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Dear Andrew

Moveable Transactions (Scotland) Bill at Stage 1

Thank you for your letter of 23 September to Alison Irvine seeking an explanation of the following matters in relation to the Bill. On behalf of the Scottish Government, I am pleased to respond as follows.

Section 3(8) - Transfer of claims

The Committee has asked for a further explanation of why this power is considered necessary to be delegated as it could be used to exclude claims from being able to be transferred by way of intimation, and therefore reduce, or remove, the flexibility that the Bill currently provides for.

Paragraph 18 of the Delegated Powers Memorandum (DPM) states that “Assignations in favour of financiers will almost invariably be registered because this will be simpler, easier and cheaper than intimations to multiple debtors. Intimation will also not be an option for future claims.”.

Paragraph 19 notes that “It may therefore be that the vast majority of assignations will be effected by registration in the Register of Assignations and intimation may become increasingly rare.”.

The DPM also acknowledged, however, that some creditors will prefer to continue to assign by means of intimation since they will not want to publicise the assignation of a debt in a public register and would prefer the confidentiality offered by intimation. The Scottish Law Commission (SLC) noted that, while financial institutions would know about registration, those involved in one-off transactions may not. For these reasons, the Scottish Government decided to introduce a combined system of intimation or registration in order to provide assignees with flexibility and a choice as to how they give effect to the assignation of a claim.

Paragraph 19 goes on to explain, however, that "the existence of the possibility of assignation by means of intimation means that third parties cannot rely on a search of the register since this will not disclose an assignation which has been effected by intimation. There may be support in the future for removing the option of intimation as this would mean that all assignations would be registered and a third party would be able to rely on a search of the register.".

As this demonstrates, the benefits of flexibility provided by a dual system which allows intimation or registration have to be weighed against the benefits of clarity of a system which allows the register to serve as a comprehensive and authoritative record. At the moment, the benefits of flexibility are considered to carry greater weight. However, that balance may well shift over time in relation to certain types of claim and if that happens then it is considered appropriate that it should be possible to finesse the rules in relation to particular types of claim without the need for further primary legislation.

Section 3(8) therefore gives Scottish Ministers the option in the future of prescribing certain types of claim for which registration would be compulsory to transfer the claim. The SLC noted that in some jurisdictions, assignation of invoices that have yet to be paid must be registered to have third party effect. They also observed that if the registration of what are called "trade receiveables" in England (the equivalent of "claims" under the Bill) was to become required south of the border then there may be support for this to be the position in Scotland as well.

It is not thought likely that use of the power in section 3(8) would even be contemplated for some time. This would be in order to allow usage of the Register of Assignations to become understood and well-used as a means of raising finance on the basis of debts which can be sold.

Given feedback from potential users of the Register, it is thought to be unlikely that intimation will cease to be used in all circumstances. It is not anticipated that the power in section 3(8) would remove the option of intimation entirely: it would operate only in the case of certain types of claim which will be specified in regulations (subject to the affirmative procedure). The kinds of claim which may require to be so prescribed may become obvious as time passes as the law in relation to assignation by intimation or registration is better understood and as practice in other modern jurisdictions develops. This would have the effect that searchers will know that, if certain kinds of claims can only be transferred by registration of the assignation, then they can rely on a search of the register if they are only interested in whether a party has assigned a particular kind of claim.

Section 4(7) - assignation of claims: insolvency

The Committee has asked for a further explanation of why these powers are considered necessary to be delegated as they appear to be wide and could be used to make significant modifications to the Bill.

Paragraph 26 of the DPM indicated that the SLC noted that there are many different types of insolvency and similar processes both within Scotland and elsewhere, with variations within some of the processes. The Commission commented that deciding on exactly which processes should be subject to the rules relating to an assignor's insolvency was not easy. Although section 4(6) of the introduced Bill provides a relatively comprehensive list of Scottish insolvency processes, the Commission believed, and the Scottish Government agrees, that

Scottish Ministers should have the power to amend the list of provisions by secondary legislation (for example, it may be necessary to clarify what constitutes an equivalent process in other jurisdictions). Further, it should be noted that there is an existing power in section 223 of the Bankruptcy (Scotland) Act 2016 which allows insolvency disqualification provisions in any enactment to be reduced or extended. However, the Bill would not be able to benefit from that power, as this section is not about disqualification provisions. It is considered though that there should be a similar ability to extend or remove provisions in response to changes in the law or shifting views/practices in relation to different insolvency measures. As such, it is viewed as appropriate that there should be an ability to modify what is defined as "insolvency" for the purposes of this section.

The section also allows for the modification of subsections (4) and (5). As the Committee notes, that would allow adjustment of when the assignation is ineffective in relation to a claim and what circumstances that applies to. However, the SLC felt, and the Scottish Government agreed, that it is necessary to be able to specify further circumstances by reference to which an assignation is to be ineffective as regards a claim. It may also be necessary to modify the existing provision that is made in this regard. This power is required in particular so that if a further insolvency process is specified under subsection (6), the existing rules about ineffective assignations are capable of accommodating that new process appropriately.

The power in section 4(7) may require to be used at relatively infrequent intervals, but the Scottish Government agrees with the Committee's assessment that the power could be used to make relatively significant modifications to the Bill, as the regulations may impact on the financial position of assignors and debtors. But it is essential that the Bill properly and accurately identifies and applies applicable insolvency processes, some of which may not be in existence at present and may replace existing procedures. However, for all of these reasons it was considered that regulations under section 4(7) should be subject to affirmative parliamentary procedure so that any changes which need to be made to the Bill can be fully and effectively scrutinised.

Section 53(8) – Acquisition in good faith of motor vehicles

The Committee has asked for an explanation of why, in the absence of an explanation in the Delegated Powers Memorandum, the negative procedure is considered appropriate when specifying classes of motor vehicle to which subsections (1) - (7) do not apply, and whether affirmative procedure may be more appropriate.

The SLC suggested, and the Scottish Government agrees, that the Scottish Ministers should have the power to specify classes of motor vehicle which are not to benefit from the rule in section 53. The rationale for this was that the Register of Statutory Pledges might in the future become so easy to check electronically that certain classes of acquirer should be expected to check it. In New Zealand, for example, good faith private purchasers from licensed motor dealerships are protected, but purchasers from private individuals are expected to check the register.

The withdrawal of the protection of section 53 may, however, depend on the extent to which the registration of vehicle identification numbers becomes compulsory under the rules of procedure which will be brought forward for the Register of Statutory Pledges.

It is thought that this would only happen if the registration of vehicle identification numbers were to become commonplace. The power will therefore be used only rarely and the

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Scottish Government believed that in circumstances where it became very easy to check the register then it would not be a matter of controversy if the protection of section 53 might be withdrawn from some acquirers (for example, it could be withdrawn in relation to commercial vehicles). Given that the power would be being exercised in such circumstances and would also not involve an amendment to primary legislation, it was considered that the negative procedure was appropriate in terms of not infringing unduly upon valuable parliamentary time. However, if the Committee nevertheless feels, in spite of this explanation, that the affirmative procedure would be an appropriate use of the Committee's time then the Government is happy to consider amending this accordingly.

Section 93(1) – Power of Scottish Ministers as regards duration of statutory pledge

The Committee has asked to know whether, given the views of the SLC's consultees and the impact this power could have if exercised, there should be a consultation requirement, not only with the Keeper, but also with other stakeholders, before this power is exercised.

It is hoped (and UK Finance have suggested this to the Scottish Government) that, although it will not be compulsory to register assignations, restrictions or discharges and these will take place legally off-register, commercial pressures will lead to the register being corrected to reflect the true legal position. A subsequent lender on the basis of a specific asset is likely to demand that previous, extinguished pledges which relate to that asset are removed from the register so that their pledge will have prior ranking in the event of default. This will have the effect of decluttering the register.

It is anticipated that, if the power in section 93(1) is proposed to be used, the period set under it would be many years after registration where there is little likelihood that the statutory pledge is outstanding. Paragraph 143 of the DPM noted that the power would allow for the creation of an application route which would allow the secured creditor to renew the pledge and thus avoid its removal from the register if the entry continues to be relevant. Renewal could be on more than one occasion.

The party with the most interest in the register being decluttered is the Keeper of the Registers, particularly as she will be aware of whether the volume of entries is actually having a detrimental and slowing effect on searches in the register. While secured creditors under pledges will of course have an interest in ensuring that those pledges remain valid, any renewal route would be similarly straightforward to the process for registering the pledge initially (i.e. it would be online and automatic). Further, as noted above, it is anticipated that the need for pledges to be renewed would be limited given that it is expected that any duration period would be sufficiently long that the removal process would almost exclusively affect pledges which were no longer in existence anyway.

Given the intention to permit renewal of an entry in the register, and the likelihood that the power in section 93(1) will be used only in relation to pledges which were recorded many years previously, the Scottish Government does not believe that it is necessary to require consultion of stakeholders apart from the Keeper of the Registers. This could lead to consultation being required where no parties were particularly interested due to the detail of the proposal. However, the Scottish Government would of course consult as appropriate if it was considered that the detail of what was being proposed was such that more extensive consultation was necessary. It should also be noted that any regulations made under this power would be subject to the affirmative procedure and would therefore be subject to full

scrutiny.

Section 34(8) - Assignee's duty to respond to request for information

Section 63(4) – Pledge enforcement notice

Section 65(8) – Secured creditor's right to take possession of, or steps in relation to, corporeal property

Section 75(10) – Application of proceeds from enforcement of pledge

Section 105(8) – Secured creditor's duty to respond to request for information

The Committee has asked, in relation to all of these provisions, why, if there are further categories of person able to be identified at this time, such as insolvency officials or executors, they are not specified on the face of the Bill.

While broad categories have been identified as possible examples, it is not expected to be as straightforward as simply specifying "insolvency practitioners", etc. For example, section 34 *obliges* an assignee to comply with a request made under that section. As noted in the DPM, it is not considered that there should be a general public right to information about assignations. Subsection (2) of that section therefore confines the right to make a request to those who have a direct interest in the claim or who have been authorised by the assignor.

In a similar fashion, it is anticipated that it would be necessary to try to confine insolvency practitioners to those with a relevant interest. It will therefore be necessary to consult with insolvency practitioners or appropriate bodies to ensure that the concept of a relevant interest is correctly captured.

It was not possible in advance of introduction of the Bill to ensure that all relevant interests had been identified and properly defined for the purposes of these specific provisions. In contrast, consulting the necessary parties once the Bill has been passed will allow consultees to benefit from the evidence heard during the Bill's passage and awareness of any amendments made to it. This will allow them to more reliably assess when they expect to have a relevant interest that would justify inclusion under this provision, based on a greater understanding of the role they are likely to have in relation to this new law.

It is therefore proposed that one set of regulations will be brought forward under these provisions after the Bill is enacted. These regulations will set out all of the categories of insolvency practitioners, authorised or entitled persons, etc, once full consideration has been given to the correct definitions of such persons and the proposed changes have been consulted on to the extent required.

All of the provisions which the Committee has identified contain a power to modify the provison in the primary legislation to which it relates and will therefore be subject to affirmative procedure. The categories of person will appear in the text of the primary legislation, before the new registers and the legislation becomes operational, meaning that there will be a comprehensive list on the face of the Act and there will be no difficulty for users in seeing at a glance who is covered by the provision. The regulations will also have the opportunity to be scrutinised fully by the Parliament.

Given that the proposed new registers which will be the main method of implementation of the reforms in the Bill will not come into operation until the summer of 2024, it is considered

that there should be plenty of time for the work in ensuring that insolvency practitioners and others are properly identified and defined in modifications to these provisions. After those regulations have been brought into force, it is expected that these powers will be used but rarely and then only in response to the operation of the Act in practice as time passes.

We hope that these explanations will be useful to the Committee. Please do not hesitate to contact me if you require further information.

Hamish Goodall