10 February 2023

Mr Hamish Goodall
Justice Directorate
Civil Law and Legal System Division
Scottish Government

Moveable Transactions (Scotland) Bill

Dear Mr Goodall,

I am writing on behalf of UK Finance's Commercial Finance members following Stage One consideration by the Scottish Parliament of the Moveable Transactions (Scotland) Bill. We are grateful for the informed and informative contributions made by the Delegated Powers and Law Reform Committee and those stakeholders that contributed to the detailed consideration of the legislation so far.

We also remain grateful for the Scottish Government's continuing work on this important piece of legislation. As you know, UK Finance and its predecessor bodies have been pleased to contribute to the modernisation of Scots law in this area since the Scottish Law Commission's preparatory work well over 10 years ago.

As you will be aware from previous submissions and, indeed, from the comments of the industry's representative to the Committee directly, the core interest of UK Finance and its members has been around the benefits of the legislation for businesses seeking to access finance. Put simply, the measures in the Bill will enable Scottish businesses to access more finance more easily, and it was encouraging to see universal recognition and welcome for these elements of the legislation from all parliamentarians and stakeholders involved.

We follow with our limited comments on the relevant issues raised during Stage One.

Application in relation to consumers

As above, UK Finance's focus has been on the benefits of the Bill's measures for Scottish businesses and those finance providers that support them. Nonetheless given the prominence of the potential application of the measures in relation to consumers (acting in their personal capacity) in the Committee's considerations, we provide some limited commentary. In particular, we do so on 'indirect' implications for the provision of finance to businesses.

Assignation

Some members of the Committee expressed concerns about the possibility under the Bill of transferring debts due by consumers by registration in the new register and without giving notice to those consumers.

As discussed in the sessions, such transfers made 'in bulk' are a routine part of the normal functioning of the mainstream financial markets through securitisation or similar mechanisms, whether these be residential mortgages (not covered by the Bill), credit card receivables, or other consumer (or commercial) debt.

Currently, notice is not normally given to consumers of such bulk transfers as the transferor normally continues to manage the relationship with the consumer, with notice normally only being given if the management of the debt is to change. Currently, these transfers require cumbersome trust mechanisms to be used for Scottish debts and the Bill will permit these to be replaced with efficient registration in the new public Register of Assignations. Notification prior to change in management of the debt will lead to confusion of consumers, who are protected in any event by the general "good faith" payment provisions in the Bill and the applicable regulatory regimes. Notification to consumers should not, therefore, be required in addition if the registration option is followed.

Some of UK Finance's Personal Finance members (that is, those financial institutions that deal with individual consumers) may use these bulk transfers of consumer debt for the purposes of their own funding or treasury operations, as do Commercial Finance members (those institutions that deal with business customers) in respect of debts due to them by their business clients.

Given their typical products, it is highly unlikely that in the normal course of business UK Finance's Personal Finance members would seek assignation of debts owed by consumers on an 'individual' basis nor, indeed, that Commercial Finance members would do so. If, however, any lender were to do this, we would certainly point to the existing safeguards provided by the Consumer Credit Act and the FCA statutory regime, as well as the incoming Consumer Duty, as well as the general good faith payment provisions in the Bill. These were considered at length in Committee, of course.

We note with interest the views received by Scottish Government and the Registers of Scotland that "assignation of consumer debt" may comprise early and heavy usage of the Register of Assignations.

As noted, UK Finance's focus has been on the usage of the new registers for business assets but based on feedback from our members we suggest that it will be the use of such consumer debts as underlying bulk collateral in support of 'wholesale' financial markets transactions as mentioned above that this is likely to refer to.

These transactions will be large in terms of numbers and aggregate value of debts assigned but will likely be relatively small in numbers of assignations registered in the new register when compared to numbers of assignations of business debts by our Commercial Finance members in the ordinary course of their businesses. Based on feedback from our members, we see no reason why there should be many registrations of assignations of consumer debts on an individual rather than a bulk basis.

Accordingly, in our view it would be inconsistent with the objectives of the legislation to limit the benefits of the Bill in this regard by further restricting its application to consumer debts. As the Minister rightly notes in his response to the Committee's recommendations, in this respect consumers would arguably be in a more advantageous position than they would be currently and, in any event, would certainly not be disadvantaged. Moreover, we refer again to the current and incoming regulatory and legislative safeguards for consumers that will overlay the Bill, as well as the protections it already contains.

Statutory Pledges

We note the concerns expressed by certain stakeholder groups about the ability of consumers to pledge their personal assets to access finance. As with our comments above with respect to assignations, with the exception of High Net Worth Individuals, it is highly unlikely that in the normal course of business UK Finance's members would seek to provide finance on that basis. The specialist personal lenders that may do so generally lie outside UK Finance's membership and so we are not able to offer detailed comment in that regard, beyond noting again that current and incoming regulatory and legislative safeguards would remain unchanged by the Bill.

We would, however, strongly endorse the representations made by business representative groups that sole traders and other smaller unincorporated businesses should be able to access finance using the provisions of the Bill even if its application to individuals where they are granting security over their personal assets is further restricted or removed.

To our knowledge this view is not contested by any other stakeholders, and supporting the provision of finance to the smallest businesses is one of the most important aspects of the legislation. Indeed, preserving the ability of unincorporated businesses to take advantage of the legislation's benefits is even more important given that in Scotland they are unable to use one of the main 'workarounds' available to incorporated businesses in the form of a floating charge.

On this basis UK Finance would support a decision by the Scottish Government to amend the legislation to remove the application of the statutory pledge measures to individual consumers provided that the amendments are effective in ensuring that sole traders and other unincorporated businesses can still benefit from its measures. If appropriate, we would be pleased to provide our views on the practical effectiveness of such proposed amendments in due course.

Application to shares and other financial collateral

It is undisputed that the ability to obtain effective security over shares in Scottish companies and other financial collateral is a key benefit of the legislation. We have no comment on the legislative competencies of the respective Parliaments but UK Finance would support the bringing forward of the required secondary legislation at the earliest possible opportunity.

Fees

We recognise that the fees for using and searching the Registers will be set by secondary legislation following further consultation with stakeholders and, moreover, that a number of UK Finance's members have provided their views bilaterally to the Registers of Scotland as part of their programme of out-reach with prospective users.

UK Finance would simply reiterate the views expressed previously that the overall approach to fees should be to encourage usage. This is, of course, particularly important given the dual approach will mean that registration will not be compulsory. UK Finance's members further believe that it would be appropriate for the fees to be broadly consistent with those for Companies House.

We would also note that many scale-users will likely seek to buy blended search outputs from a business information provider which would include information from the Registers. It is important that the fee arrangements established enable this.

Companies House

UK Finance's members would emphasise the importance of enabling reciprocal registration between the new Registers in Scotland and the Companies Register. As with the Orders required in relation to shares and other financial collateral, we would support the introduction of the required secondary legislation to enable this at the earliest opportunity.

Set-off

We are aware that colleagues from the legal community have submitted detailed comments on a number of areas of the legislation. Concerns have been raised, in particular, about the effect of current drafting in Section 13, which was subject to some consideration by the Committee.

At present, whilst aspiring to provide clarity, this section creates some uncertainty as to when the cut-off time for a set-off claim occurs. The Scottish Government will be aware that certainty about cut-off time for set-off claims is critical, particularly in financial markets where very large values are set off between counter-parties to contracts and the value of claims can vary quickly. Absent a wider project to consider Scots rules of set off (which would be welcome but is not practical in the timescales for the Bill), UK Finance would support recasting of these aspects in the manner put forward by legal colleagues.

We hope that these comments are helpful to the Scottish Government and Parliament as the Bill proceeds to Stage Two. Please do not hesitate to share them with the Committee as appropriate.

UK Finance and its members remain strongly supportive of the Bill. It will deliver much-needed modernisation of Scots law around assignation and security interests, will enable the utilisation of technology to introduce a registration system fit for the 21st Century, and will enable more finance to be provided to more businesses.

Please do not hesitate to contact us if you or colleagues require any further information in relation to the comments made in this correspondence or on the legislation more generally.

Yours sincerely

Matthew

Matthew Davies
Director, Commercial Finance