

Scottish National Investment Bank Bill

[As Amended at Stage 2]

Revised Explanatory Notes

Introduction

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Scottish National Investment Bank Bill (which was introduced in the Scottish Parliament on 27 February 2019) as amended at Stage 2. Text has been added or amended as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the margin.

2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

The Bill

Overview

3. The Bill places a duty on the Scottish Ministers to establish the Scottish National Investment Bank (the "Bank") as a public limited company ("p.l.c.") and gives the Scottish Ministers the necessary powers to capitalise the Bank. Scottish Ministers will also be given the power to set the strategic direction of the Bank by the setting of Missions.

4. The Bill also places a duty on the Scottish Ministers to provide the Bank with its Articles of Association (that is to say the constitution of the Bank as a p.l.c.) and mandates what is to be in the Articles and the circumstances in which certain provisions can be modified. The Bill also makes provision for the annual reporting and performance review (every five years) of the Bank.

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5. The Schedule of the Bill makes provision for the application of public bodies legislation to the Bank.

Part 1 – Establishment of the Bank

Chapter 1 - Scottish Ministers' duty to establish the Bank

6. Section 1 places a duty on the Scottish Ministers to establish the Bank as a public company limited by shares. The Scottish National Investment Bank p.l.c is to have its registered office in Scotland and be owned solely by the Scottish Ministers. The Bank's Articles of Association are to be framed in accordance with Chapter 2 (the Bank's Articles of Association on establishment).

Chapter 2 -The Bank's Articles of Association on establishment

7. Section 1A makes provision, for requiring that the Bank's articles of association include a statement of the inclusion in the Articles of a vision for the Bank.

8. Section 2 makes provision, for inclusion in Articles, about the Bank's main object and ancillary objects (or objectives). The Bank's main object situates the role of the Bank within the economic development powers devolved to the Scottish Government. The ancillary objects direct the Bank's investment towards delivering against a broad range of outcomes which include creating and shaping new markets as well as promoting both environmental and social wellbeing.

8.9. Section 2A makes provision, for inclusion in the Articles, for the preparation of a balanced scorecard to assist in the Bank's preparation of reports. The balanced scorecard approach is a recognised performance management strategy that enables organisations to track performance against a range of outcomes. In preparing the balanced scorecard document, the Bank must consider the economic, social, environmental, or any other (financial or non-financial) impacts of its investments.

9.10. Section 3 makes provision, for inclusion in the Articles, about the general powers of the Bank.

10.11. Section 4 makes provision, for inclusion in the Articles, about the borrowing powers of the Bank. Under the fiscal framework agreement

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between the Scottish and UK governments¹, the Scottish Government has limited powers to borrow finance. Borrowing by the Bank from parties other than the Scottish Ministers would be counted towards the Scottish Government's borrowing limit. Restrictions are therefore placed on the Bank's ability to borrow to ensure it does not impact upon the Scottish Government's fiscal position.

11.12. Section 5 makes provision, for inclusion in the Articles, about the ownership of the Bank, namely, that it can only be owned by the Scottish Ministers.

12.13. Section 6 makes provision, for inclusion in the Articles, about the composition of the Board and sets out parameters for the appointment of Directors to the Board of the Bank. This includes a requirement on Ministers to consider the desirability of non-executive directors, across the Board as a whole, to having experience or knowledge of the issues facing both workers and businesses in Scotland.

13.14. Section 7 makes provision, for inclusion in the Articles, about the tenure of Directors appointed to the board of the Bank.

14.15. Section 8 makes provision, for inclusion in the Articles, about the remuneration of the Bank directors and staff, namely that this is to be determined by the directors subject to any direction from the Scottish Ministers.

15.16. Section 9 makes provision, for inclusion in the Articles, for the establishment of separate audit and risk committees and their respective functions.

16.17. Section 9A provides that the Scottish Ministers must establish an advisory group to provide them with advice on the objectives, conduct and performance of the Bank..

17.18. Section 10 makes provision, for inclusion in the Articles, that the Articles mentioned in this Chapter (Chapter 2) can only be amended or

¹ Fiscal framework: agreement between the Scottish and UK Governments: <https://www.gov.scot/publications/agreement-between-scottish-government-united-kingdom-government-scottish-governments-fiscal/>

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repealed in accordance with section 20 (procedure for modifying entrenched provisions).

Part 2 – Operational Matters

Strategic Missions

19. Section 11 provides that the Scottish Ministers are to set strategic missions for the Bank. When setting these missions Scottish Ministers are required to issue the Bank with documentation detailing the socio-economic challenges that the Bank is to seek to address through its investments. Investments made under the missions should reflect and be aligned with the Bank's object and ancillary objects.

20. Before setting a new mission for the Bank, or modifying or bringing to an end an existing mission, the Scottish Ministers must conduct a public consultation lasting a minimum period of 40 days.

18.21. Provision is also made to allow the Bank's board to submit proposals to Scottish Ministers to set new missions or modify or end existing missions. A copy of any mission (or modification of any mission under the section) is to be laid before the Scottish Parliament and published.

19.22. Section 12 provides that within three months of receiving a document from the Scottish Ministers under section 11 (setting missions) the Bank will report to the Scottish Ministers explaining how the Bank intends to respond to the mission. Section 12 also makes provision for similar reporting each financial year.

Accountability

20.23. Section 13 provides that at the end of each financial year the Bank must report to the Scottish Ministers on the performance of its investments. Scottish Ministers may also request performance reports at any other time during the financial year. Performance in this case includes both financial and non-financial performance such as the delivery of social, environmental and wider economic value.

21.24. Section 14 provides that a strategic review of the performance of the Bank and any subsidiaries of the Bank must take place at least every five years and that it is for the Scottish Ministers to appoint a person to carry out this review. A copy of the review will be laid before the Scottish Parliament and published. Section 14 requires that the Bank's delivery

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against its objects, missions and the National Performance Framework must be considered as part of the Strategic Review of Performance.

22.25. Section 14A requires the Scottish Ministers to issue a direction about fair work to the Bank and requires the Bank to comply with the direction. The direction is to set out that the Bank must seek to promote fair work. Furthermore, in issuing a direction, the Scottish Ministers are to define what “fair work” is for the purposes of that direction. The Scottish Ministers are required to consult persons who appear to them to represent the interests of workers and employers in Scotland, and the Bank itself, before issuing the direction.

Scottish Government financing of the Bank

23.26. Section 15 gives the Scottish Ministers a power to capitalise the Bank in return for shares in the Bank.

24.27. Section 16 provides that the Scottish Ministers may not spend more than the authorised minimum on capitalising the Bank unless any approvals necessary under State aid rules have been obtained. Under section 763 of the Companies Act 2006, the minimum share capital needed to establish a public limited company is £50,000. Section 16 permits sufficient capitalisation to allow the Scottish Ministers to establish the Bank as a public limited company. However, State aid approval is required to capitalise the Bank to the level which would enable it to fulfil its object and ancillary objects. This approach allows for sufficient flexibility to allow the Bank to be established and resourced so that it is able to undertake the entirety of its functions once State aid approval is given.

25.28. Section 17 provides that the Scottish Ministers may provide such finance to the Bank as they consider necessary and that this includes taking and paying for shares in the Bank as well as the giving of grants, loans or guarantees.

26.29. Section 18 provides that the Scottish Ministers may not provide finance to the Bank by means of a grant unless any approvals necessary under State aid rules have been obtained.

27.30. Section 19 makes provision as to the meaning of State aid rules.

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Modification of entrenched provisions

28.31. Section 20 provides that those entrenched articles of association mentioned in Chapter 2 (the Bank's Articles of Association on establishment) may only be made by a special resolution of the Bank's members (the Scottish Ministers) and only if that special resolution has been laid before and approved by resolution of the Scottish Parliament.

Part 3 – Final Provisions

29.32. Section 21 introduces the schedule (see paragraphs 35 to 43 below).

30.33. Sections 22, 24 and 25 make provision as to references to the Bank and its subsidiaries, Commencement of the Act and its short title respectively.

31.34. Section 23 provides the Scottish Ministers with powers to make any ancillary provisions which are appropriate for the purposes of, or in connection with, or for giving full effect to this Act or any provision made under it.

The schedule

Ethical Standards in Public Life etc. (Scotland) Act 2000

32.35. Paragraph 1(3) of the schedule adds the Bank to the list of devolved public bodies in schedule 3 of the Ethical Standards in Public Life etc. (Scotland) Act 2000.² This means that the Bank will need to:

- have a code of conduct for its members, whose compliance with the code will be policed by the Standards Commission for Scotland, and
- maintain a public register of its members' interests.

33.36. The Ethical Standards in Public Life etc. (Scotland) Act 2000 imposes requirements in respect of a body's members, by which that Act means the body's office holders. Unlike most of the other bodies that the 2000 Act applies to, the Bank will be a public limited company. In company law the members of a limited company are its shareholders, rather than its office holders. Paragraph 1(2) of the schedule therefore amends the 2000 Act to make clear that where that Act's provisions refer to the Bank's

² <http://www.legislation.gov.uk/asp/2000/7/schedule/3>.

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members they are to be understood as referring to the Bank’s directors (i.e. its office holders) rather than its shareholders.

Freedom of Information (Scotland) Act 2002

34.37. Paragraph 2 of the schedule adds the Bank to the list of Scottish public authorities in schedule 1 of the Freedom of Information (Scotland) Act 2002.³ This means that the Bank will be subject to the requirements that Act places on public bodies, including requirements to provide information to the public on request and to have in place a scheme for the pro-active publication of information it holds.

35.38. Being a public authority within the meaning of the Freedom of Information Act also makes the Bank a “Scottish public authority” to which the Environmental Information (Scotland) Regulations 2004⁴ apply.

36.39. In addition, as a public authority within the meaning of the Freedom of Information Act, the Bank is a “public authority” or “public body” for the purposes of the General Data Protection Regulation by virtue of section 7 of the Data Protection Act 2018⁵ (subject to the Secretary of State not making regulations under that section to remove its “public authority” status). The General Data Protection Regulation (also commonly referred to by the acronym “GDPR”) is Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. There are particular rules applied to bodies classified as “public authorities” (over and above those applied to all data processors) in the GDPR and the Data Protection Act 2018. An analysis of those rules is beyond the scope of these Notes.

Public Appointments and Public Bodies (Scotland) Act 2003

37.40. Paragraph 3 of the schedule adds the Bank to the list of specified authorities in schedule 2 of the Public Appointments and Public Bodies etc. (Scotland) Act 2003.⁶ This means that the Scottish Ministers, when appointing the Bank’s office holders, will need to comply with the

³ <http://www.legislation.gov.uk/asp/2002/13/schedule/1>.

⁴ <http://www.legislation.gov.uk/ssi/2004/520/contents/made>.

⁵ <http://www.legislation.gov.uk/ukpga/2018/12/section/7>.

⁶ <http://www.legislation.gov.uk/asp/2003/4/schedule/2>.

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code of practice on public appointments produced by the Commissioner for Ethical Standards in Public Life in Scotland.

Public Services Reform (Scotland) Act 2010

38.41. Paragraph 4(2) of the schedule adds the Bank to the list of bodies in schedule 5 of the Public Services Reform (Scotland) Act 2010.⁷ This means that it is a body in relation to which an order can be made under section 14 of that Act.⁸ An order under section 14 of the Public Services Reform Act can (subject to restrictions, and only after the Scottish Parliament has approved a draft of the order):

- modify, confer, abolish, transfer or provide for the delegation of any function of a public body,
- amend the constitution of a public body.

39.42. Paragraph 4(3) of the schedule adds the Bank to the list of bodies in schedule 8 of the Public Services Reform Act. This means that the Bank will be subject to the duties to report after each financial year on:

- expenditure (see section 31 of the Public Services Reform Act), and
- the steps it has taken to promote and increase sustainable growth and improve its efficiency, effectiveness and economy (see section 32 of the Public Services Reform Act).

Gender Representation on Public Boards (Scotland) Act 2018

40.43. Paragraph 5 of the schedule adds the Bank to the list of bodies in schedule 1 of the Gender Representation on Public Boards (Scotland) Act 2018.⁹ This means that in appointing the Bank's non-executive directors, the Scottish Ministers must give preference to a woman if there are equally qualified candidates of either gender and appointing a woman would result in, or be a step towards, 50% of the directors being women (see section 4 of the Gender Representation Act¹⁰). In addition, the Gender Representation Act requires that steps be taken to encourage women to apply to be non-executive directors of the Bank (see section 5¹¹), and

⁷ <http://www.legislation.gov.uk/asp/2010/8/schedule/5>

⁸ <http://www.legislation.gov.uk/asp/2010/8/part/2>.

⁹ <http://www.legislation.gov.uk/asp/2018/4/schedule/1>.

¹⁰ <http://www.legislation.gov.uk/asp/2018/4/section/4>.

¹¹ <http://www.legislation.gov.uk/asp/2018/4/section/5>.

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further steps to be taken to promote gender balance amongst the Bank's directors if the 50% target has not been reached by particular dates (see section 6¹²).

¹² <http://www.legislation.gov.uk/asp/2018/4/section/6>.

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