Supplementary Legislative Consent Memorandum

Economic Crime and Corporate Transparency Bill

Background

1. This supplementary Memorandum has been lodged by the Deputy First Minister and Cabinet Secretary for Finance, Shona Robison MSP, under Rule 9B.3.1(a) of the Parliament's Standing Orders. The Economic Crime and Corporate Transparency Bill ("the Bill") was introduced in the House of Commons on 22 September 2022. The latest version of the Bill, Explanatory Notes and other supporting documents can be found at: https://bills.parliament.uk/bills/3339

2. As advised in the original LCM, negotiations at official and Ministerial level were ongoing at the time of lodging in relation to the forfeiture of cryptoassets; the failure to prevent fraud offence; and the register of overseas entities in order to ensure future regulation making powers that may impact on devolved matters have a process to ensure the interests of Scottish Ministers are recognised and provided for.

Provisions which relate to Scotland requiring an LCM

3. The areas of law covered by the Bill are largely reserved, but there are a number of areas where legislative consent is required for devolved matters.

4. Some of the areas in the Bill where the need for legislative consent arises has required an assessment of the appropriate balance between legislative convenience and respecting Scottish Ministerial responsibilities in terms of how provisions operate. This need has manifested itself when assessing whether the operation of certain provisions should require direct consent or consultation with concurrent powers sitting with Scottish Ministers.

5. This has been an issue with a number of recent UK Government (UKG) Bills and the Scottish Government remains committed to finding the most appropriate solutions to these issues when they arise.

6. Each example, including in this Bill, is different and there is no one size fits all approach, with often competing and conflicting aspects arising when determining what an appropriate approach on consent and consultation should be. However, a pattern has emerged across a number of recent UKG Bills where this Parliament has taken the view that there has been insufficient recognition of the importance of respecting the devolution settlement. The withholding of consent for some provisions at this stage reflects a hope, if not an expectation, that future issues of this sort can be minimised.

7. In the context of this specific Bill, where this issue arises of UK Ministers taking powers in devolved areas, this is explained below along with the justification for what is considered the appropriate approach to take.

Cryptoassets

8. Further dialogue has taken place with UKG since the previous LCM was lodged. Following those discussions UKG has tabled amendment number 90 to the proposed new section 303Z42 in the Proceeds of Crime Act 2002 in relation to cryptoassets. That amendment provides a consult plus mechanism, which builds on the previous section and sets out that if regulations were made affecting the forfeiture process in Scotland and Scottish Ministers disagreed with the proposal then the Secretary of State if pressing ahead would need to provide an explanation why.

9. In addition to that amendment the UKG has also confirmed that that the intention of the regulation-making power is to allow future changes to the obligations of the cryptoasset service provider under section 303Z42(4)(a). Their expectation and strong intention is that any other amendments would only be made to support or facilitate that revised UK-wide process, and would not alter the functions of Scottish Ministers. Scottish Ministers are therefore now content to recommend to recommend legislative consent for section 303Z42.

10. This regulation making power could alter the executive competence of the Scottish Ministers insofar as proceeds of crime are devolved, are within the legislative competence of the Scottish Parliament and therefore requires legislative consent.

Failure to prevent fraud offence and the identification doctrine

11. For failure to prevent fraud, a consult mechanism was added by amendment number 120 and this will require the Secretary of State to consult with Scottish Ministers before exercising the power in clause 190(5) or (6). While a consent mechanism would have been preferred, the Scottish Government did not recommend withholding legislative consent on this issue in the original LCM in light of consideration of the importance of the offence operating in Scotland. With a consult mechanism added, the Scottish Government continues to recommend legislative consent given that progress made in adding the consult mechanism in. There are also some amendments which make modifications to the offence as it relates to subsidiary undertakings (111-116, 118-119 and 122-124) and these do not raise any concerns for the Scottish Government.

12. A new provision was added to the Bill by amendments numbered 104-106, 109, 138-140 and 144-145 which require legislative consent. These amendments are intended to codify the current common law ‘identification doctrine’ which is used for establishing corporate liability where senior managers of an organisation have committed an offence. This relates to economic crimes only, as defined in the Bill. This is due to the scope of this Bill with any extension to beyond economic crimes

requiring separate legislation. This has been extended to Scotland following a request from the Cabinet Secretary for Justice and Home Affairs after the original intention of the UKG was to extend this provision to England and Wales only. The UKG has agreed to include Scotland and has made an amendment accordingly. Under amendment number 105 there is a power enabling the Secretary of State to amend the list of economic crimes and there is a concurrent power which enables Scottish Ministers to amend the list of economic crimes so far as would be within the legislative competence of the Scottish Parliament. The Scottish Government requested these provisions and accordingly legislative consent is recommended.

Trusts and Register of Overseas Entities (ROE)

Addition to Schedule 6 (anti-avoidance) 77L

13. Further dialogue has taken place with the UKG since the previous LCM was lodged. Following those discussions the UKG has lodged two amendments to the Secretary of State regulation making power contained in Schedule 6 (Paragraph 9(1)) as inserted by amendment 77L. This was one of a number of additional ROE provisions that were introduced by amendment at Lords Grand Committee stage which are designed to address anti-avoidance measures in relation to trusts. The power allows the Secretary of State to make further regulations, relating to people who are not to be treated as a registrable beneficial owner.

14. The first amendment number 85 inserts wording to include a sunset clause limiting the use of the power to make regulations under paragraph 9(1) of Schedule 6 to the Economic Crime (Transparency and Enforcement) Act 2022 (exclusion of descriptions of registrable beneficial owner) to a period of two years beginning with the day on which the Bill receives Royal Assent.

15. The second amendment number 86 inserts wording to include a requirement for the Secretary of State to consult Scottish Ministers before making regulations under paragraph 9(1) of Schedule 6 to the Economic Crime (Transparency and Enforcement) Act 2022 (exclusion of descriptions of registrable beneficial owner) that contain provision that would be within the legislative competence of the Scottish Parliament.

16. The consent of the Scottish Parliament is required to these amendments because the power could be used to legislate for matters within the competence of the Scottish Parliament.

17. The Scottish Government understands that the UKG intend to use this power in relation to pensions trusts, and the sunset clause especially signals strongly the intent to only use it for the intended pensions trusts transitional issue. Whilst Scottish Ministers would have preferred a consent requirement, they are now content to recommend legislative consent for Schedule 6 (as inserted by amendment 77L) in light of these two amendments.

Power to make regulations about access to trusts information

18. This amendment number 78 will insert a new clause conferring a regulation-making power on the Secretary of State to make provision requiring the registrar (Companies House) to disclose protected trusts information where an application is made by a person in accordance with regulations. Regulations under this section are subject to affirmative resolution procedure.

19. The Secretary of State would be required to consult the Scottish Government before making regulations about the disclosure of protected trusts information if that provision would be within the legislative competence of the Scottish Parliament.

20. This amendment requires the consent of the Scottish Parliament, as it allows UK Ministers to make subordinate legislation in areas that are not reserved to Westminster.

21. Whilst a consent mechanism would have been preferable, the consult mechanism, coupled with the affirmative procedure for use of the power, and the benefits of a consistent approach UK-wide, mean Scottish Ministers recommend legislative consent to this amendment.

Requirement to provide further information about trust beneficiaries when updating (or making an application for removal)

22. This amendment number 84 inserts a new Schedule to the Economic Crime (Transparency and Enforcement) Act 2022 requiring an overseas entity that has a beneficial owner who is a trustee to provide information about changes in beneficiaries under the trust that take place during a certain time period (rather than just providing a snapshot of the beneficiaries at the end of the period). By requiring information about all changes to beneficiaries within a given period, rather than just details of the beneficiaries at the end of the period, this measure appears to be aimed at closing anti-avoidance loopholes and increasing transparency.

23. A power is conferred on the Secretary of State to make regulations that would provide for exceptions to this requirement to deliver information. The Secretary of State must consult the Scottish Ministers before making regulations that contain provision that would be within the legislative competence of the Scottish Parliament if contained in an Act of that Parliament.

24. This amendment requires the consent of the Scottish Parliament as it extends to types of entity whose regulation is within the competence of the Scottish Parliament, and the power allows UK Ministers to make subordinate legislation in areas that are not reserved to Westminster. Scottish Ministers support measures to close anti-avoidance loopholes and increase transparency. Whilst a consent mechanism would have been preferable, the consult mechanism for use of the

power coupled with the benefits of a consistent approach UK-wide, mean Scottish Ministers recommend legislative consent to this amendment.

Consultation

25. There has been no further consultation beyond what is described in the original LCM lodged on 5 May 2023.

Financial implications

26. It remains the case that there are no significant additional costs to the Scottish Government or its key stakeholders are envisioned as a direct consequence of the provisions within Economic Crime and Corporate Transparency Bill.

Conclusion

27. The Scottish Government remains supportive of the intent of the Bill and believes that engagement has been good overall between officials. The Scottish Government are grateful for amendments that have been made to reflect devolved matters, and welcomes the progress that has been made on some of the issues raised. The Scottish Government's position remains that where the UKG intends to take powers to make secondary legislation in devolved areas that must be accompanied by effective mechanisms to respect the devolution settlement and to recognise the responsibilities of Scottish Ministers and the Scottish Parliament.

Draft Legislative Consent Motion

28. The Scottish Government is supportive of the purpose of the Economic Crime and Corporate Transparency Bill. This is aligned to key aspects of the Scottish Government's vision for corporate transparency. The Bill is technical and the policy content uncontroversial. The Scottish Government's draft legislative consent motion is:

> "That the Parliament agrees that the relevant provisions contained within the UK Economic Crime and Corporate Transparency Bill, introduced in the House of Commons on 22 September 2022, which fall within the legislative competence of the Scottish Parliament or alters the executive competence of Scottish Ministers, should be considered by the UK Parliament".

Scottish Government
June 2023

This Supplementary Legislative Consent Memorandum relates to the Economic Crime and Corporate Transparency Bill (UK legislation) and was lodged with the Scottish Parliament on 19 June 2023

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All documents are available on the Scottish Parliament website at: www.parliament.scot/documents