POLICY NOTE

THE MOVEABLE TRANSACTIONS (SCOTLAND) ACT 2023 AMENDMENT REGULATIONS 2025

SSI 2025/XXX

The above instrument will, if approved, be made by the Scottish Ministers in exercise of sections 4(7)(c), 50(4) and 119 of the Moveable Transactions (Scotland) Act 2023 ("the 2023 Act"). The instrument is subject to the affirmative procedure.

Summary Box

The purpose of this instrument is to amend the 2023 Act to amend the definition of insolvency, and to make minor technical amendments and corrections to sections 6 and 14 of the 2023 Act for the purposes of, and for giving full effect to, that Act.

Policy Objectives

The 2023 Act reforms and modernises Scots law to make it easier for businesses and individuals to assign claims or raise finance using moveable property by creating two new registers, the Register of Assignations ("RoA") and the Register of Statutory Pledges ("RSP") under the management and control of the Keeper of the Registers of Scotland ("the Keeper"). The registers will simplify and facilitate moveable transactions in Scotland:

- the ownership of debts and other obligations will be able to be assigned (transferred) by registering the assignation in the RoA rather than by giving notice (intimation) to the debtor (although intimation will remain available); and
- corporeal (tangible) moveable property and incorporeal (intangible) moveable property (such as intellectual property and financial assets) will be able to be used as security for loans by registering a statutory pledge in the RSP, removing the current need to transfer either possession of, or title to, the property to the creditor or the use of expensive and inefficient workarounds.

This instrument would amend the 2023 Act as follows.

Definition of insolvency - sections 4(6)(a) and 50(3)(a) of the 2023 Act

The 2023 Act sets out, in sections 4(6) and 50(3) respectively, circumstances in which either the assignor of an assignation or the provider of a statutory pledge, respectively, would be deemed insolvent for the purposes of the 2023 Act.

At Stage 2 of the parliamentary scrutiny of the Moveable Transactions (Scotland) Bill, amendments were made to the insolvency definitions in these sections. Some of these amendments were reversed and others corrected at Stage 3 on the basis that the Scottish Government would undertake further stakeholder consultation on the definition of insolvency for the purposes of the 2023 Act during the pre-commencement period and, if the consultation pointed to further amendments being necessary, that these would be made by regulations under the specific powers in sections 4(7)(c) and 50(4) of the 2023 Act as passed. This consultation ran from 16 October to 15 November 2023.

Consideration of the resulting stakeholder consultee responses resulted in one common issue being identified, that of the inclusion in the insolvency definitions of an application for a debt payment programme under a Debt Arrangement Scheme (see further under 'Consultation' below). Regulation 2(2) and (6) accordingly remove the corresponding provisions from the definitions contained in sections 4(6)(a) and 50(3)(a) of the 2023 Act respectively.

Assignability and defences – sections 6(3) and 14(1) of the 2023 Act – existing and future claims

A central tenet of the reforms provided for in the 2023 Act is the ability to assign both existing *and* future claims. This is not currently possible in a practical sense under Scots law and therefore it was part of the policy intention, going back to the 2017 Scottish Law Commission report on moveable transactions, for the reforms to remedy this. The 2023 Act does so by allowing registration (as an alternative to intimation) as a competent method for assigning a claim. This allows both existing claims and those not yet in existence to be assigned competently - as provided for in section 1(4) of the 2023 Act. For example, a business would be able to grant an assignation document, have it registered and competently assign future invoices to future customers that don't exist yet – these claims would later transfer to the assignee once the business becomes the holder of the claim (i.e. at the point the future invoices come into being). This is because the 2023 Act provides for registration as an alternative to intimation – you cannot intimate to future customers that don't exist yet, hence the need for publicity by registration.

Sections 6(3) and 14(1) of the 2023 Act provide for different elements, concerning respectively limitations on assignability and defences of the debtor, but the amendments proposed under this instrument at regulations 2(3) and (4)(a) and (b) are of similar effect. There are two important elements to an assignation – the *grant* of the assignation document assigning the claim, and the *transfer* of the claim itself. In a standard assignation of an existing claim not subject to any conditions, the transfer element will occur upon registration or intimation and will likely be within a short timeframe after the grant of the document. However, for an assignation of a *future* claim, the assignation document can be granted some time before the eventual transfer of the claim – as it only transfers once it comes into existence. Therefore, sections 6(3) and 14(1) as passed, by limiting the agreement not to assign a claim or agree that a defence should not be asserted to the time of the *granting* of the assignation document, whilst it covers existing claims, will not work correctly for future claims. The salient point in time for the operation of these provisions is the *transfer* of the claim (and in relation to section 6(3) the point at which the claim would have otherwise transferred), not the grant of the assignation document. These limited amendments would not affect the applicability of these provisions to existing claims, and would preserve the ability of the parties to agree otherwise in both sections 6(3) and 14(1).

The Scottish Government accordingly considers the amendments proposed to these provisions in this instrument are appropriate to ensure that the overall policy intention of the reforms in Part 1 of the 2023 Act apply equally to existing and future claims as otherwise provided for in the 2023 Act. These amendments are consequential and incidental and are considered appropriate in light of the regime of the 2023 Act, in particular section 1(4), to allow the 2023 Act to be implemented and operate in the manner intended.

Compensation etc. – section 14(3) of the 2023 Act – registration, intimation and deemed delivery of notice

It was the intention when passing section 14 to put the common law rule "the assignee takes the rights of the assignor" on a statutory footing. Section 14(3), which specifically deals with the assertion of a right of compensation etc. of this rule, provides that a debtor is not to be treated as having been told about the assignation of a claim only because an assignation document has been registered. A technical amendment to section 14(3) is considered necessary for the purposes of giving full effect to both that provision and the wider 2023 Act because, whilst registration is carved out for the purposes of section 14(3) because it does not form part of the existing common law rule, it was an error not to also carve-out the new deemed notice provisions found in section 8(9) and (10) of the 2023 Act, which also do not form part of the existing common law rule and apply where an assignation has been intimated instead of registered. We consider it was clearly Parliament's intention when passing section 14(3) that on notice being given to the debtor, compensation in relation to subsequent dealings could not be pled as per the existing common law rule. But there are no deemed delivery notice provisions in the existing law, and it is considered to be unfair to debtors to have compensation pleas cut off because of a transfer of a claim they know nothing about. The introduction of registration means that a claim can be transferred without the debtor's actual knowledge, but so too do the deemed notice provisions where it is intimated. Regulation 2(4)(c) remedies this gap and is considered appropriate as consequential, incidental on and supplementary to section 8(9) and (10) of the Act.

Consulting the Keeper on the Rules – sections 39(3) and 111(3) of the 2023 Act

The 2023 Act provides that the Scottish Ministers may make regulations containing the rules of procedure for the RoA and the RSP, under sections 39(1) and 111(1) respectively. Any such regulations providing for the register rules are to be subject to the negative procedure, as provided for in section 118(4) of the 2023 Act.[1] However, the requirement to consult the Keeper in sections 39(1) and 111(1) erroneously make reference to "laying a draft of a Scottish statutory instrument […] before the Scottish Parliament […]". The Keeper has in any event been consulted before making the Regulations containing the Rules which have been made at the same time as this instrument is laid, and to which the amendments to be made by this instrument will not apply (as they will not be in force when the Rules Regulations are made). Regulation 2(5) and (7) nonetheless amend sections 39(3) and 111(3) to reflect the correct negative procedure. The Scottish Government consider these amendments are appropriate as consequential and incidental to allow for the aforementioned provisions to operate as intended without impacting the purpose of the provisions as passed by Parliament. This will apply to any future exercise of the rule-making power.

In conclusion, the Scottish Government consider the amendments proposed are appropriate to make the required limited technical amendments to the 2023 Act to ensure that the 2023 Act is implemented in line with the manner Parliament intended.

[1] The Delegated Powers Memorandum for the Bill as considered by Parliament noted negative procedure for these provisions (sections 37(1) and 109(1) as they were then numbered).

Anticipatory exercise of powers

Insofar as this instrument is made under sections 4(7)(c), 50(4) and 119 of the 2023 Act and, with the exception of the latter, prior to those sections being commenced by the Moveable Transactions (Scotland) Act 2023 (Commencement) Regulations 2024[2] which will bring sections 4(7)(c) and 50(4) into force on 1 April 2025, the same day as this instrument will come into force, this would be in accordance with section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010 which enables a power to make subordinate legislation to be exercised prior to the commencement of the provision of the relevant Act which confers the power. The Scottish Ministers consider it is expedient to exercise sections 4(7)(c) and 50(4) in this way so the changes to the definition of insolvency are in place in order to bring the rules on the assignation of claims and the creation of statutory pledges in section 4 and 50 of the new regime in the 2023 Act into force and to give them full effect as required using the powers in sections 4(7)(c) and 50(4) of the Act for the purposes of those sections.

UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility

The Scottish Ministers have made the following statement regarding children's rights.

In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, the Scottish Ministers certify that, in their view, the Moveable Transactions (Scotland) Act 2023 Amendment Regulations 2025 is compatible with the UNCRC requirements as defined by section 1(2) of the Act.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Consultation

As mentioned above, a short and targeted consultation on the definition of insolvency for the purposes of the Act was carried out in late 2023. A total of six responses were received. There was consensus that the definitions of insolvency for the purposes of the Act should capture both relevant insolvency procedures as well as the state of being insolvent but beyond that there was a range of views offered on whether the definitions should be narrow or wide. Based on the responses and the preference to adopt a balanced and consistent approach the decision was taken to make only one change – to remove an application for a debt payment programme under the Debt Arrangement Scheme ("DAS") from the definitions on the basis that, as highlighted by one of the consultees, the Debt Arrangement Scheme is not an insolvency process but a statutory debt repayment process. They considered that is would be inconsistent in terms of wider Scottish Government policy to treat DAS differently in the context of this legislation, to which the Scottish Government concurs.

[2] S.S.I. 2024/378 (C. 27).

Impact Assessments

A Child Rights and Wellbeing Impact Assessment ("CRWIA") has been completed on this instrument and has been published alongside the laying of this instrument. An Equality Impact Assessment ("EQIA") was undertaken for the introduction of the Moveable Transactions (Scotland) Bill to Parliament. The EQIA has been reviewed for this instrument and it was concluded that the EQIA meets the needs of this instrument. No equality issues have been identified and there were no issues concerning children's rights and wellbeing identified.

Financial Effects

A Business and Regulatory Impact Assessment ("BRIA") has not been carried out for this instrument as a BRIA was completed when the Bill was introduced to the Scottish Parliament No changes made to the Bill through its parliamentary passage alter the overall impact on businesses which was found at that time to be positive. This instrument does not have any material consequence to businesses.

Scottish Government
Justice
December 2024