Legislative Consent Memorandum

Economic Crime (Transparency and Enforcement) Bill

Background

1. This memorandum has been lodged by Keith Brown MSP, Cabinet Secretary for Justice and Veterans, under Rule 9.B.3.1(a) of the Parliament's Standing Orders. The Economic Crime (Transparency and Enforcement) Bill was introduced in the House of Commons on 01 March. The Bill can be found here.

2. The principal objective of the Bill is to bring forward a Register of Overseas Entities (ROEs) and strengthen the Unexplained Wealth Orders (UWOs) powers to enable the UK to counter illicit financial activity from Russia (and elsewhere), enforce sanctions and help in the wider fight against grand corruption and serious organised crime.

Provisions which relate to Scotland

3. The Bill has three main elements: Register of Overseas Entities; Unexplained Wealth Orders; and changes to the sanctions regime. The first two of these make provision which engage Rule 9B of the Parliament's Standing Orders.

Unexplained Wealth Orders

4. Clause 41 would increase the scope of existing powers as set out in section 396A(3) of the Proceeds of Crime Act 2002 to enable a UWO to be served on persons who are reasonably expected to have some form of control over the asset subject to the UWO. This includes Directors or officers of legal entities with day to day control over properties, including those having access to records of property ownership, transactions, and property management costs. This would ensure that when a property holder is not an individual, a UWO can require a "responsible officer" of the respondent to the UWO to provide information requested under the order. The Scottish Government is in agreement with this provision.

5. Clause 43 provides for an alternative test to the income requirement for UWOs as set out in section 396B(3) of the 2002 Act. This measure would ensure that property via complex ownership structures is within scope of the UWO regime. Currently there must be grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient to obtain the property. This has been successfully challenged in the High Court in England on the grounds that the holder of the property did not finance the purchase and therefore their income was irrelevant. The provision in the Bill will deal with this issue by enabling a UWO to cover where the property or where the funds used by any person

to obtain it, were unlawfully obtained. The Scottish Govenrment is in agreement with this provision.

6. Clause 45 provides a power to extend the period for which an interim freezing order has effect as detailed at section 396D of the 2002 Act, and inserts new sections 396DA and 396DB. Taken together this would afford the Scottish Ministers more time to review material provided to it in response to an UWO before a corresponding interim freezing order (IFO) over the relevant property expires (and so before the property can be moved beyond the reach of law enforcement). This provision would increase the statutory period for the review of material provided in response to a UWO from 60 days to a total of 186 days, but reviewed if required by the Court up to every 63 days until the maximum period. Any freezing orders in place over the relevant property would remain in place for the extended period of time. The clause additionally allows for the Lord Advocate to seek such an extension where she has been given the opportunity by Scottish Ministers to detemine whether to take enforcement or investigatory action under the 2002 Act in her own right, but has not yet been able to make such a determination. The Scottish Government is in agreement with this provision.

7. Clause 47 provides for a limit on when the court may make an order for expenses in relation to UWOs against the Scottish Ministers or the Lord Advocate. This provision provides that expenses are only payable by the Scottish Ministers or the Lord Advocate if they have acted unreasonably, dishonestly or improperly. The Scottish Government is in agreement with this provision.

Register of Overseas Entities

8. Part 1 of the Bill seeks to establish a new Register of Overseas Entities (ROE) showing who owns and controls overseas entities that own UK property, including in Scotland.

9. The provisions in Part 1 of the Bill apply to Scotland in their entirety, in so far as these provisions cover overseas entities that own land in Scotland. Schedules 1 and 2 set out the procedures for compliance including the application process, which beneficial owners require to register and conferral of powers on the Secretary of State to make further provision for the matters set out in the Schedules.

10. Schedule 4 of the Bill makes provision specific to land registration practice in Scotland. It amends the Conveyancing (Scotland) Act 1924 and the Land Registration (Scotland) Act 2012 and makes transitional provisions. It also includes a power for the Secretary of State to make further provision. The amendments include conferring functions on the Keeper of the Registers of Scotland, and powers for the Scottish Ministers to consent to registration in some circumstances where the Keeper would otherwise be required to reject the application.

11. Some of the subject-matter of the proposals extends beyond reserved matters.

12. The Scottish Government is fully supportive of measures to improve transparency of land ownership.

13. The new Register will apply to any legal entity that is governed by the law of a country other than the UK (an “overseas entity”). The overseas entity must take reasonable steps to identify and register any beneficial owners in relation to the entity. The new Register will be operated by Companies House and will be free to access.

14. The Bill also makes provision that means that, in order to register title to land, an overseas entity must be registered on the ROE with Companies House. A failure to do this will, in most cases, affect the ability of the overseas entity to (i) acquire legal title to land or (ii) to sell, lease or grant security over the land. The Bill makes the necessary amendments to the Conveyancing (Scotland) Act 1924 and the Land Registration etc. (Scotland) Act 2012 in order to achieve this. In essence, an overseas entity would be unable to transact with property registered in the Land Register after 8 December 2014 (the date the 2012 Act came into force) or register title to property in Scotland after the new Register comes into force unless the overseas entity is registered in the new Register or is exempt from registration. The draft Bill contains provisions which prevent the Keeper of the Registers of Scotland from accepting applications from a regulated entity onto the Land Register without the appropriate ROE registration number.

15. The restriction on being able to transfer good title without ROE registration could in some cases operate unduly harshly so the amendments to the 2012 Act included within Schedule 4 provide Scottish Ministers with power to consent to registration in certain circumstances where the Keeper would otherwise be required by the provisions of this Bill to reject the application. Note, the decision to only capture property registered in Scotland after 8 December 2014 was determined by the UK Government on the basis of that being the date that new land registration requirements came into play in Scotland. The Scottish Government has not explored extension to an earlier date, but prima facie there is no reason to think that this could not be done in principle, had UK Government asked.

16. Provision has been added in Part 3 of Schedule 4 to enable the Secretary of State to amend the provisions as they apply in Scotland by statutory instrument for a period of up to 18 months after coming into force. The Scottish Government also notes that a number of further amendments have been made, some of which may impact on devolved matters, and our officials are considering these further with a view to whether any further discussion is required on these amendments.

Reasons for seeking a legislative consent motion

Unexplained Wealth Orders

17. In relation to Unexplained Wealth Orders, the Bill makes provision applying to Scotland which falls within the legislative competence of the Scottish Parliament. The overall purpose of Part 2 of the Bill relates to the proceeds of crime. Legislation relating to the proceeds of crime is generally within the legislative competence of the Scottish Parliament except where it relates to matters such as the proceeds of drug trafficking or to money laundering. The provisions in the Bill therefore fall within legislative competence where they can be exercised in relation to non-reserved

matters. Further, the Bill makes provisions which alter the executive competence of the Scottish Ministers. This makes it a “relevant” Bill under Chapter 9B of the Standing Orders of the Scottish Parliament and consequently requires the consent of the Scottish Parliament.

18. The Scottish Government recommends that the Scottish Parliament gives consent for the UK Parliament to consider the proposed amendments to the 2002 Act that extend and apply to Scotland. The proposed changes are aimed at improving the recovery of assets obtained through unlawful conduct.

19. Although the criminal and civil law are generally devolved, the 2002 Act provides for the confiscation of criminal benefit and civil recovery for unlawful conduct, which covers drug trafficking and money laundering as well as devolved crime. As the 2002 Act concerns a complex mix of both reserved and devolved matters, it is appropriate for the proposed amendments to be made through the UK Parliament. However, to the extent that the proposed amendments make provision in relation to the civil recovery of the proceeds of devolved crime, they are within the Scottish Parliament’s legislative competence and require its consent.

20. The Bill extends and alters the functions on the Scottish Ministers in relation to the seeking, and operation of UWOs, and insofar as this alters the executive competence of the Scottish Ministers, the relevant clauses in the Bill require the consent of the Scottish Parliament.

Register of Overseas Entities

21. In respect of the Register of Overseas Entities, the consent of the Scottish Parliament is required primarily because the Bill requires overseas entities going beyond ‘business associations’ to comply with its provisions. This includes some forms of entity regulation of which is within devolved competence.

22. The Scottish Government is fully supportive of measures to improve transparency of land ownership, including the overall provisions of the Bill in respect of the Register of Overseas Entities and recommends that the Scottish Parliament gives consent to the UK Parliament to considering the Bill, subject to the specific points outlined below.

23. One of the enforcement mechanisms proposed within the Bill is to prohibit the Keeper of the Registers of Scotland from accepting applications for registration of title onto the Land Register where the regulated entity has not registered with ROE. Where a regulated entity has not complied with its duties under the Bill a third party transferee will not be able to register their title either. The restriction on being able to transfer good title without ROE registration could in some cases operate unduly harshly so the amendments to the 2012 Act include, at paragraph 7 of Schedule 4, a provision that Scottish Ministers have power consent to registration in certain circumstances where the Keeper would otherwise be required by the provisions of this Bill to reject the application. This conferral of executive competence requires the consent of the Scottish Parliament.

24. The conferral of the power on the Scottish Ministers came about as a result of engagement between BEIS, the Scottish Government, Registers of Scotland and the

Office of the Advocate General. The Scottish Government recommends that the Scottish Parliament gives consent to this provision.

25. Due to the pace at which the Bill is proposed to pass through the UK Parliament, the Bill includes in Part 3 of Schedule 4 powers for the Secretary of State, by regulations, to make further or alternative provision for the purposes of requiring or encouraging an overseas entity that owns or holds a right or interest in or over land in Scotland, or enters into land transactions in Scotland, to register as an overseas entity. The regulation-making powers in Part 3 of Schedule 4 are very wide in their scope. The Scottish Government is concerned that the Scottish Ministers should have the opportunity to appropriately manage the exercising of this power in relation to devolved matters and are working with the UK Government to try and reach a pragmatic solution.

Consultation

26. It has not been possible to conduct a formal consultation exercise because of the pace at which the UK Government is progressing its legislation. However, the Scottish Government has engaged with, and taken account of the views of, key stakeholders responsible for implementing the Bill, such as the Civil Recovery Unit and Registers of Scotland. The key stakeholders have raised no operational difficulties and are broadly content with the Bill.

Financial implications

27. No significant costs or savings are expected to arise as a result of the provisions within the Bill.

Conclusion

28. For the reasons set out above, the Scottish Government believes that legislative consent is necessary and appropriate.

Draft Legislative Consent Motion

29. The draft motion, which will be lodged by the Cabinet Secretary for Justice and Veterans is:

“That the Parliament agrees that the relevant provisions of the Economic Crime (Transparency and Enforcement) Bill, introduced in the House of Commons on 1 March 2022, relating to amendments for Unexplained Wealth Orders contained in the Proceeds of Crime Act 2002, and the provisions in the Bill relating to the Register of Overseas Interests, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

Scottish Government
March 2022

This Legislative Consent Memorandum relates to the Economic Crime (Transparency and Enforcement) Bill (UK legislation) and was lodged with the Scottish Parliament on 4 March 2022

Economic Crime (Transparency and Enforcement) Bill – Legislative Consent Memorandum

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

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