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Further to my letter of 12 December 2022, I thought that it would be helpful to members of the Committee if I summarised the consultation and further consideration which the Scottish Government has undertaken in response to the Committee's Stage 1 Report on the Moveable Transactions (Scotland) Bill.

I cannot at this stage confirm exactly what amendments the Government will be bringing forward as these are still being considered from a legal and workability perspective. I should emphasise that, in what is already a very legally complex Bill concerning a niche (though economically very important) area of law, a lot of the amendments will be technical in nature.

Consultation on the Bill

In relation to the Committee's suggestion that further consultation should be undertaken where the Scottish Government is considering introducing a Bill to give effect to a Scottish Law Commission (SLC) Report, and significant time has passed since the SLC's original consultation on its proposals, I understand that the Minister for Community Safety, whose Ministerial remit includes liaison with the SLC, has now written to the Committee on this matter.

Assignment

Assignment of consumer debt

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In its Stage 1 Report on the Bill, the DPLRC asked the Scottish Government to consult further on the likely use of the Register of Assignations for the assignment of consumer credit debts and the impact on individual consumers, and to report back to the Committee in advance of the deadline for Stage 2 amendments.

The Committee recognised that to require intimation in all cases involving individuals would undermine the reforms in relation to access to invoice financing. Nonetheless, the Committee was concerned about the impact the removal of intimation may have on debtors and asked the Scottish Government to consider and report back on this issue within the same timeframe.

Officials sought the view of UK Finance, which is the trade association for the UK banking and financial services sector, formed in July 2017. It represents over 300 firms in the UK providing credit, banking, markets and payment-related services. It was the result of a merger of a number of bodies including, of particular relevance to Moveable Transactions, the Asset Based Finance Association. UK Finance wrote to the Scottish Government (on 10 February) with its views and their letter has been shared with the Committee.

Officials also consulted Bruce Wood who retired last year as a practising solicitor (he was previously the Queen's Solicitor in Scotland) and was a member of the SLC advisory group on Moveable Transactions. Until his retirement he was recognised as a leading practitioner in the fields of invoice finance and asset finance. Mr Wood subsequently wrote to the Committee.

Reflecting evidence given to the Committee during Stage 1, UK Finance and Mr Wood confirmed that assignments of consumer debt in Scotland are at present either carried out under English law (which does not require intimation) or by way of trust arrangements. Consumers are thus typically not receiving intimation of assignments. Intimation of assignment is not required in comparator jurisdictions including England, France, Germany, Australia, Canada, New Zealand and the United States.

It is understood that, in practice in Scotland, payment of debt continues to the original creditor, even if the debt has been assigned, and the original creditor passes on the payment to the new creditor unbeknown to the debtor.

Debtors are therefore not receiving intimation of assignment of their debt at present and as a result they continue to pay the creditor who was last known to them, usually the original creditor, who will pass on the payment to the new creditor. There will therefore be no impact on individual debtors as a result of the Bill. The Bill also provides protection for debtors who perform to the original creditor.

I met Citizens Advice Scotland and a number of money and debt advice agencies on 23 February and they similarly shared the view that there would be no impact on individual debtors as a result of the Bill. They did not raise any further concerns.

Section 13: Waiver of defence clauses

The Government has, as invited by the Committee, reflected on the position of sole traders and whether the option to remove defence clauses might be removed for sole traders. This matter was raised in consultation with the Federation of Small Businesses in Scotland who

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indicated that they had no strong opinion, but noted that they had not received any representations from their members on this subject. In the light of their views, the Government is not minded to amend section 13 to remove the ability of sole traders to waive defence clauses.

As noted in my letter of 12 December, the Government has also considered the possible removal of the option for defences to be waived in assignation agreements with individuals not acting in a business context. The Government's view remains that the correct place for regulation of assignations of consumer credit agreements is consumer credit law and, more generally, the place for protecting consumers from unfair contract terms is the Consumer Rights Act 2015.

Application of statutory pledge to individuals

The Scottish Government has accepted that the Bill should be amended at Stage 2 to remove the ability of individuals to grant a statutory pledge. This amendment will require careful consideration of a carve out, to accommodate, amongst other concerns, the ability for sole traders and other acting within a business context still to grant a statutory pledge. The clear intention is to retain the benefits of the Bill for sole traders and other small, unincorporated businesses.

Further protections for sole traders

The Committee recommended that the Scottish Government should give consideration to creating more protections in the Bill for sole traders. A greater issue may, however, be the practicalities around what assurances secured creditors seek in practice in order to satisfy themselves that the pledge is properly being granted by a sole trader or unincorporated business in the correct context.

The FSB is concerned that more protections for small traders are likely to be priced in to loans which might frustrate the intention to make finance easier to obtain.

If it is made more difficult for the potential creditor (which could be the result of more protections for sole traders), or the regulatory environment does not make it easy and attractive to lend to sole traders, then finance reliant on statutory pledge may not be so available to small businesses and/or the cost of loans secured by the statutory pledge may increase. In both cases this may actually operate to the detriment of sole traders.

That may be an argument against greater protections, since it may put us back to the present situation where creditors charge more for lending on moveable assets in Scotland than south of the border because of the state of the law here.

The FSB has indicated to the Government that they do not believe that further specific protections are required for sole traders.

The Government is, however, considering amendments which would provide some further protections for sole traders, aimed at preventing mischief from predatory lenders seeking to by-pass the prohibition against individuals (in general) granting a statutory pledge.

Enforcement against small businesses

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The Bill as introduced provided that when the provider of the statutory pledge was an individual (acting as such), a court order would be required to enforce the pledge in the event of default. This will of course no longer be relevant as such individuals will not be able to grant a pledge. The Government continues to consider whether a court order should be required in the event of enforcement of a pledge against a sole trader.

Section 104 Order

Following discussion between legal advisers for the Scottish Government and the UK Government, the UK Government's view is that the use of a section 104 order would be appropriate. The relevant departments within the UK Government have been made aware for their own consideration. Once there are firmer indications as to next steps for how this will proceed, we will update the DPLRC. Notwithstanding this progress, any eventual section 104 order will be capable of being made only once the Bill has been passed.

Links with Companies House

The Scottish Government has also raised, with counterparts in the UK Government, the prospect of an Order being granted under section 893 of the Companies Act 2006 to enable reciprocal registration between the new registers in Scotland proposed in the Bill, the Companies Register and the Register of Intellectual Property. Discussions are continuing with BEIS but, as with the proposed section 104 Order, the proposed section 893 Order is reliant on the Bill being passed at Holyrood first.

Electronic signatures

The Committee recommended in its Stage 1 Report that the Bill should be amended to require only that a simple electronic signature is required, given the barriers which advanced electronic signatures can create to conducting business electronically for most users. A number of stakeholders had made this suggestion to the Committee.

The Federation of Small Business have indicated to us that they think that advanced (or qualified) electronic signatures (AES and QES) are costly and the expense of certain well-known systems had, they said, been criticised by members.

Registers of Scotland (RoS) have indicated that they don't hold any information on the cost of procuring an AES vs QES for the reason that documents signed by AES are not registrable in any of the Keeper's registers. They believe, however, that the jump in cost and complexity between each level of signature is likely to be significant:

- QES, in addition to requiring the most complicated software to apply, also attracts high costs due to the regulatory requirements of being a qualified trust service provider – setting up and maintaining business policies and practices, audits, indemnity insurance etc all contribute to a higher cost.
- AES does not require the qualified certificate aspect that a QES does, but AES still requires the granter to be identified and the signature to be linked to the granter, which will incur some of the costs of running a QES – as such AES will still require specific software (in which the ability to sign by AES is likely included as part of a

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wider 'workflow solution', which is why it can be difficult to isolate the costs of the AES/QES from the other things which forms part of the provider offering).

- Simple electronic signatures simply require to be associated with the electronic document in electronic form – there is no ID verification and no association with the granter. As such, a typed signature in word or an email signature would qualify, and for that reason, no special software is required (although, of course, the signature providers still offer products to do so).

RoS's view was therefore that, for the purposes of uptake of the new registers, and with small/micro-businesses in mind, simple electronic signatures would offer the best option.

The counter-argument is that these types of signature are less secure and more susceptible to fraud, and that is why the Scottish Government decided on AES as the default standard for formal validity (for documents that fall within s1(2) of the Requirements of Writing (Scotland) Act 1995) in the Electronic Documents (Scotland) Regulations 2014 (with QES being required for self-providing standard and therefore registration).

RoS indicated that they could say with confidence that the jump in cost and complexity between simple and AES is likely to be significant. They also indicated that the standard of signature was of no consequence to the Keeper, particularly as it would only be copies of the assigination or constitutive documents which would be submitted to the relevant registers.

RoS have also indicated that, in relation to the use of QES in the Land Register, it is rarely used and, given the opportunity to consider again, they would not have adopted such a requirement.

In view of the indications given by RoS with regard to the likely usage of the registers, and the views of the FSB and others who have commented, the Government is considering an amendment which would require only simple electronic signatures.

Scottish Government amendments

It is our intention that the Government's Stage 2 amendments will be lodged on 13 March and we will provide members of the Committee with Purpose and Effect notes in the usual way.

I hope this explanation is helpful to the Committee.

Tom Arthur

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