



Stuart McMillan MSP
Convener
Delegated Powers and Law Reform Committee
Scottish Parliament
Edinburgh
EH99 1SP

19 May 2023

Dear Convener,

Economic Crime and Corporate Transparency Bill LCM

Thank you for your letter of 16 May 2023.

I have responded to the points raised as set out below and hope you find these helpful in your continued consideration of the Bill.

Lords amendment 73L – new section 29C to be inserted in the Limited Partnerships Act 1907

Lords amendment 73K – new section 29A to be inserted in the Limited Partnerships Act 1907

a) Whether the powers conferred on the Secretary of State by amendment 73L and 73K, insofar as within devolved competence, fall within areas formerly within EU competence before the UK fully withdrew from the EU; and

b) How, where the process for scrutiny by the Scottish Parliament set out in SI Protocol 2 does not apply, the Parliament is to scrutinise the Scottish Ministers' consent to UK SIs made by the Secretary of State under powers conferred in devolved areas that do not fall within areas formerly within EU competence before the UK fully withdrew from the EU.

Lords amendment 73L inserted new section 29C into the Limited Partnerships Act 1907 ('the 1907 Act')¹ and provides an enabling power for the Secretary of State or the Scottish Ministers to amend section 29B(3), which provides a list of concurrent proceedings which would have

¹ For completeness, please note this now appears as new section 32 of the 1907 Act in the full text of the Bill as amended in the House of Lords in Grand Committee (see [here](#))



to be notified to the court where a relevant person becomes aware of them whilst a petition or application for winding up under sections 28 or 29 is pending. Lords amendment 73K inserted new section 29A into the 1907 Act² which provides a power to enable the Secretary of State to make provision to govern the winding up of limited partnerships under new sections 28 or 29 of that Act.

a) Whilst the EU has competence to make provision in some devolved areas about cross border insolvency proceedings using Article 81 of the Treaty on the Functioning of the EU (and has done so, for example, [Council Regulation 2015/848](#) for the purposes of effective administration of cross-border insolvency proceedings), the powers introduced by Lords amendment 73L and 73K are not directed at cross-border insolvency proceedings and we do not consider they fall within devolved areas formerly within EU competence before the UK fully withdrew from the EU.

b) Protocol II as it currently stands only applies to UK SIs that include provisions that are within devolved competence and relate to matters that were formally within the competence of the EU. However, the protocol is currently under review and the future scope of the protocol is on the agenda for that review. The review is being carried out by SG and SP officials working together. It is hoped that the review will make significant progress over the summer.

Lords amendment 77L – new schedule 5A – Duty to deliver further information for transitional cases

a) Whether the powers conferred on the Secretary of State by amendment 77L, section 303Z42, and amendment 84C, insofar as within devolved competence, fall within areas formerly within EU competence before the UK fully withdrew from the EU; and

b) If, in each instance, an amendment is agreed to include a consent mechanism, how, where the process for scrutiny by the Scottish Parliament set out in SI Protocol 2 does not apply, the Parliament is to scrutinise the Scottish Ministers' consent to UK SIs made by the Secretary of State under powers conferred in devolved areas that do not fall within areas formerly within EU competence before the UK fully withdrew from the EU.

a) The power conferred on the Secretary of State allows the Secretary of State to make specific provision to exempt certain persons from being treated as a registrable beneficial owner by the provisions of a proposed new Schedule 6 to the Economic Crime (Transparency and Enforcement) Act 2022. The provisions of Schedule 6 will, if passed, impose additional reporting obligations on overseas entities, and specifically overseas trusts, to which the Act applies. We do not consider that this power falls within an area formerly within EU competence before the UK fully withdrew from the EU.

b) Protocol II as it currently stands only applies to UK SIs that include provisions that are within devolved competence and relate to matters that were formally within the competence of the EU. However, the protocol is currently under review and the future scope of the protocol is on the agenda for that review. The review is being carried out by SG and SP officials working together. It is hoped that the review will make significant progress over the summer.

² Similar to the footnote above, the reference to section 29A now appears as new section 30 in the 1907 Act in the text of the Bill as amended in the House of Lords in Grand Committee.

Schedule 7: New section 303Z42 of POCA – Forfeiture order: supplementary

a) Whether the powers conferred on the Secretary of State by amendment 77L, section 303Z42, and amendment 84C, insofar as within devolved competence, fall within areas formerly within EU competence before the UK fully withdrew from the EU; and

b) If, in each instance, an amendment is agreed to include a consent mechanism, how, where the process for scrutiny by the Scottish Parliament set out in SI Protocol 2 does not apply, the Parliament is to scrutinise the Scottish Ministers' consent to UK SIs made by the Secretary of State under powers conferred in devolved areas that do not fall within areas formerly within EU competence before the UK fully withdrew from the EU.

a) The new section 303Z42 deals with the forfeiture of cryptoassets that are both recoverable property and are intended by any person for use in unlawful conduct. This civil regime is generally devolved. Therefore, it is arguable that new section 303Z42 is within EU competence insofar as it relates to the proceeds of crime that are forfeited with a cross border dimension.

b) Protocol II as it currently stands only applies to UK SIs that include provisions that are within devolved competence and relate to matters that were formally within the competence of the EU. However, the protocol is currently under review and the future scope of the protocol is on the agenda for that review. The review is being carried out by SG and SP officials working together. It is hoped that the review will make significant progress over the summer.

Lords amendment 84C - Failure to prevent fraud: large organisations

a) Whether the powers conferred on the Secretary of State by amendment 77L, section 303Z42, and amendment 84C, insofar as within devolved competence, fall within areas formerly within EU competence before the UK fully withdrew from the EU; and

b) If, in each instance, an amendment is agreed to include a consent mechanism, how, where the process for scrutiny by the Scottish Parliament set out in SI Protocol 2 does not apply, the Parliament is to scrutinise the Scottish Ministers' consent to UK SIs made by the Secretary of State under powers conferred in devolved areas that do not fall within areas formerly within EU competence before the UK fully withdrew from the EU.

And in relation to Lords amendment 84C:

c) Why the Scottish Government is recommending that the Parliament consents to the provision regardless of whether a consent mechanism is included.

a) Lords amendment 84C provides an enabling power for the Secretary of State to adjust the organisations which will be subject to the failure to prevent fraud offence. Whilst the EU has some competence within the criminal sphere, this is not unlimited and Article 83 of the Treaty on the Functioning of the European Union sets out the limits of that competence in connection with defining offences and is limited to specific serious offences with a cross-border dimension. The Scottish Government is of the view that the enabling power connected with this offence, insofar as within devolved competence, does not fall within the scope of Article 83 and therefore does not fall within an area formerly within EU competence before the UK fully withdrew from the EU.

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b) Protocol II as it currently stands only applies to UK SIs that include provisions that are within devolved competence and relate to matters that were formally within the competence of the EU. However, the protocol is currently under review and the future scope of the protocol is on the agenda for that review. The review is being carried out by SG and SP officials working together. It is hoped that the review will make significant progress over the summer.

c) The new failure to prevent fraud offence is an important step in ensuring victims can be protected by organisations across the UK putting in place improved fraud prevention procedures. Noting that the new offence relates to a mix of reserved and devolved matters, there is a good justification for approaching this area consistently across the UK including in Scotland. This in part relates to many organisations operating across the nations of the UK.

At the request of the Scottish Government, the UK Government has provided a power for Scottish Ministers to update relevant offences operating for the purposes of the failure to prevent fraud offence where those offences would be within devolved competence e.g. if a new statutory offence of fraud was legislated for at the Scottish Parliament. This power is contained in clause 189(2) of the Bill as amended in Grand Committee. The power of the Secretary of State to adjust the organisations which will be subject to the offence is narrow and could not change the fundamentals of the offence. Although a number of organisations affected will likely fall within the exceptions to the ‘business association’ reservation in section C1 of schedule 5 of the Scotland Act 1998 (e.g. charities), it is considered many organisations will fall within the ‘business association’ reservation. The Scottish Government recognises the merit in having a singular threshold across the UK for the operation of the offence.

As such, the Scottish Government considers the balance lies in having the new offence, including amendment 84C, operating for Scotland so the benefits of protection for victims can be delivered in Scotland as well as elsewhere in the UK. It is within this context that the Scottish Government does not recommend Parliament withholds consent for this clause.

Schedule 6: New section 131ZC(3) of POCA: Power to amend the definition of “cryptoasset service provider” for the purposes of the confiscation regime in Scotland.

Schedule 6: New sections 150A, 303Z20 and 303Z35 of POCA: Power to amend the definition of “cryptoasset service provider” for the purposes of the confiscation regime in Scotland

a) Why Scottish Ministers consider that a consultation requirement is deemed adequate in this instance.

a) The Proceeds of Crime Act is a largely uniform scheme across the UK and it is desirable to ensure consistency across jurisdictions.

The Scottish Ministers are content that the new regulation making powers around the definitions of cryptoassets and related items and crypto service providers in s150A (confiscation) and 303Z20 and 303Z35 (civil recovery) remain suitable for consultation with Scottish Ministers. This mirrors the other order making powers in the Act.

This is in the interests of ensuring a swift and consistent response to changes in cryptoasset related technology throughout the UK. The updating of these definitions and how cryptoassets are hosted will be heavily reliant on the expertise of financial institutions and regulated authorities, much of which is reserved.

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This does contrast to our desire for a consent mechanism for 303Z42. The regulations made under that order making power may more directly affect the executive functions of Scottish Ministers, for instance the realisation of cryptoassets following forfeiture, or impact on the Scottish court process.

Yours sincerely,

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