

# Heat Networks (Scotland) Bill

[As Amended at Stage 2]

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## Supplementary Delegated Powers Memorandum

### Purpose

1. This supplementary memorandum has been prepared by the Scottish Government in accordance with rule 9.7.10 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Heat Networks (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament. This supplementary memorandum should be read in conjunction with the original Delegated Powers Memorandum published to accompany the Bill on introduction.

### Provisions conferring power to make subordinate legislation introduced or amended at Stage 2

3. The amended or new delegated powers in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate

## **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**

### **Provision**

4. Subsection (7) of section 1 has been amended so that “thermal energy” is added to the terms whose definition may be amended or further defined, by regulations, under subsection (7).

### **Reason for taking power**

5. Regulations made under this section are intended to enable the Scottish Ministers to modify definitions, so that future developments in heat network technology can be taken into account. This would enable the provisions of the Act to apply to any innovative heat network systems, as may be appropriate in future.

6. While the definitions of “heat network”, “district heat network” and “communal heating system” were already subject to modification by regulations under section 1(7), it is considered necessary to be able to amend the meaning of “thermal energy” too on the basis that thermal energy can be distributed through heat networks at ambient temperatures.

### **Choice of procedure**

7. These definitions are central to the Bill as they determine to whom the provisions of the Bill will apply. 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 11(8) – Revocation of heat networks licence**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative procedure**

### **Provision**

8. Section 11 enables the licensing authority to revoke a heat networks licence if the authority considers that the licence holder no longer has the ability to supply thermal energy by means of a heat network, or if the licence holder has failed to comply with a condition of the licence.

### **Reason for taking power**

9. Section 11 specifies some procedural matters that the licensing authority must adhere to prior to revoking a licence.

10. The Bill was amended at Stage 2, to enable regulations to set out further procedures which must be followed in connection with the revocation of a licence. This may be necessary in future, for example, should it be thought appropriate for other persons to be notified of the licensing authority's intention to revoke a licence.

### **Choice of procedure**

11. 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.

12. This is in keeping with the procedure applying to similar powers to be conferred by sections 24(7) and 50(4), which enables similar provision to be made, by regulations, in respect to the revocation of heat network consent and zone permits, respectively.

## **Section 11A(1) – Appeals against revocation of heat networks licence**

**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**

13. Section 11A was added to the Bill by amendment, and provides the Scottish Ministers with power to set out an appeals process for heat networks licence holders whose licence has been revoked by the licensing authority.

### **Reason for taking power**

14. Under section 4(a), the Scottish Ministers will act as the licensing authority (unless another person is appointed as the licensing authority under section 4(b)), and will therefore have the power to revoke heat networks licences. As such, there is not a body to whom appeals against the merits of a decision to revoke a heat networks licence may be appropriately made (i.e. an authority over and above the Scottish Ministers).

15. The Scottish Ministers may designate another person(s), by regulations, as the licensing authority under section 4(b). It is the intention of the Scottish Ministers to do so, at which point, the Scottish Ministers could appropriately hear appeals against the revocation of a licence.

16. However, as the designation of a third-party licensing authority must occur first, it is not possible to specify the appeals process in primary legislation, and regulations must be used instead.

17. Additionally, while section 11A(2) specifies a number of matters that regulations regarding appeals against revocations may include, regulations provide the opportunity to make further provision as may be necessary.

## **Choice of procedure**

18. This is primarily a detailed procedural issue, and as such, the negative procedure would normally provide an appropriate level of Parliamentary scrutiny.

19. However, as section 11A(3) enables regulations under this section to modify an Act, the affirmative procedure will apply where regulations add to, replace or omit any part of the text of an Act. Where regulations contain no such additions, replacement or omissions, the negative procedure applies.

## **Section 18A(1) – Designation of local authority as consent authority for the area of the local authority**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative procedure**

## **Provision**

20. Section 18A was added to the Bill by amendment, and enables the Scottish Ministers, by regulations, to designate a local authority as the “consent authority” for its area.

21. Where a local authority has not been designated as a consent authority for its area, Part 2 of the Bill specifies that the Scottish Ministers will act as such.

## **Reason for taking power**

22. A consent authority is to be responsible for: receiving heat network consent applications; determining applications; attaching any obligations or limitations to heat network consents awarded; agreeing that consent may be transferred to another person; modifying heat network consents; and revoking consent.

23. These responsibilities will create new costs for local authorities, should they become a consent authority. As such, the intention is to allow each

local authority to decide whether they would wish to take on the role of consent authority.

24. Once the intentions of each local authority are known, the regulation-making power provided at section 18A(1) enables the designation of up to 32 individual local authorities to be made efficiently, without the need for further primary legislation.

### **Choice of procedure**

25. As well as creating new costs for local authorities, becoming a consent authority is likely to create a need for new and/or expanded skills and resources.

26. In light of this, and given that section 18A(3) will require the Scottish Ministers to seek the views of the local authority in question before laying these regulations, it is appropriate for the higher level of parliamentary to apply in relation to the designation of a local authority as a consent authority.

### **Section 24(7) – 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**

27. As introduced, section 24 of the Bill provided a broad power for the Scottish Ministers, by regulations, to make provision about the revocation of heat network consent.

28. The Bill was amended at Stage 2 to specify some of some of the procedures to be followed in relation to revocation: the need to give notice of the proposed revocation of consent to a consent holder; and the opportunity for the consent holder to make representations about the proposed revocation.

## **Reason for taking power**

29. Section 24 sets out procedural matters that the consent authority must adhere to prior to revoking a heat network consent.

30. It may be necessary in future to set out further procedures for the consent authority to follow, such as a requirement for other persons to be notified of the consent authority's intention to revoke a heat network consent.

## **Choice of procedure**

31. 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.

32. This is in keeping with the procedure applying to similar powers to be conferred by sections 11A and 50(4), which enable similar provision to be made, by regulations, in respect to the revocation of heat networks licences and zone permits, respectively.

## **Section 24A(3) – Appeals against notice of revocation given by local authority**

**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**

33. Section 24A was added to the Bill by amendment, and provides consent holders with the opportunity to appeal to the Scottish Ministers, where a local authority notifies the consent holder of its intention to revoke a heat network consent.

## **Reason for taking power**

34. The power under subsection (3) to make further provision about the right of appeal to the Scottish Ministers against a notice of revocation given

under section 24(4) by a local authority as consent authority provides the necessary flexibility to develop this appeal process.

35. It will be necessary to tailor the appeals process to the heat network consenting processes of a "consent authority" should local authorities be designated to take these functions. Much of the detail of these processes will be specified by regulation and that is why the power has been take to enable that tailoring in line with any subsequent regulations.

### **Choice of procedure**

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

37. However, section 24A(7) enables regulations under this section to modify an Act (for example, to extend the remit of a tribunal to hear any inquiry or hearing that may be provided for). The affirmative procedure will apply where regulations add to, replace or omit any part of the text of an Act. Where regulations contain no such additions, replacement or omissions, the negative procedure applies.

### **Section 24B(1) – Call-in of heat network consent applications etc. by the Scottish Ministers**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: direction**

**Parliamentary procedure: no procedure**

### **Provision**

38. Section 24B(1) enables the Scottish Ministers to direct that a particular heat network consent application, or particular types of application, be referred by a local authority (acting as the consent authority for its area) to them for their decision. This power is similar to those currently available to the Scottish Ministers in relation to planning applications under section 46 of the Town and Country Planning (Scotland) Act 1997.



## **Reason for taking power**

39. Such a direction would allow the Scottish Ministers, rather than the relevant local authority, from determining a heat network consent application (or other types of applications).

40. While it is not envisaged that this direction would be made regularly, it is necessary to provide the opportunity for Scottish Ministers to make decisions about developments which, for example, raise issues of national importance.

## **Choice of procedure**

41. The power is not subject to any Parliamentary procedure to enable the Scottish Ministers to call-in and determine such applications as timeously as possible. This is the same procedure used for calling-in planning applications under the Town and Country Planning (Scotland) Act 1997.

## **Section 24B(6) – Call-in of heat network consent applications etc. by the Scottish Ministers**

**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**

42. Section 24B enables the Scottish Ministers to direct that a particular heat network consent application (or applications for modification of consent or applications for consent, agreement or approval which is required by a heat network consent condition) be referred to them for their decision. Subsection (6) enables the Scottish Ministers to make further provision about making such a direction.

## **Reason for taking power**

43. Subsection (3) specifies a number of details that a call-in direction must contain, including that it must be made in writing. However, it may be

necessary to make further provision about making such directions, in future, which regulations under subsection (6) allow.

44. These regulations also enable provision to be made about determining heat network consent applications which have been called in by the Scottish Ministers. Section 20 of the Bill makes provision about determining consent applications, but it may be necessary to adapt this in regulations under section 24B(6) to take into account the reasons for which an application was called-in.

### **Choice of procedure**

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

46. However, section 24B(8) enables regulations under this section to modify an Act (for example, should clarity be needed in future on the types of consent applications under this Act which may be subject to the call-in direction made by the Scottish Ministers). The affirmative procedure will apply where regulations add to, replace or omit any part of the text of an Act. Where regulations contain no such additions, replacement or omissions, the negative procedure applies.

### **Section 24C(1) – Directions as to method of dealing with heat network consent applications etc. by local authorities**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative procedure**

### **Provision**

47. Section 24C provides the Scottish Ministers with powers to make regulations relating to how applications for heat network consent (or applications for modification of consent or applications for consent, agreement or approval which is required by a heat network consent condition) are to be dealt with, when they are made to local authorities.

## **Reason for taking power**

48. Subsection (1) enables the Scottish Ministers to make regulations about how local authorities are to deal with heat network consent applications etc. Subsection (3) specifies that these regulations may include: the requirement for local authorities to provide information on applications received; the restriction of local authorities in determining an application for a period of time; and the requirement for local authorities to include certain conditions on the award of consent.

49. The intention is to provide the Scottish Ministers with sufficient time and information to determine whether they wish to call-in an application. However, it may be that once the consent system is in operational, that it becomes apparent that other procedures are needed to enable the Scottish Ministers to determine whether they should call-in an application, or types of application.

## **Choice of procedure**

50. These regulations would deal with detailed procedural issues, and as such, the negative procedure provides an appropriate level of Parliamentary scrutiny.

51. These powers mirror those which exist in relation to planning applications under section 43 of the Town and Country Planning (Scotland) Act 1997, which are also subject to the negative procedure.

## **Section 24D(4) – Appeals regarding applications for heat network consent etc. to local authorities**

**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**

52. Section 24D(1) and (2) was added to the Bill by amendment and it confers a right of appeal to the Scottish Ministers against various decisions

(listed in section 24D(1)) relating to heat network consent taken by a local authority as the appropriate consent authority.

### **Reason for taking power**

53. Subsection (4) would confer power to establish the appeal process to the Scottish Ministers. The heat network consent system is not yet developed and as such, any appeals process needs to align with the overall regulatory regime as regulations more readily allow.

### **Choice of procedure**

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

55. However, section 24D(8) enables regulations under this section to modify an Act (for example, to extend the remit of a tribunal to hear any inquiry or hearing that may be provided for). The affirmative procedure will apply where regulations add to, replace or omit any part of the text of an Act. Where regulations contain no such additions, replacement or omissions, the negative procedure applies.

### **Section 26A – Effective community engagement: guidance**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: no procedure**

### **Provision**

56. Under section 26(1A), the Scottish Ministers may determine that an application for heat network consent (or modification of consent) in certain circumstances must contain a “Community Engagement Report”.

57. Section 26A(1) enables the Scottish Ministers to issue guidance about what constitutes effective community engagement for the purposes of producing a Community Engagement Report.

## **Reason for taking power**

58. Any such guidance is required to provide heat network applicants with detailed and specific information in relation to community engagement.

59. Moreover, it is the Scottish Government's intention to develop the guidance in partnership with interested stakeholders. As such, it is not possible to set out the requirements of effective community engagement in primary legislation at this time, and in any case, any such requirements may need to be updated to reflect changing practices and circumstances in future.

## **Choice of procedure**

60. This is an administrative power of the Scottish Ministers and is not subject to Parliamentary procedure. However, the Scottish Ministers are required to both consult appropriate persons in the development of any such guidance and to publish it, thereby providing transparency.

## **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**

61. As introduced, section 27 of the Bill enabled the Scottish Ministers, by regulations, to determine the procedure the consenting authority must follow in determining heat network consent applications.

62. The Bill was amended at Stage 2 to enable the regulations in subsection (1) to extend to making provision about the Scottish Ministers' decisions whether to modify a heat network consent on their own initiative (and the publication and notification of such decisions).

## **Reason for taking power**

63. As noted in the original Delegated Powers Memorandum, the heat network consent application procedure – and the procedure for applying for modification – will be a new process for both the consent 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.

64. The power under section 27(1) has been extended to the Scottish Ministers' decisions to modifying heat network consent on their own initiative to allow transparency in relation to those decisions in addition to decisions by the Scottish Ministers in relation to the modification of heat network consent which following an application by the consent holder.

### **Choice of procedure**

65. The regulations are to make detailed provisions about processes to be followed by the consent authority and applicants 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. There was no change to the proposed Parliamentary procedure at Stage 2.

### **Section 27A(1) – Applications and decisions under Part 2 where there is more than one appropriate consent authority**

**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**

66. As a consequence of the ability for local authorities to act as consent authorities – and of the fact that heat networks may cross local authority boundaries – section 27A was inserted into the Bill by amendment at Stage 2 so that regulations could be made in the circumstances where a proposed heat network development will span more than one local authority.

## **Reason for taking power**

67. It will be necessary to discuss and agree working practices with local authorities on how such applications should be determined. Ahead of those discussions, it would not be desirable to specify how decisions are to be made in primary legislation.

68. As well as this, it may be that working practices between local authorities change over time, in line with any changes to heat network technology or the growth of the sector. It is therefore desirable to maintain flexibility in how local authorities are to work together in determining applications, in the manner that regulations allow.

## **Choice of procedure**

69. These regulations would make provision about detailed procedures which local authorities are to follow, in what are likely to be exceptional circumstances. It is therefore considered that the negative procedure provides the appropriate form of Parliamentary scrutiny.

70. However, subsection (2) does enable these regulations to modify an Act if necessary (for example, changes may be required to the decision-making processes to be taken by an appropriate consent authority under Part 2 of the Bill where there is more than one appropriate consent authority. In such circumstances, it is appropriate that the higher level of Parliamentary scrutiny afforded by the affirmative procedure applies.

## **Section 35A(3) – Combining applications to local authorities for heat network consent and planning permission**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative procedure**

## **Provision**

71. Section 35A provides the Scottish Ministers with regulation-making powers to combine an application for heat network consent, with an application for planning permission, in the event that both are made to a local authority.

## **Reason for taking power**

72. The purpose of this section is to minimise the administrative burden on both developers and local authorities when making and considering applications, respectively.

73. The form and manner of a heat network consent application – including the information required from the applicant – will be determined by the Scottish Ministers under section 26. As the form and manner of a heat network consent application is determined, it is not yet possible to effectively combine with applications for planning permission, and as such subsequent regulations will be required.

## **Choice of procedure**

74. These regulations would make provision about detailed procedures which applicants and local authorities are to follow. It is therefore thought that the negative procedure provides the appropriate form of Parliamentary scrutiny.

## **Section 50(1)(c) – Heat network zone permit: revocation**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative procedure**

## **Provision**

75. As introduced, section 50 of the Bill enables the permitting authority to revoke a heat network zone permit in the event that the holder had lost its heat networks licence, or a heat network consent associated with the zone permit.

76. The Bill was amended at Stage 2, to enable the Scottish Ministers to expand, by regulations, on the circumstances in which a zone permit may be revoked.

## **Reason for taking power**

77. It is necessary to have the opportunity to expand the circumstances in which a zone permit may be revoked in order to, for example, apply to



situations where, for example, the basis on which an application for a zone permit was granted later turns out to have been inaccurately represented.

78. This may not be the only additional circumstance that revocation may be justified. As such, regulations provide a precautionary opportunity to add to the circumstances in which revocation may occur, as may become evidently necessary in time.

### **Choice of procedure**

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

### **Section 50(4) – Heat network zone permit: revocation**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative procedure**

### **Provision**

80. As introduced, section 50 of the Bill enables the permitting authority to revoke a heat network zone permit in certain circumstances.

### **Reason for taking power**

81. Subsections (2) and (3) set out procedural matters that the permitting authority must adhere to prior to revoking a zone permit.

82. It may be necessary in future to set out further procedures for the permitting authority to follow. For example, should it be thought appropriate for other persons to be notified of the permitting authority's intention to revoke a heat network zone permit.

### **Choice of procedure**

83. 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.

84. This is in keeping with the procedure applying to similar powers to be conferred by sections 11A(8) and 24(7), which enables similar provision to be made, by regulations, in respect to the revocation of heat networks licences and consent, respectively.

## **Section 50A(1) – Appeals against revocation of heat network zone permit**

**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**

85. Section 50A was added to the Bill by amendment at Stage 2. It confers power on the Scottish Ministers to be regulations make provision for or about appeals against revocation of heat network zone permits.

### **Reason for taking power**

86. Section 50A(1) confers power on the Scottish Ministers to establish an appeals process against the revocation of a heat network zone permit by regulations. The heat network zone permit system is not yet developed and as such, any appeals process needs to align with the overall regulatory regime as regulations more readily allow.

### **Choice of procedure**

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

88. However, section 50A(3) enables regulations under this section to modify an Act (for example, to provide the opportunity for the Scottish Ministers to change the remit of another statutory body so as it may act as the person(s) to whom appeals may be heard, if desired in future).

89. In such instances, it is thought appropriate that the higher degree of Parliamentary scrutiny afforded by the affirmative procedure is appropriate.

## **Section 50B(1) – Compensation on revocation of heat network zone permit**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative procedure**

### **Provision**

90. Section 50B provides the Scottish Ministers with a power to make regulations about the compensation payable to a person following the revocation of a heat network zone permit.

91. 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**

92. 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**

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

## **Section 59(3)(a)(ii) – Acquisition of necessary wayleave**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative procedure**

### **Provision**

94. Section 59 enables heat networks licence holders to apply to the Scottish Ministers to obtain necessary wayleave rights. Before applying to the Scottish Ministers, subsection (3) requires the licence holder is first to seek a necessary wayleave right from the owner of the land.

95. Where the licence holder cannot ascertain the name or address of the owner of the land after reasonable enquiry, subsection (3)(a)(ii) requires the licence holder to give notice in such form and manner as may be specified by the Scottish Ministers by regulations.

### **Reason for taking power**

96. There are likely to be various reasons for, and circumstances in which, licence holders are unable to ascertain the name or address of an owner of land. Due to this, it is not desirable to specify in primary legislation how the licence holder is to appropriately give notice of its intention to obtain a necessary wayleave.

97. It is preferable to consult with heat network developers and owners of land to agree on an appropriate form of notice, and to retain the flexibility to adapt this as may be necessary in future, as the heat networks sector grows in Scotland.

### **Choice of procedure**

98. The question of how to notify unknown persons of the intention to obtain a necessary wayleave right, is a technical and administrative matter. It is therefore considered appropriate that these regulations should be subject to negative procedure.

## **Section 61A(2)(a)(ii) – Variation of network wayleave right**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative procedure**

### **Provision**

99. Section 61A enables heat networks licence holders to apply to the Scottish Ministers to vary an existing network wayleave rights. Before applying to the Scottish Ministers, subsection (2) requires the licence holder is first to seek to vary the network wayleave right from the owner of the land.

100. Where the licence holder cannot ascertain the name or address of the owner of the land after reasonable enquiry, subsection (2)(a)(ii) requires the licence holder to give notice in such form and manner as may be specified by the Scottish Ministers by regulations.

### **Reason for taking power**

101. As with the power under section 59, there are likely to be various reasons for, and circumstances in which, licence holders are unable to ascertain the name or address of an owner of land. Due to this, it is not desirable to specify in primary legislation how the licence holder is to appropriately give notice of its intention to obtain a necessary wayleave.

102. It is therefore again preferable to consult with heat network developers and owners of land to agree on an appropriate form of notice, and to retain the flexibility to adapt this as may be necessary in future, as the heat networks sector grows in Scotland.

### **Choice of procedure**

103. As with section 59, the question of how to notify unknown persons of the intention to obtain a necessary wayleave right, is a technical and administrative matter. It is therefore again considered appropriate that these regulations should be subject to negative procedure, to balance the use of Parliamentary time and resource on the one hand, and the content of the regulations on the other.

## **Section 61B(4) – Compensation on variation of a network wayleave right**

**Power conferred on: the Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: negative procedure**

### **Provision**

104. Section 61B(1) provides that where a network wayleave right is varied under section 61A(7)(a) (i.e. following an application by a licence holder) so as to place or increase a burden on the occupier (and where the occupier is not also the owner, the owner) either or both of those persons may recover compensation from the licence holder. Subsection (4) enables the Scottish Ministers to make further provision about compensation payable under section 61B(1).

### **Reason for taking power**

105. The detail in relation to the payment of compensation and the procedure 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**

106. As the matters to be detailed in regulations are likely to be administrative in nature, it is considered appropriate that the negative procedure is used

## **Section 61D(1) – Registration of network wayleave rights**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations made by Scottish statutory instrument

**Parliamentary procedure:** negative procedure

### **Provision**

107. Section 61D provides the Scottish Ministers with a power to make provision about the registration of network wayleave rights by regulations.

### **Reason for taking power**

108. It is not possible at this point in time to determine how frequently network wayleave rights may be exercised in future, and in turn, how extensive their register will become.

109. As such, matters that the regulations may contain under subsection (2) – such as who is to establish and maintain the register, and fees payable on registration – cannot be specified at this time. In addition, such decision would benefit from further consultation with heat network operators and developers, as well as those persons who may become responsible for such a register.

110. As well as this, while subsection (2) specifies a range of matters that regulations under subsection (1) may contain, it is not desirable to be constrained to these issues given that the acquisition of network wayleave rights in this sector will be a new process in Scotland, and may give rise to issues that are as yet unanticipated, and which the regulations may therefore helpfully consider.

### **Choice of procedure**

111. As the matters to be detailed in regulations are likely to be administrative in nature, it is considered appropriate that the negative procedure is used.

## **Section 76B(1) – Heat Network Supply Targets**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations made by Scottish statutory instrument

**Parliamentary procedure:** affirmative procedure

### **Provision**

112. Section 76B(1) requires the Scottish Ministers, by regulations, to set one or more targets in relation to the supply of thermal energy through heat networks in Scotland.

### **Reason for taking power**

113. The heat networks market in Scotland is largely unregulated at present and, as such, there is little robust evidence on the current supply of thermal energy through heat networks to form a baseline on which to set a target. Additionally, while there have been a number of research studies into the potential supply of thermal energy through heat networks in Scotland, the findings of these studies have varied greatly.

114. As such, it is desirable to understand more about the current market (through the introduction of heat networks licences), and on its potential growth (through the designation of heat network zones) before a target is set.

### **Choice of procedure**

115. Once a target is set, it is reasonable to assume that decisions made by the Scottish Government – such as on spending and future policies – will be made, in part, in accordance with meeting those targets.

116. In the circumstances, the higher degree of parliamentary scrutiny afforded by the affirmative procedure is appropriate.



## **Section 76B(2) – Heat Network Supply Targets**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations made by Scottish statutory instrument

**Parliamentary procedure:** negative procedure

### **Provision**

117. Section 76B(1) requires the Scottish Ministers, by regulations, to set one or more targets in relation to the supply of thermal energy through heat networks in Scotland.

118. Subsection (2) of that section enables the Scottish Ministers to make regulations under subsection (1) about how such a target, or targets, may be set.

### **Reason for taking power**

119. Subsection (3) gives some indication of the kind of provision that may be made in regulations under subsection (2): the matters to be considered in setting the target(s); the criteria to be used in setting the target(s); and provision about review of the target(s).

120. In exercising the power it may be necessary to consider, for example, whether a target be set in relation to a sub-sector of the building stock, in different areas of Scotland, or on specific organisations.

121. However, as it is not yet determined what such a target, or targets, will relate to, it is necessary to retain flexibility to make regulations about how targets in this section are to be set.

### **Choice of procedure**

122. 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.

## **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 procedure**

### **Provision**

123. 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 consent authority and the permit authority in carrying out their functions under the Bill.

124. As a consequence of local authorities being able to act as consent authorities, the Bill was amended at Stage 2 so that the Scottish Ministers may make provision under the regulations at section 77(1) to enable local authorities to charge and recover fees in connection with their role as a consent authority (should they be designated as one).

### **Reason for taking power**

125. Fees for heat network consent 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. 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.

126. In addition, the administration of heat network consent will also create additional cost for consent authorities (potentially including local authorities). Should section 77(1) not have been amended to add local authorities to the list of persons that the Scottish Ministers could have made regulations in respect to, then those acting as consent authorities would have been unable to have recovered costs as may be necessary.

This document relates to the Heat Networks (Scotland) Bill (SP Bill 64) as introduced in the Scottish Parliament on 2 March 2020

## **Choice of procedure**

127. 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 adequate scrutiny of the nature and content of the regulations on the other.

This document relates to the Heat Networks (Scotland) Bill (SP Bill 64) as introduced in the Scottish Parliament on 2 March 2020

# Heat Networks (Scotland) Bill

## Supplementary Delegated Powers Memorandum

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