

Explanatory Memorandum to the Commons (Severance of Rights) (Wales) Order 2014

This Explanatory Memorandum has been prepared by the Department for Sustainable Futures and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Commons (Severance of Rights) (Wales) Order 2014. I am satisfied that the benefits outweigh any costs.

Alun Davies AM

Minister for Natural Resources and Food, one of the Welsh Ministers
4 February 2014

1. Description

The Commons (Severance of Rights) (Wales) Order 2014 (“the 2014 Order”) enables limited exceptions to the prohibition on the severance of rights of common introduced by section 9 of the Commons Act 2006 (“the Act”). The 2014 Order permits the temporary severance of rights of common to graze animals from the land to which they are attached by enabling the leasing or licensing of the rights to a third party for no more than five years. Owners of land to which rights are attached who lease or licence that land, may retain to themselves the entitlement to exercise those rights.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

The powers to authorise temporary severance by letting or leasing is contained in Section 9 of, and paragraph 2 of Schedule 1 to, the Commons Act 2006. These powers in relation to Wales now vest in Welsh Ministers.

3. Legislative background

Section 9 of the Act prohibits the severance of rights of common, whether the severance is temporary (*e.g.* where the rights are leased or licensed by the commoner to a third party) or permanent (*e.g.* where the rights are sold to one person, and the land to which the rights are attached is sold to another). However this provision is subject to the exceptions specified in Schedule 1 of the Act and is retrospective in its effect from 28 June 2005.

Paragraph 2 of Schedule 1 to the Act permits temporary severance where the Welsh Ministers have made provision in an Order made by way of Statutory Instrument, or, where a Commons Council has been established in relation to a common, any rules which may have been made by that commons council.

In Wales, The Commons (Severance of Rights) (Wales) Order 2007 (“the 2007 Order”) currently allows that a right of common to graze animals may be temporarily severed from the land to which it is attached by leasing or licensing to a third party as follows:

- a. the right of common may be leased/licensed separate to the land to which it is attached (the dominant tenement), provided that the lease or license does not exceed three years (although the lease or licence may be renewed); or
- b. the land or part of the land (the dominant tenement), to which the rights of common is attached, may be leased/licensed without the right of common.

The 2007 Order which had effect from 28 June 2005 came into force on 1 March 2007.

The 2007 Order was a temporary arrangement to allow continuation of agreements that were in place when Section 9 and Schedule 1 of the Act commenced. A commitment was made at that time to review the 2007 Order.

The 2007 Order has now been reviewed and will be replaced by the 2014 Order which will be subject to the annulment (negative) procedure by the Assembly.

4. Purpose & intended effect of the legislation

Repeal and replace the 2007 Order (SI No. 583 (w.55) to modify the agreement procedure for which rights of common can be temporarily leased or licensed to a third party. The 2007 Order currently allows that a right of common to graze animals may be temporarily severed from the land to which it is attached by leasing or licensing to a third party for a maximum period of 3 years. The aim of the 2014 Order is to extend the temporary severance agreements from 3 years to a maximum period of 5 years (renewable). This will bring the leasing/licensing period in line with the 5 year contract period required under management schemes such as Glastir, which will provide environmental benefits for commons and create farm business continuity.

The 2014 Order also intends to introduce a requirement on the owner of the dominant tenement entering into a temporary severance agreement to notify certain bodies with interests in common land of any new leasing or licensing arrangements. This will enable the effective management of the land to take place and the updating of official records when Part 1 of the Act is brought into force giving a clear and accurate picture of those exercising rights.

5. Consultation

A Regulatory Impact Assessment (RIA) has been completed and the details of the consultation undertaken are included below.

PART 2 – REGULATORY IMPACT ASSESSMENT

Options

Options 1: Do Minimum

This option maintains the system established under the 2007 Order, and would allow current 3 year agreements to be renewed and new agreements to be made. However it would introduce the provision that agreements can be renewed on an unlimited basis and would also introduce a new requirement to notify specific individuals and organisations that a 3 year temporary severance agreement had been entered into. As well as introducing a requirement to keep a record of any temporary severance agreements in the Common Land Registers and updates should take place once Part 1 of the Act is brought into force.

Option 2: Amend the current 2007 Order to allow a maximum period of 5 years.

This option would continue to allow the leasing or licensing of rights of common on a temporary basis but it will amend the current procedure to allow temporary severance agreements to be extended from 3 years to a maximum period of 5 years. It will introduce the provision that agreements can be renewed and also introduce a requirement to notify specific individuals and organisations that a 5 year temporary severance agreement had been entered into. As well as introducing a requirement to keep a record of any temporary severance agreements in the Common Land Registers and updates should take place once Part 1 of the Act is brought into force.

Option 3: Not allow temporary severance in future.

This would require a revocation of the 2007 Order. Once existing agreements expire they would not be renewed, and no new agreements to lease or license rights of common could be made.

Costs & benefits

Sectors and groups affected

Any changes to the legislation on the leasing or licensing of temporary severance agreements will affect those groups with an interest in common land. These include farmers, those with rights of common, private individuals and local authorities, these groups will be required to follow new agreement procedures.

Option 1

Do minimum – retain the current system allowing agreements to be made for a 3 year period.

Costs

There would be a minimal increase in costs with this option in terms of notifying specific individuals and organisations that an agreement had been entered into, and only in relation to updating the Commons Registers once Part 1 of the Act is brought into force.

Benefits

Individuals are familiar with the current procedure for arranging temporary severance agreements for a maximum period of 3 years and maintaining the current procedure would still allow such agreements to be renewed and for new agreements to be made whilst ensuring continuity. Individuals will still have the option to lease or license their rights of common to third parties on a temporary basis if they choose not to use their rights to graze animals on the common. Maintaining these agreements helps to prevent commons from being neglected and causing under-grazing. Some individuals also felt that 3 years is a sufficient time period for agricultural and conservation management purposes.

It is also in the public's interest to maintain the current procedure for temporary agreements as it would maintain order and stability on common land and many felt that the current procedure worked well in practice.

Option 2

Amend the current 2007 Order to allow for an increase in temporary severance agreements from 3 years to a maximum period of 5 years (renewable)

Concerns have been expressed in the past that 3 years as allowed under the current Order may not be long enough for some agricultural purposes. Also, since the inception of Glastir in 2011, having a 3 year lease or license of rights complicates commoners' entry into the scheme because of the requirement under Glastir to enter a 5 year management contract. This option has the advantage that where graziers have leased rights and wish to enter Glastir, there would be one single contract term that could run concurrently.

Costs

There would be a minimal cost to local authorities in relation to updating the Commons Registers once Part 1 of the Act is brought into force. The cost to the Local Authorities of updating the registers will only materialise once Part 1 of The Act is brought into force. Prior to Part 1 coming forward, the costs and fee structures will be agreed following discussion with Local Authority representatives.

Benefits

This option would allow the leasing or licensing of rights of common on a temporary basis but in line with 5 year Glastir contracts. Also concerns have

been expressed in the past that 3 years as allowed under the current Order may not be long enough for some agricultural purposes. This demonstrates our commitment to joined-up agricultural policy, and there are demonstrable environmental benefits for commons that can be achieved. Management schemes such as Glastir that foster environmentally responsible use of rights and other local management schemes to prevent commons falling into dereliction through under grazing will benefit from the extended period of 5 years. It is also in the public's interest to maintain the current procedure for temporary agreements as it maintains order and stability on common land.

Option 3

Remove all temporary severance agreements

Costs

Concerns were expressed during the 2006 consultation that not allowing temporary severance would lead to disruption of management practices of commons, but it is unclear whether this would happen in practice. Although it was also pointed out that some farmers were dependent for their livelihoods on leasing or licensing rights of common, it has not been satisfactorily proven that the practice is widespread.

The costs associated with this option relate to farmers potentially losing income as a result of having to reduce the number of livestock they keep or in additional costs to the farmer in renting or purchasing additional land to graze their livestock.

Benefits

There would be no perceived benefits for removing the option to enter into temporary severance agreements. It would not be in the public's interest to remove them as there could be a loss of order and stability on common land. Loss of agreements could lead to commons becoming neglected and under grazed.

Consultations

Consultation on the proposed amendments to the Commons (Severance of Rights) (Wales) Order 2007/583.

The Welsh Government consulted:

Local Authorities, Welsh Local Government Association, National Park Authorities, Farming Unions, Commoners Associations, Open Spaces Society, Wildlife groups, Environmental groups amongst others who have interests or represents interests in common land.

The 2007 Order was a temporary arrangement to allow continuation of agreements that were in place when Section 9 and Schedule 1 of the Act

commenced. The 2007 Order was made following a consultation held in 2006 and a commitment was made to review the 2007 Order in the fullness of time.

The Welsh Government considered that sufficient time has elapsed since the making of the 2007 Order to allow a consideration of how the regulations set under the 2007 Order have worked in practice, and whether changes should now be made.

The consultation ran for 12 weeks from 5 September to 25 November 2011.

A total of 14 responses were received, covering a wide range of organisations who have direct experience of dealing with the management of common land or the management of rights of common. In addition, some responses were received from individual commoners and landowners.

Of the 14 responses returned, one failed to say which option they preferred whilst the other 13 respondents opted for the following:

Option 1 no change, retain 3 year agreement – 1 respondent

Option 2 change to 5 year agreements – 6 respondents

Option 3 repeal the 2007 Order and not allow agreements – 6 respondents.

There was no particular consensus amongst respondent type as to whether temporary severance should not be allowed or should remain / be extended. It should be noted, however, landowners / land managers and commoners and business interests would generally prefer to repeal the Order; whereas agricultural, environmental and heritage organisations would generally prefer agreements of 5 years.

A summary of the consultation responses is included at Annex A

Consultation - The Commons (Severance of Rights) (Wales) Order 2014

The Welsh Government consulted:

Local Authorities, Welsh Local Government Association, National Park Authorities, Farming Unions, Commoners Associations, Open Spaces Society, Wildlife groups, Environmental groups amongst others who have interests or represents interests in common land.

To seek the views of land owners, holders of rights of common and other stakeholders in common land in Wales on introducing new legislation for Wales on the leasing or licensing arrangements for the temporary severance of rights in Wales.

The Commons (Severance of Rights) (Wales) Order 2014 will:

- Repeal and replace The Commons (Severance of Rights) (Wales) Order 2007 (SI No. 583 (W.55)); and
- Extend the maximum period of temporary severance agreements from 3 to 5 years. These agreements can be renewed on expiry of the 5 year term for additional periods of 5 years. This will allow graziers who have leased rights

and wish to enter Glastir, the opportunity to have a single contract term running concurrently.

The consultation ran for 6 weeks from 3 September to 15 October 2012.

A total of 2 responses were received, one from a local authority and the other from a land agent representing owners of common land in North Wales.

Of the 2 responses returned, one fully supports the 2014 Order and welcomes the requirement that Commons Registration Authorities are informed of temporary severance agreements. The other response are content with the proposals to increase the period of time from 3 to 5 years however they have doubts that this will achieve the Welsh Government objectives which will see agreements running concurrently with Glastir agreements.

A detailed analysis has not been provided in light of the fact that only 2 responses were received. This information is available on request from the Animal Policy Delivery Branch, Agriculture, Fisheries and Rural Strategy, Welsh Government, Cathays Park, Cardiff CF10 3NQ

No changes / amendments have been made to the legislation as a result of the consultation responses.

APPENDIX A

The Competition Assessment

The competition filter test	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	NO
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	NO
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	NO
Q4: Would the costs of the regulation affect some firms substantially more than others?	NO
Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation?	NO
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	NO
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	NO
Q8: Is the sector characterised by rapid technological change?	NO
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	NO

Post implementation review

As the primary driver for making a change to the length of agreements for the temporary severance of rights is to enable graziers who have leased rights and wish to enter Glastir, the opportunity to have a single contract term running concurrently.

The Common Land Element of Glastir opened on 1 January 2012 with further applications being taken for contract start dates on 1 January in subsequent years. It will be necessary to go through two 5 year Glastir contract cycles (starting 1 January 2012) before reviewing the Commons (Severance of Rights) (Wales) Order 2014. By reviewing the Order after a 10 year period it will ensure that some commons have been through the Glastir contract process twice whilst some of the remaining commons that have been slower to enter Glastir should have completed one Glastir Contract by 2022. It is therefore proposed that the Order is kept under review and stakeholders be asked to feed back in the intervening period on how the 5 year temporary severance agreements are working. A more in depth review will be held following the 10 year period when information in line with the Glastir contract process should be available.