EXPLANATORY MEMORANDUM TO

THE MOVEABLE TRANSACTIONS (SCOTLAND) ACT 2023 (FINANCIAL COLLATERAL ARRANGEMENTS AND FINANCIAL INSTRUMENTS) (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2025

2025 No. 275

1. Introduction

1.1 This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Ian Murray, Secretary of State at Scotland Office confirms that this Explanatory Memorandum meets the required standard.

2.2 Louise Nicholls, Deputy Director for Constitutional Policy, at the Scotland Office confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Freya Croxford at the Scotland Office Telephone: 07845 878924 or email: freya.croxford@ukgovscotland.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 The Moveable Transactions (Scotland) Act 2023[1] ("the 2023 Act") is an Act of the Scottish Parliament that provides for the reform and modernisation of Scots law as regards transactions concerning moveable property. This Order accordingly makes provision in consequence of the 2023 Act to bring financial collateral arrangements and financial instruments within the scope of the reform to Scots law provided for by the 2023 Act. This will enable individuals, businesses, and other bodies in Scotland to assign a claim relating to a financial collateral arrangement and also more efficiently use financial instruments as collateral for a loan by way of a newly created form of security in Scots law: the statutory pledge.

Where does the legislation extend to, and apply?

4.2 The extent of this Order (that is, the jurisdiction(s) which the Order forms part of the law of) is Scotland.

4.3 The territorial application of this Order (that is, where the Order produces a practical effect) is Scotland.

[1] 2023 asp. 3.

5. Policy Context

What is being done and why?

5.1 The policy objective of the 2023 Act is to reform and modernise Scots law in relation to transactions concerning moveable property. This includes the law relating to: (i) the assignation of a claim; and (ii) security over certain kinds of incorporeal moveable property - for example intellectual property, which includes copyright, trademarks, design rights and patents.

5.2 The genesis of the 2023 Act was a 2017 Report (including a draft Bill) by the Scottish Law Commission ("SLC") following its consultation on the reform of Scots law as it relates to moveable property. The SLC considered it vital to any reform that: (i) any updates to the law of assignations would extend to financial collateral arrangements; and (ii) the proposals to establish a new right in security would extend to financial instruments as a form of incorporeal property.

5.3 The main beneficiaries of extending the provisions of the 2023 Act to financial collateral arrangements and financial instruments will be businesses and Small and Medium Enterprises ("SMEs").

What was the previous policy, how is this different?

5.4 Invoice factoring is a form of asset-based finance whereby businesses effectively sell their unpaid invoices to a financier, in exchange for a discounted sum. At present under Scots law, if a business wishes to assign its unpaid invoices to a financial institution in order to raise finance, there has to be written intimation (notification) of the assignation to every invoiced customer (i.e., the debtors). This is cumbersome, expensive, and often impractical since there may be numerous debtors. In addition, it cannot be done in respect of future claims, such as invoices due by existing customers in the future, where the debtor cannot yet be identified. This Order will enable claims which relate to financial collateral arrangements to use a new Register of Assignations (as introduced by the 2023 Act) which will provide registration, as an alternative to intimation, as a means of assigning claims which is both easier and more efficient.

5.5 Current Scots law concerning security over moveable property has not kept pace with some other comparable jurisdictions. The last few decades have seen significant statutory reform in comparable jurisdictions such as Australia, New Zealand, France, Belgium and Jersey plus the publication of transnational instruments such as the UNCITRAL Model Law on Secured Transactions. The lack of reform means that some transactions (particularly share pledges) are therefore difficult or even impossible to execute in Scotland under Scots law, necessitating the use of complicated workarounds involving, for example, leaseback or trust arrangements. Sometimes English law is used in place of Scots law, which takes longer and is more expensive for businesses in Scotland. Under current Scots law, individuals and businesses can grant a lender security against an item of moveable property as collateral (such as a share in a company) in exchange for a loan or credit arrangement. The only way a fixed security is taken over shares under Scots law is by the provider/debtor transferring the shares to the creditor, with the creditor as a result becoming the registered holder of the shares – this is known as a 'Scottish share pledge'. When the obligation to the creditor is fulfilled or repaid, the creditor then transfers ownership of the shares back to the provider/debtor. Therefore, security over shares in Scotland can only be achieved by transfer given there is no Scottish equivalent to the approach taken in comparator jurisdictions, which facilitate the taking of security over shares without full transfer of ownership to the creditor.

5.6 This puts Scots law at a serious disadvantage to comparator nations and forces Scottish providers to give up ownership of their shares when seeking finance, which they (and indeed the creditor) may not wish to do for many reasons. The 2023 Act creates a new type of fixed security over moveable property in Scots law, called the 'statutory pledge'. A statutory pledge over shares would not require the transfer of ownership to the secured creditor, as such a pledge would be registered in the new Register of Statutory Pledges (as introduced by the 2023 Act). This Order will enable financial instruments (such as shares) to be efficiently and competently used as collateral for a loan in Scotland.

5.7 The policy has always been, going back to the SLC Report, that the provisions of the 2023 Act should extend to financial collateral arrangements and financial instruments. If they were not, it would place Scottish entrepreneurs and businesses at a disadvantage as they would not be able to use financial collateral arrangements and financial instruments to raise funds using the provisions of the 2023 Act.

6. Legislative and Legal Context

How has the law changed?

6.1 This Order is made in exercise of the powers conferred by sections 104, 112(1) and 113(2) to (5) of the Scotland Act 1998[2] ("the 1998 Act"). Section 104 of the 1998 Act enables provision to be made that is necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament. This Order makes provision that is necessary and expedient in consequence of the provisions of the 2023 Act.

6.2 This Order makes provision in consequence of the 2023 Act in relation to: (i) the assignation of claims (including those which are financial collateral arrangements pursuant to the Financial Collateral Arrangements (No. 2) Regulations 2003[3]) ("the FCARs"); and (ii) incorporeal moveable property in the form of financial instruments pursuant to the FCARs being used as collateral for a loan and subject to a new form of security in Scots law, the statutory pledge. This Order also makes minor consequential modifications to the 2023 Act for the purposes of signposting the reader to this Order where relevant.

6.3 Financial instruments and financial collateral arrangements relate to a reserved matter under schedule 5 Part 2 paragraphs A3 and A4 of the 1998 Act (financial services and financial markets, respectively), therefore these provisions were not included in the 2023 Act on enactment for lack of legislative competence, therefore making this Order necessary to fully implement the reform envisaged by the SLC.

Why was this approach taken to change the law?

6.4 Provisions relating to financial instruments and financial collateral arrangements were not included in the 2023 Act on enactment. The Scottish Government subsequently made a request to use an Order under section 104 of the 1998 Act to make these provisions. The Secretary of State for Scotland has agreed that it is necessary and expedient in consequence of the 2023 Act to do so.

[2] 1998 c. 46.
[3] S.I. 2003/3226.

7. Consultation

Summary of consultation outcome and methodology

7.1 The main consultation has been carried out by the SLC as part of their 2017 Report of the law of moveable transactions. A discussion paper[4] was published in 2011 and the responses are reflected in the final report[5] which was published in three volumes[67] in 2017.

7.2 The extension of the provisions of the 2023 Act to financial collateral arrangements and financial instruments was well supported by stakeholders.

7.3 When the Moveable Transactions (Scotland) Bill was introduced to the Scottish Parliament on 25 May 2022, the lead committee to which it was assigned – the Delegated Powers and Law Reform Committee ("the DPLRC") - carried out further consultation and a number of responses[8] were received, many of which strongly supported the extension of the provisions of the 2023 Act to financial collateral arrangements and financial instruments.

7.4 Throughout the Bill's passage through the Scottish Parliament the DPLRC corresponded[9] with both the Scottish and UK Governments regarding the proposal to extend the provisions of the 2023 Act to financial collateral arrangements and financial instruments. There was early mutual acknowledgement of the benefits of doing so and the subsequent correspondence accordingly discussed process, timetabling and updates as to progress on discussions between officials on the Order.

7.5 Both the Scottish Government and HM Treasury have been consulted in the preparation and drafting of this Order. HM Treasury are content that this Order does not impact on policy reserved to the UK Government.

8. Applicable Guidance

8.1 This instrument does not include applicable guidance.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this Order because a Business Regulatory Impact Assessment[10] was prepared by the SLC in relation to the draft Bill contained in their 2017 Report, which greatly influenced what became the 2023 Act, which informs this Order. As the assessment concludes: "For many businesses, the ability to raise finance using their moveable assets can make the difference between success and failure; between "just about surviving" and thriving[11]". "Put simply,

[4] https://www.scotlawcom.gov.uk/files/6113/1057/2523/dp151.pdf
[5] https://www.scotlawcom.gov.uk/files/1715/1361/1309/Report_on_Moveable_Transactions_-_Volume_1_Report_249.pdf
[6] https://www.scotlawcom.gov.uk/files/9215/1361/1360/Report_on_Moveable_Transactions_-_Volume_2_Report_249.pdf
[7] https://www.scotlawcom.gov.uk/files/4415/1361/1403/Report_on_Moveable_Transactions_-_Volume_3_Report_249.pdf
[8] https://yourviews.parliament.scot/dplr/moveable-transactions-bill/consultation/published_select_respondent
[9] https://www.parliament.scot/bills-and-laws/bills/s6/moveable-transactions-scotland-bill
[10] https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf
[11] https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf – Page 1

modernising the law would make various forms of financial transactions easier than they currently are in Scotland today. This should encourage increased finance provision to Scottish businesses"[12].

Impact on businesses, charities and voluntary bodies

9.2 The impact on business, charities or voluntary bodies is positive given that they will be able to use an easier and more cost-effective way of both assigning claims and use a new type of security – the statutory pledge – as a means of raising finance.

9.3 The legislation positively impacts small or micro businesses.

9.4 Small and micro businesses have not been exempted in any way as this Order does not place any burden on them but does enable them to use financial collateral arrangements and financial instruments to raise finance for their business in the same way as medium to large businesses can. As the SLC's Business and Regulatory Impact Assessment[13] sets out: "Considering that SMEs[14] account for 99.3% of all private sector enterprises and 54.6% of private sector employment in Scotland, deficiencies in the law which make it harder for smaller businesses to access finance may be having serious knock-on effects in relation to the wider Scottish economy".

9.5 There is no, or no significant, impact on the public sector because this sector is generally unlikely to use financial collateral arrangements or financial instruments to raise funding.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 This Order is in consequence of the 2023 Act and no formal monitoring is prescribed for this Order specifically. However, in section 117 of the 2023 Act there is an obligation for the Scottish Ministers to report on the operation of the 2023 Act within five years of it coming into force.

[12] https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf – Page 22

[13] https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf – Page 6

[14] Small and Medium Enterprises.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 The Secretary of State for Scotland has made the following statement regarding Human Rights:

"In my view the provisions of The Moveable Transactions (Scotland) Act 2023 (Financial Collateral Arrangements and Financial Instruments) (Consequential Provisions and Modifications) Order 2025 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").