

REQUEST FOR RULES OF COURT: ELECTRONIC COMMUNICATIONS CODE

Policy Proposal

1. To invite the Council to consider and approve draft rules amending the Summary Application Rules to implement the Electronic Communications Code (Jurisdiction) Regulations 2017 (“the Jurisdiction Regulations”). The Jurisdiction Regulations make provision for the transfer of cases under the Electronic Communications Code (“the Code”) from the Lands Tribunal for Scotland to the sheriff court.
2. A draft Act of Sederunt is produced at **Paper 7.1A**. This matter was previously considered by the Council at its October meeting.

Timing

3. At its October meeting, the Council noted that the Code and the Jurisdiction Regulations are expected to come into force before the end of 2017. The Secretariat will continue to liaise with policy colleagues in DCMS with a view to the rules coming into force at the same time as the Code and the Jurisdiction Regulations.

Background

4. The Code contains provisions for applications to be made to the courts or tribunals seeking an order in relation to disputes arising from the Code. Paragraph 94 of the Code provides that applications to the court in relation to Scotland are to be made to the sheriff court.
5. Paragraph 95 of the Code provides that the Secretary of State may by regulations provide for a function conferred by the Code on the court to be exercisable in relation to Scotland by the Lands Tribunal for Scotland.
6. The rules request submitted jointly by the Scottish Government and the UK Department for Culture, Media and Sport (DCMS) invited the Council to consider the need for court rules arising from the Jurisdiction Regulations, which were produced in draft form. Final draft Jurisdiction Regulations have now been laid in Parliament and can be seen at **Paper 7.1B**.
7. The Jurisdiction Regulations make provision for the Lands Tribunal of Scotland to transfer proceedings in a specific case to the sheriff court, where it considers the sheriff court a more appropriate forum for the determination of the dispute.

8. Members agreed that such applications should proceed by summary application and that specific rules of court should make provision for the first steps in procedure following transfer to the sheriff court.

Policy discussion

9. At the last meeting members noted that the draft Jurisdiction Regulations prescribed “relevant proceedings” to which the Regulations apply. It was noted that draft Regulation 4 provided that the “relevant proceedings” may only be commenced in the tribunal. It was not clear whether the sheriff court would continue to have concurrent jurisdiction in some proceedings and the Secretariat undertook to confirm the position.
10. Policyholders have confirmed that the definition “relevant proceedings” includes all applications to be made to the court. Accordingly, in Scotland all applications under the Code must be made to the Lands Tribunal for Scotland in the first instance.
11. It therefore follows that an application to transfer proceedings could be made at any stage, potentially including before service has taken place.
12. On that basis, the draft rules simply make provision for the transfer of the application to the sheriff court and for the sheriff to make such order as he or she sees fit for the case to proceed in accordance with the Summary Application Rules.

Implementation

13. The Secretariat has liaised with policyholders at DCMS and the Legislation and Implementation Team within the Scottish Courts and Tribunals Service in the development of these rules and both are content with the proposed procedure.

Recommendation

14. **The Council is invited to consider the draft rules at Paper 7.1A and to indicate whether it is content that they be submitted to the Court of Session for consideration, subject to any stylistic or typographical amendment.**

**SCJC Secretariat
November 2017**

SCOTTISH STATUTORY INSTRUMENTS

2017 No. XXX

SHERIFF COURT

**Act of Sederunt (Summary Application Rules 1999 Amendment)
(Transfer from Lands Tribunal for Scotland) 2017**

Made *** November 2017*

Laid before the Scottish Parliament *** November 2017*

Coming into force *[11th] December 2017*

In accordance with section 4 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013¹ the Court of Session has approved draft rules submitted to it by the Scottish Civil Justice Council [with such modifications as it thinks appropriate].

The Court of Session therefore makes this Act of Sederunt under the powers conferred by section 104(1) of the Courts Reform (Scotland) Act 2014² and all other powers enabling it to do so.

Citation and commencement, etc.

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Summary Application Rules 1999 Amendment) (Transfer from Lands Tribunal for Scotland) 2017.

(2) It comes into force on [11th] December] 2017.

(3) A certified copy is to be inserted in the Books of Sederunt.

¹ 2013 asp 3. Section 4 was amended by the Court Reform (Scotland) Act 2014 (asp 18) schedule 5, paragraph 31 and by the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (asp 2), schedule 1, paragraph 1(4).

² 2014 asp 18.

Amendment of the Summary Application Rules 1999

2.—(1) The Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999³ is amended in accordance with this paragraph and paragraph 3.

(2) After Part XLVIII: (trafficking and exploitation orders) of Chapter 3⁴ (rules on applications under specific statutes) insert—

“PART XLIX: TRANSFERS FROM THE LANDS TRIBUNAL FOR SCOTLAND TO THE SHERIFF UNDER THE ELECTRONIC COMMUNICATIONS CODE

Interpretation

3.48.1. In this Part—

“the Electronic Communications Code” means the Electronic Communications Code contained in Schedule 3A of Communications Act 2003⁵; and

“the Jurisdiction Regulations” means the Electronic Communications Code (Jurisdiction) Regulations 2017⁶.

Transfers from the Lands Tribunal for Scotland to the sheriff under the Electronic Communications Code

3.48.2.—(1) This rule applies to a case which has been brought in the Lands Tribunal for Scotland under the Electronic Communications Code and which has been transferred to the sheriff under Regulation 5 of the Jurisdiction Regulations.

(2) On receipt of the documentation in a case which has been transferred to the sheriff from the Lands Tribunal under paragraph (1), the sheriff clerk must record the date of receipt on the first page of the documentation;

(3) Within 7 days of receipt of the documentation referred to in paragraph (2) the sheriff may make such order as he or she thinks fit to secure so far as practicable that the case thereafter proceeds in accordance with these Rules.

(4) An order under paragraph (3) may include—

³ S.I. 1999/929, last amended by S.S.I. / xxx].

⁴ Part XLVIII was inserted by S.S.I. 2017/211.

⁵ 2003 c. 21. Schedule 3A was inserted into the Communications Act 2003 by section 4 and Schedule 1 of the Digital Economy Act 2017 (c. 30).

⁶ S.I. 2017/xxxx, which comes into force on [11th] December 2017.

- (a) where the case has not been intimated to the respondent before being transferred to the court, an order for the applicant to make intimation of the case to the respondent;
- (b) where no response has been lodged by the respondent in the case, an order for answers to be lodged; or
- (c) an order for a hearing to determine further procedure.

CJM SUTHERLAND

Lord President

I.P.D.

Edinburgh

[-----] 2017

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

The Electronic Communications Code is set out in Schedule 3A to Communications Act 2003. Schedule 3A was inserted by Part 2 of the Digital Economy Act 2017. The Code replaces the previous code, set out in Schedule 2 to the Telecommunications Act 1984. The Electronic Communications Code (Jurisdiction) Regulations 2017 permits functions conferred on the court by the Code to be exercised, for Scotland, by the Lands Tribunal for Scotland. Regulation 5 gives the Lands Tribunal for Scotland power to transfer relevant proceedings, as defined in the Regulations, to the sheriff court.

This Act of Sederunt amends the Summary Application Rules 1999 to make provision for cases transferred to the sheriff in terms of these provisions. Paragraph 2(2) inserts a new Part XLIX containing new Rules 3.48.1 and 3.48.2 into the 1999 Rules. Provision is made, on transfer, for the sheriff clerk to record the date of receipt of the case, and for the sheriff to make such orders as he or she thinks fit to secure so far as practicable that the case proceeds in accordance with the Summary Application Rules.

Draft Regulations laid before Parliament under section 402(2A) of the Communications Act 2003, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2017 No. 0000

ELECTRONIC COMMUNICATIONS

**The Electronic Communications Code (Jurisdiction) Regulations
2017**

Made - - - - - ***

Coming into force in accordance with regulation 1(1)

The Secretary of State, in exercise of the powers conferred by section 402(3) of, and paragraphs 95(1) to (4) of Schedule 3A to, the Communications Act 2003(a), makes the following Regulations.

The Secretary of State has consulted the Scottish Ministers in accordance with paragraph 95(5)(a) of Schedule 3A to that Act.

A draft of these Regulations was laid before Parliament and approved by a resolution of each House of Parliament in accordance with section 402(2A) of that Act(b).

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Electronic Communications Code (Jurisdiction) Regulations 2017 and come into force on the day that section 4 of, and Schedule 1 to, the Digital Economy Act 2017 come fully into force.

(2) These Regulations extend to England and Wales and to Scotland.

Interpretation

2.—(1) In these Regulations—

“the code” means the electronic communications code set out in Schedule 3A to the Communications Act 2003;

“relevant proceedings” means proceedings under any of the following provisions of the code—

(a) Parts 4, 5, 6, 12 or 13, or

(b) paragraph 53.

(a) 2003 c. 21. Schedule 3A was inserted by Schedule 1 to the Digital Economy Act 2017 (c. 30).

(b) Section 402(2A) was inserted by paragraph 47(3) of Schedule 3 to the Digital Economy Act 2017.

Conferral of jurisdiction on tribunals

3. Subject to regulation 4, the functions conferred by the code on the court(a) are also exercisable by the following tribunals—

- (a) in relation to England, the First-tier Tribunal (in a case where relevant proceedings are transferred to it by the Upper Tribunal),
- (b) in relation to England and Wales, the Upper Tribunal, and
- (c) in relation to Scotland, the Lands Tribunal for Scotland,

and any provision of the code which confers a function on the court is to be read as if the reference to the court included references to these tribunals.

Restriction on jurisdiction for commencement of relevant proceedings

4. Relevant proceedings must be commenced—

- (a) in relation to England and Wales, in the Upper Tribunal, or
- (b) in relation to Scotland, the Lands Tribunal for Scotland.

Transfer of relevant proceedings to the court

5.—(1) A tribunal referred to in regulation 3 may transfer relevant proceedings to—

- (a) in relation to England or Wales, the county court, or
- (b) in relation to Scotland the sheriff court,

if that tribunal considers the court to be a more appropriate forum for the determination of those proceedings.

(2) A tribunal may transfer proceedings in accordance with paragraph (1) of its own motion or on the application of a party to those proceedings.

Name
Minister of State

Date _____ Department for Digital, Culture, Media and Sport

EXPLANATORY NOTE

(This note is not part of the Regulations)

The Electronic Communications Code (“the code”) is set out in Schedule 3A to the Communications Act 2003. Schedule 3A was inserted by Part 2 of the Digital Economy Act 2017. The code replaces the previous code set out in Schedule 2 to the Telecommunications Act 1984.

The code sets out the basis on which electronic communications operators authorised by Ofcom under section 106 of the Communications Act 2003 may exercise rights to deploy and maintain their electronic communications apparatus on, over and under land. Electronic communications apparatus is defined in paragraph 5 of the code. Under the provisions of the code, “the court” has jurisdiction for most disputes.

Regulation 3 permits functions conferred on the court by the code to be exercised by certain tribunals, and modifies the code accordingly. These regulations do not extend to Northern Ireland. Accordingly, all functions conferred by the code on a county court in Northern Ireland are exercisable in Northern Ireland only by a county court.

(a) See paragraph 94(1) of Schedule 3A to the Communications Act 2003 for the definition of “the court”.

Regulation 4 provides that “relevant proceedings” (defined in regulation 2) under the code must be commenced only in the Upper Tribunal or the Lands Tribunal for Scotland.

The First-tier Tribunal can hear relevant proceedings only if the Upper Tribunal transfers a case to it in accordance with rule 5(3)(k)(ii) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (S.I. 2010/2600).

Regulation 5 gives each of the tribunals listed in regulation 3 power to transfer relevant proceedings to the respective court, if the court would be a more appropriate forum.

The county court (in England and Wales) and the sheriff court (in Scotland) can hear relevant proceedings, brought after the date on which these Regulations come into force, only if a tribunal transfers those proceedings in accordance with the provisions of regulation 5.

An Impact Assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen. An Explanatory Memorandum is published alongside this instrument on www.legislation.gov.uk.

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