

Moveable Transactions (Scotland) Bill

[As amended at Stage 2]

Supplementary Financial Memorandum

Introduction

1. As required under Rule 9.7.8B of the Parliament's Standing Orders, this Supplementary Financial Memorandum is published to accompany the Moveable Transactions (Scotland) Bill (introduced in the Scottish Parliament on 25 May 2022) as amended at Stage 2.
2. The Memorandum has been prepared by the Scottish Government. It does not form part of the Bill and has not been endorsed by the Parliament. It should be read in conjunction with the original Financial Memorandum published to accompany the Bill as introduced.
3. The purpose of this Supplementary Financial Memorandum is to set out the expected costs associated with the new and amended provisions included in the Bill following the amendments made at Stage 2. This document addresses those amendments with anticipated or potential cost implications. Amendments agreed at Stage 2 which are not covered in this Supplementary Financial Memorandum are considered not to significantly or materially affect the assumptions in the original Financial Memorandum.

Costs on the Scottish Administration

Exemption from search fees for not-for-profit money advisers

4. Amendments were made to the Bill at Stage 2 to exempt not-for-profit money advisers from paying a fee to search either the Register of Assignations or the Register of Statutory Pledges when the not-for-profit money adviser is not charging individuals for the services they provide. The amendments also give Scottish Ministers the power to, by regulations, make further provision about the meaning of a not-for-profit money adviser for the purposes of the relevant sections (i.e. sections 31 and 102).
5. The fees which will apply for registration events and searches in the new Register of Assignations and the Register of Statutory Pledges will be the subject of consultation before the fee structure is established in regulations under section 110 of the Land Registration etc. (Scotland) Act 2012. While it is not possible to give more

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specific information at this stage about what search fees in the new registers are likely to be, the Scottish Law Commission's Business and Regulatory Impact Assessment indicated that search fees would be £4 or less.

6. The extent to which this will result in a loss of such revenue to the Scottish Administration will depend on the extent to which the registers are likely to be used for searches by not-for-profit money advisers acting for individuals. In that regard, it is worth noting that—

- There is some doubt over whether searches of the Register of Assignations would be of much assistance to not-for-profit money advisers. Section 20 of the Bill sets out what the assignations record will contain and does not require inclusion of the debtor's details. Where debts have been assigned in a bulk assignment transaction, it is highly unlikely that the debtor's name will even be included within any documents contained in the record. In addition, for the reasons set out in paragraph 156 of the Explanatory Notes published alongside the Bill at introduction, the record can only be searched by reference to the assignor of the debt (not the debtor). In general, the system has been designed so that the debtor is not expected to search the register. That is why the Bill provides that a simple failure to search the register does not mean that the debtor is acting in bad faith if they make payment to the original creditor.
- The Bill has been amended to remove the ability of individual consumers from being able to grant a statutory pledge under Part 2 of the Bill. Individual consumers are also not expected to search the register when doing something such as purchasing items from someone acting in the ordinary course of their business or when buying something for personal use from another individual (see sections 51 and 52). It is therefore unlikely that there would be any reason for not-for-profit money advisers to be routinely searching the Register of Statutory Pledges on behalf of their clients.

7. In view of the likely very low usage of the new registers by not-for-profit money advisers, it is considered that the drop in revenue from search fees will be negligible. Registers of Scotland have indicated that they do not believe that the exemption of not-for-profit money advisers from paying search fees will have a significant impact on the recovery of costs for the operation of the register provided that suitable checks (which do not impose an undue burden on Registers of Scotland) are built-in to avoid the risk of this facility being abused by those who are not eligible for it.

Compensation for search errors

8. The Bill was amended at Stage 2 to make the Keeper of the Registers of Scotland liable to pay compensation for loss suffered in consequence of any failures of the search systems under her control to return an accurate search result in respect of the assignations record in the Register of Assignations or the statutory pledges record in the Register of Statutory Pledges (see sections 35(1)(ca) and 107(1)(ca)).

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9. The effect of these amendments is not to cover the situation where incorrect information has been submitted into either the Register of Assignations or Register of Statutory Pledges. It is to cover the situation where, solely as a result of malfunction of the Keeper's search facility, an inaccurate search result is returned.

10. It is believed that such errors will arise very rarely, if ever, and the financial impact is therefore likely to be negligible. However, it is impossible to estimate what compensation is likely to be payable by the Keeper if this situation does arise as the amount payable will depend on the circumstances of those individual cases. It should, though, be noted that compensation is not payable to the extent that the loss was not reasonably foreseeable or to the extent that the person failed to take reasonable steps to mitigate their loss. Non-patrimonial loss is also not covered.

Review duties

11. A new section 113A was added to the Bill by Stage 2 amendment which requires the Scottish Ministers to undertake a review of the Act and prepare a report on that review as soon as practicable after the end of the review period (which ends three years after the legislation receives Royal Assent). The Report must be published and laid in the Scottish Parliament. A requirement is also placed on Scottish Ministers to give particular consideration to the operation of the statutory pledge provisions on sole traders and small businesses.

12. Section 13A was also added to the Bill by Stage 2 amendment and places a duty on Scottish Ministers to prepare and publish a report setting out the impact of the waiver of defence clause in section 13(1). The report will have to set out any steps that the Scottish Ministers intend to take to mitigate any negative impacts that have been identified. This will have to be done within three years of the provision being operational.

13. Reviews will inevitably require the use of future resources, which will have cost implications for the Scottish Government both in terms of staff time and publishing costs. It is envisaged that a professional consultancy firm will be engaged to help with the design of the surveys/questionnaires. Thereafter it would fall to Scottish Government staff to analyse the responses, undertake any necessary meetings with stakeholders and draft the two reports. The estimates set out below are based on 2 members of staff devoting 3 months' concentrated effort on the reviews and reports. It may of course require more or less time. The costings are based on 2022-23 average staff costs. Ultimately, the cost implications of the reviews will to a large extent be dictated by the extent of engagement from the sector and the number of, and nature of, responses received to any consultation.

Description	Estimated Cost
Professional consultancy help with design of surveys	£10,000
Scottish Government staff time estimated at 0.25 of a year and on 2022-23 average staffing costs	£32,000
Publication costs of reports	£4,000
Total	£46,000

Removal of ability of individual consumers to grant statutory pledge

14. The Bill was amended at Stage 2 to provide that it will not be competent for an individual to act as the provider of a statutory pledge unless they are acting in the course of (i) their business, (ii) the activities of a charity of which they are a trustee, or (iii) the activities of an unincorporated association of which they are a member (see section 43A). This means that it will no longer be possible for an individual consumer to grant a statutory pledge.

15. This change at least potentially reduces the number of statutory pledges registered in the Register of Statutory Pledges, and any such reduction would result in a consequent reduction in registration fees. The Registers of Scotland had, however, consulted with likely users of the Register of Statutory Pledges prior to this change being made, and they concluded that the likely incidence of use of the new register by individuals not acting in the course of business or in the other capacities mentioned above would have been less than 1% of the register's overall use. This can be explained by the fact that if the ability of individuals to grant statutory pledge had been retained, those individuals would in effect have been prohibited from using household goods as collateral. As such, apart from cars, it would likely have been the case that pledges by individual consumers would only have been granted over high value goods such as art works or expensive musical instruments. Such items are not owned by a significant proportion of the population. Further, in relation to cars, it was suggested that financial institutions would have been likely to continue to finance the acquisition of vehicles using the hire purchase legislation anyway given that this legislation has now been in place for nearly 60 years and their systems are set up to complement it.

16. It is therefore considered that the impact of the removal of the ability of individuals to grant statutory pledge will be insignificant in terms of usage of the register and the registration and search fees which might otherwise have been generated.

Costs on local authorities

17. Local authorities are not directly affected by any of the measures in the Bill, including any of the changes made to the Bill at Stage 2.

Costs on other bodies, individuals and businesses

Exemption from search fees for not-for-profit money advisers

18. The corollary of the changes discussed at paragraphs 4 to 7 above is that not-for-profit money advisers will in theory incur less in the way of charges than they otherwise would have. However, for the reasons discussed above, this is not thought likely to be relevant in practice.

Electronic documents

19. There is no requirement for electronic signatures under the Bill. Section 1(1) requires any assignation document to be “executed” (wet signature) or “authenticated” (electronic signature) by the assignor. Section 43(2) requires any constitutive document for a statutory pledge also to be either “executed” or “authenticated” by the provider. Subject to a limited exception, execution or authentication is also required under section 56 for an amendment document to a statutory pledge.

20. The definition of “authenticated” in the Bill as introduced, taken in combination with the authentication requirements for registration in the Keeper’s registers contained in section 9G of the Requirements of Writing (Scotland) Act 1995, meant that only a qualified electronic signature (QES) was permissible under the Bill if the signatory opted for an electronic rather than a wet signature. QES is the highest standard of electronic signature and involves the identity of the signatory being verified by a qualified trust service provider before the signature can be applied. QES offers the highest level of security and evidential value. This meant that, should assignors or providers decide upon using electronic signatures as opposed to wet signatures, they would have required to have computer software that facilitates QES. This is distinct to what is known as a simple electronic signature (SES) or an advanced electronic signature (AES), which both have a lower evidential value. Added QES functionality in such software currently comes at extra cost and complexity.

21. At Stage 2, what constitutes “authentication” was adjusted (section 116(1A)) and provision was also made to ensure that a higher form of electronic signature was not required in order to facilitate registration (section 112A). The result of these changes is that, for those wishing to use an electronic signature, only SES is required.

22. This change was made in response to representations from stakeholders about cost concerns arising from the use of AES or QES. As such, there will be a cost saving to businesses as a result of this change.

23. Prior to lodging amendments on this topic, the Scottish Government consulted stakeholders about this issue, including the Federation of Small Businesses (FSB) and the Registers of Scotland. The FSB indicated that they thought that the forms of authentication beyond SES were costly to small businesses. It is understood that there is a jump in cost and complexity between each level of signature above SES, and the cumulative cost to all users year after year is likely to be significant. However, it is not possible to put a figure on the savings which will be derived from this change since it is not known with any certainty what those costs are. SES services are generally not for sale, there is a limited range in what AES services can be used for, and QES service costs depend on a number of factors. These include how often it can then be used (i.e. how many signatures can be applied in documents), how long it is valid for (1 year, 3 years, or 10 minutes), what type of accompanying “service package” the user is purchasing, etc. This is on top of the unit cost to acquire a QES, which varies depending on the provider. Costs for a QES seem to range from £50 to over £300 per annum but these costs are not necessarily comparable due to the variables outlined above.

24. Although a SES will suffice for authentication, there is nothing in the Bill to stop parties using AES or QES if they wish. As such, any businesses which already have such systems will be able to continue using them and will not incur any costs as a result of this change in the Bill.

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