

Moveable Transactions (Scotland) Bill

[As amended at Stage 2]

Supplementary Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with rule 9.7.9 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Moveable Transactions (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were introduced to the Bill at Stage 2. It should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Provisions conferring power to make subordinate legislation introduced or amended at Stage 2

3. The amended or new delegated powers in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

Delegated Powers

Section 31(5) – Searching the assignments record

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or new power: New

Provision

4. Section 31(4) was added to the Bill by amendment at Stage 2 and provides that no fee is payable for searching the Register of Assignations when it is searched by a

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not-for-profit money adviser who is not charging individuals for the services they provide.

5. Section 31(5) gives Scottish Ministers the power to, by regulations, make further provision about the meaning of a not-for-profit money adviser for the purposes of that provision.

Reason for taking power

6. It may be that in the future further provision is required about what is meant by a “not-for-profit money adviser” – for example, defining the term or listing those who qualify. This power permits Scottish Ministers to provide further clarity and precision if it is required. It would be disproportionate for there to have to be primary legislation to amend what constituted a not-for-profit money adviser.

Choice of procedure

7. This power is limited to making further provision about the meaning of “not-for-profit money adviser”. It will not allow the removal of the provision relating to such advisers and nor will it allow the addition of other categories of person. It is therefore concerned only with a matter of detail and is not fundamental to the operation of the Register of Assignations as a whole. The power also does not allow for the modification of primary legislation. For these reasons, the Scottish Government believes that the power should be subject to negative parliamentary procedure.

Section 43A(3) – Competence of individual acting as provider of a statutory pledge

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

Provision

8. Section 43A limits when an individual can act as the provider of a statutory pledge so as to avoid individual consumers from granting a statutory pledge. Accordingly, an individual is only permitted to grant a statutory pledge when acting in the course of the individual’s business, the activities of a charity, or the activities of an unincorporated association. Further, the encumbered property must be a permitted asset.

9. There are currently two elements which make up the test of what constitutes a permitted asset. The first of these is essentially that the asset must be a business asset, a charity asset or an association asset (as applicable). The second is that any corporeal property must have a value exceeding £3,000 at the time of being pledged (although subsection (2A) makes provision requiring that figure to be read as if adjusted

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in line with inflation). The effect of the combination of these rules is that it will not be possible for an individual who is a sole trader to grant a statutory pledge over low value, but essential, items such as clothing, white goods or furniture.

10. The Scottish Ministers are given the power under subsection (3) to do two things in relation to permitted assets. First, they may modify the monetary threshold which corporeal assets must meet. Second, they may specify types of property which are or are not permitted assets.

11. The power here is essentially the same as the power that was taken under section 48(5) of the Bill as introduced. That power related to the constraints that were placed upon individual consumers (who were at that point to be allowed to grant a statutory pledge). The power here relates to the constraints that are placed upon individuals who are acting in a business etc. capacity. However, the ability given to Ministers to modify those constraints is the same and the Delegated Powers Memorandum published to accompany the Bill on introduction therefore remains relevant.

Reason for taking power

12. A power is taken to modify the figure, and to allow particular items to be specified as being or not being capable of being pledged, for the same reasons as a power to do those things was taken in section 48(5) of the Bill as introduced (as set out in the Delegated Powers Memorandum for the Bill as introduced).

13. Although there is now also a provision in the Bill that the monetary threshold is to be read as if adjusted in line with inflation, that deals only with inflation and not with any other reasons for which it might be considered appropriate to specify a different figure. For example, it could be appropriate to change the figure if, once the statutory pledge is up and running, feedback is received from sole traders that the current level is not working well for them in practice. In particular, the current threshold of £3,000 is based on the recommendation made by the Delegated Powers and Law Reform Committee at Stage 1. However, that figure was recommended at the point when the threshold would apply only to consumers and would function as the only protection against the pledging of ordinary household goods. Given that the threshold is now being applied instead to unincorporated businesses etc. and given that there is a further protection built-in with the rule about the type of asset which may be pledged, it may prove to be the case in the light of experience that the threshold is not set at the right level. This power would allow it to be adjusted accordingly.

Choice of procedure

14. The reason why the affirmative procedure is considered appropriate is the same as set out in the Delegated Powers Memorandum published at introduction in relation to section 48(5): namely, that these are important safeguards to avoid essential household items being pledged, and whether a statutory pledge can be granted over a particular item will be of importance to those affected by it.

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15. Although the section now applies to the limited category of individuals being granted the ability to grant a pledge, instead of applying to all individual consumers, the rationale set out above still applies. It therefore continues to be considered appropriate for this power to be subject to the affirmative procedure. It is also appropriate that this power is subject to the affirmative procedure given that its exercise will result in the modification of primary legislation.

Section 53(8) – (power to specify classes of vehicle to which good faith protections do not apply)

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: Revised (the power itself has not changed, although the procedure to which it is subject has)

Provision

16. The provision made by this section has not changed and is set out in the Delegated Powers Memorandum accompanying the Bill on introduction. In brief, section 53 provides protections to those who have acquired a motor vehicle in good faith which is encumbered property (in other words, which is subject to an outstanding statutory pledge). Section 53(8) confers power on Scottish Ministers, by regulations, to specify classes of motor vehicle that subsections (1) - (7) do not apply to. It was intended that such regulations would be subject to the negative procedure unless they modified primary legislation.

Reason for taking power

17. The reason for taking the power has not changed and remains as set out in the Delegated Powers Memorandum published to accompany the Bill on introduction.

Choice of procedure

18. At Stage 2, the Bill was amended on the recommendation of the Delegated Powers and Law Reform Committee to change regulations under section 53(8) from being subject to the affirmative procedure only if they textually amend primary legislation to always being subject to the affirmative procedure.

19. The power is expected to be exercised in circumstances where it becomes very easy to check the register. If that is the case then it would not be expected to be a matter of significant controversy if the protection of section 53 were to be withdrawn from some acquirers (for example, in relation to commercial vehicles). Given that the power would be being exercised in such circumstances and would also not involve an amendment to primary legislation, it was initially considered that the negative procedure was appropriate in terms of not infringing unduly upon valuable parliamentary time.

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20. However, in light of the Delegated Powers and Law Reform Committee's stated preference for this to be subject to the affirmative procedure and given the potential implications for the impact on the finances of those affected, it is considered appropriate for this to now be subject to the affirmative procedure in all cases.

Section 102(5) – Searching the statutory pledges record

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Revised or new power: New

Provision

21. Section 102(4) was added to the Bill by Stage 2 amendment and provides that no fee is payable for searching the Register of Statutory Pledges when it is searched by a not-for-profit money adviser who is not charging individuals for the services they provide.

22. Section 102(5) gives Scottish Ministers the power to, by regulations, make further provision about the meaning of a not-for-profit money adviser for the purposes of that provision.

Reason for taking power

23. It may be that in the future further provision is required about what is meant by a "not-for-profit money adviser" – for example, defining the term or listing those who qualify. This power permits Scottish Ministers to provide further clarity and precision if it is required. It would be disproportionate for there to have to be primary legislation to amend what constituted a not-for-profit money adviser.

Choice of procedure

24. This power is limited to making further provision about the meaning of "not-for-profit money adviser". It will not allow the removal of the provision relating to such advisers and nor will it allow the addition of other categories of person. It is therefore concerned only with a matter of detail and is not fundamental to the operation of the Register of Statutory Pledges as a whole. The power also does not allow for the modification of primary legislation. For these reasons, the Scottish Government believes that the power should be subject to negative parliamentary procedure.

Section 116(1B) – Interpretation of Act

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Revised or new power: New

Provision

25. Section 116 is the main interpretation provision in the Bill. As introduced, it included a definition of “authenticated” and “executed” within subsection (1), along with a power in subsection (3) to modify either or both of those definitions.

26. At Stage 2, section 116 was adjusted. The definitional material relating to what “authenticated” and “executed” means is now found in subsection (1A). In terms of substance, the provision in subsection (1A)(a) was changed to remove the requirement for electronic documents to be authenticated using advanced or qualified electronic signature. It will now be competent to use a simple electronic signature. It will, however, still be possible to use advanced or qualified electronic signatures if parties wish.

27. The substantive definition of execution of a document was retained in subsection (1A)(b).

28. A power to amend the definitional material in relation to both terms is retained but is now subsection (1B).

Reason for taking power

29. The new subsection (1B) allows Ministers to modify subsection (1A)(a) and (b). The power is simply an updated version of the previous power found in section 116(3). The reason for taking the power has not changed and remains as set out in the Delegated Powers Memorandum published to accompany the Bill on introduction.

Choice of procedure

30. The affirmative procedure continues to be considered appropriate for this power for the reasons set out in the Delegated Powers Memorandum published to accompany the Bill on introduction (i.e. the power relates to the ability to amend primary legislation).

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