Before including the details of the property in the schedule of key assets, the Scottish Ministers must notify each person with an interest in the property and such other persons they consider appropriate, of the proposal. Additionally, should the Scottish Ministers proceed to add a key asset to the schedule of heat network assets, then subsection (5) requires the Scottish Ministers to notify those persons with an interest in the property of this decision. Subsection (6) enables the Scottish Ministers to set out the form and manner of notifications under subsections (3) and (5) by regulations.

Reason for taking power

130. The creation and implementation of schedules of heat network assets will be a new process for both the Scottish Ministers and for market participants. It is therefore desirable to retain some flexibility for the Scottish Ministers to change their approach to notifications under subsections (3) and (5).

Choice of procedure

131. The regulations are to make detailed provisions about the form and manner of notification to be followed by the Scottish Ministers. Given the administrative nature of the power, the Scottish Government considers that the negative procedure affords the appropriate level of Parliamentary scrutiny.

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Section 72(6) – Modifying schedule of key heat network assets

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

132. Section 72 provides that if the Scottish Ministers consider that property that is not a listed asset has become a key asset, they must include details of the property in the schedule of key assets. Before including details of property in the schedule of heat network assets, subsection (3) requires the Scottish Ministers to notify each person with an interest in the property (and such other persons as the Scottish Ministers consider appropriate) of their proposal to add the property. In the event that property listed as a key asset ceases to be a key asset, then the Scottish Ministers must remove this property from the schedule and before doing so must notify each person with an interest in the key asset (subsection 5). Subsection (6) enables the Scottish Ministers to give notice under subsection (3) and (5) in such form and manners as they may specify by regulations.

Reason for taking power

133. The creation and implementation of schedules of heat network assets will be a new process for both the Scottish Ministers and for market participants. It is therefore desirable to retain some flexibility for the Scottish Ministers to change their approach to notifications as this may become necessary in future.

Choice of procedure

134. The regulations are to make detailed provisions about processes to be followed by the Scottish Ministers. Given the administrative nature of the power, the Scottish Government considers that the negative procedure affords the appropriate level of Parliamentary scrutiny.

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Section 73 – Preparation and maintenance of schedule of key network assets: further provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative procedure

Provision

135. Section 73 enables the Scottish Ministers to make further provision about the procedure to be followed in connection with the preparation and maintenance of schedules of key heat network assets.

Reason for taking power

136. This power is likely to be used to provide more details on the process to be followed before the Scottish Ministers decide whether to include details of property in a schedule of key network assets (which necessarily involves making a determination as to whether the property is a key asset of the heat network concerned). This power could also be used to specify the detail regarding the procedure relating to the process for revising the list of key assets that appear on a schedule. As these processes will contain a significant level of administrative detail, it is considered appropriate that they be dealt with through secondary legislation rather than on the face of the Bill. It may also be necessary to amend the procedure to be followed from time to time and a regulation making power will provide the flexibility to do so.

Choice of procedure

137. As the matters are largely administrative in nature, the Scottish Government considers that it is appropriate for the regulations to be subject to the negative procedure.

Section 74(4) – Transfer schemes

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

138. Section 74 provides the Scottish Ministers with the ability to make a transfer scheme to ensure preparedness in the event that a heat network

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operator can no longer provide thermal energy to end users through a heat network. Subsection (4) confers a broad power on the Scottish Ministers to make further provision about transfer schemes.

Reason for taking power

139. Transfer schemes may be necessary in two broad circumstances: firstly, where a heat network operator can no longer operate the network (through, e.g. the revocation of licence, or liquidation) and the Scottish Ministers want to ensure the continued supply of heat to end users; and secondly, where a heat network zone permit has expired and a competition is to be held to award a new permit.

140. Subsection (4) enables the Scottish Ministers to make further provision about transfer schemes by regulations. The regulations may in particular make provision for matters set out in subsection (5), including the rights that may be transferred or conferred by a transfer scheme and the procedure applying in connection with the making of a transfer scheme. The Scottish Government wishes to undertake further consultation with stakeholders in respect of the application of a transfer scheme to understand how it can be effectively implemented in practice. Given the technical nature of the matters the Scottish Ministers may require to make provision for, it is likely that provisions in respect of transfer schemes will be detailed and may be subject to regular amendment. It is therefore considered appropriate for such provision to be contained in secondary legislation rather than on the face of the Bill.

Choice of procedure

141. Given the broad nature of this power, it is considered that the affirmative procedure affords the appropriate level of Parliamentary scrutiny.

Section 75(1) – Compensation in connection with transfer schemes

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

142. Section 75 enables the Scottish Ministers, by regulations, to make provision about the payment of compensation in connection with transfer

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schemes. Subsection (2) sets out the matters which may be considered in any such regulations.

Reason for taking power

143. The detail in relation to the payment of compensation and the procedures by which compensation is to be claimed and assessed is at a level appropriate to regulations rather than being set out in primary legislation. This will also allow for greater flexibility in the event that amendment to the compensation provisions is required.

Choice of procedure

144. The power to make provision by regulations in respect of compensation payments will directly affect heat network operators and should therefore be subject to close scrutiny by the Parliament. It is therefore considered that the affirmative procedure provides the appropriate level of Parliamentary scrutiny.

Part 8 – Miscellaneous and general

Section 77(1) – Fees for applications etc.

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

145. Section 77(1) allows the Scottish Ministers, by regulations, to make provision for the payment of a charge or fee for the administration of heat networks licences, Heat network consents and heat network zone permits. This section is intended to enable the recovery of costs incurred by the Scottish Ministers, the licensing authority, the consenting authority and the permit authority in carrying out their functions under the Bill.

Reason for taking power

146. Fees for licences, consents or permits could be set in relation to a number of factors, for example, based on the size of the heat network (by number of end users served or by generation capacity), asset ownership or in respect of a scheme's classification as district or communal heating. The level of detail for the system of fees is such that it is more suited to secondary legislation than primary legislation. In addition, the Scottish

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Ministers need to be able to amend the levels of fees which may be applied as matters such as inflation may result in the need to vary these. The administration of the licensing, consenting and permitting processes will also create additional cost for the Scottish Ministers (and any body it may subsequently designate to undertake any of these functions). The Scottish Government's view is that any such charges should be cost-reflective but as noted in the Financial Memorandum, there is a broad range of expected licence fee costs. Therefore at this stage it is felt most suitable to set such fees by regulation, and this will also enable them to be more readily amended in future.

Choice of procedure

147. The regulations under this section will be subject to the negative procedure since they are likely to be largely administrative in nature and it is considered that this strikes a balance between the use of Parliamentary time and resource on one hand and the nature and content of the regulations on the other.

Section 82(1) – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: the affirmative procedure if amending primary legislation, otherwise the negative procedure

Provision

148. Section 82 provides the Scottish Ministers with the power to make, by regulations, such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate in connection with or for giving full effect to the Bill.

Reason for taking power

149. This power is necessary to allow flexibility to address circumstances that may arise in light of experience of the operation of the Bill. This is particularly relevant where new regulatory regimes are being set up and their operation has not been tested.

150. The power is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate for the purposes of, in connection with, or for giving full effect to the Bill. Several of the Bill's provisions are inserted into or interact with other processes or legislation. While the

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Scottish Government has given careful consideration to such interaction, there may be unforeseen matters which require the assistance of this ancillary power in order to ensure the proper effect of the Bill is realised.

Choice of procedure

151. Regulations made under this section which contain a provision which adds to, omits or replaces any part of an Act are subject to the affirmative procedure. Otherwise, regulations made under this section are subject to the negative procedure. This approach is normal for ancillary powers of this type.

Section 84(2) – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

Provision

152. Section 84 allows the Scottish Ministers to make regulations appointing the days on which the provisions (other than those set out in subsection (1)) of the Bill come into force.

Reason for taking power

153. It is usual practice for such commencement provisions to be dealt with by subordinate legislation and in this case, the Scottish Ministers consider it appropriate for the substantive provisions of the Bill to be commenced at such day as they consider appropriate. This will allow subordinate legislation and guidance to be put in place and for users of the legislation to have time to prepare before the new arrangements come into effect.

Choice of procedure

154. The power is subject to the default laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. This is typical for commencement regulations.

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Heat Networks (Scotland) Bill

Delegated Powers Memorandum

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