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Thank you for your letter of 8 March in which you sought further information about aspects of the Moveable Transactions (Scotland) Bill which is to be considered at Stage 2 on 21 March.

Section 104 Order in relation to financial collateral arrangements

I agree with the Committee that the clarification provided by the UK Government that it agrees that this matter should be taken forward by a section 104 Order is helpful, but note that the Committee is keen to establish the timescale for this and whether it would commence at the same as the Bill's core provisions.

The Registers of Scotland have indicated that the work required in establishing the new Register of Assignations and the Register of Statutory Pledges means that it will not be possible for the new registers to come into operation until the late spring or early summer of 2024, as set out in paragraph 37 of the Financial Memorandum.

It is anticipated that work on the section 104 Order may take up to a year to complete given the complexity of the interface between the Bill and the (reserved) Financial Collateral Arrangements (No. 2) Regulations 2003. As noted in paragraphs 61 and 62 of the Policy Memorandum:

“Security over financial collateral is the subject of dedicated, and complex, legislation. The Financial Collateral Directive (the “Directive”), dating from 2002 and substantially amended in 2009, applies in EU Member States. It was implemented in the UK by statutory instrument, the Financial Collateral Arrangements (No.2) Regulations 2003 (“the 2003 Regulations”).”

“The Directive aims to achieve a harmonised set of rules on financial collateral in the European Union which enable security over this type of asset to be taken and enforced more easily.

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However, it has been the subject of significant negative comment, notably for its wide scope of application and lack of clarity.”

It will therefore be a challenging task to draft the section 104 Order appropriately and as noted at my evidence session before the Committee, work does not usually start on a section 104 Order until the Bill to which it relates has been passed. The letter which the Committee received from the Under-Secretary of State for Scotland on 24 November 2022 noted that “Only after all the necessary conversations have been had, and after ministers in all relevant departments have provided their agreement in principle for an order to be made, would officials start drafting an Order.”

Nevertheless, it is the Scottish Government’s firm intention that the enacted Bill, the Regulations which will put in place rules of procedure for the two new registers and the section 104 Order will all be commenced at the same time in the late spring or early summer of 2024.

Work has commenced on the rules of procedure and the Bill will, we hope, be passed at Stage 3 before the summer recess. I understand that the Committee has already seen a demonstration of prototypes of the new registers and they will be modified appropriately in the light of the final version of the Bill and the rules of procedure. We believe that work on the new registers is well advanced.

It is critical that the reforms envisaged in the Bill are not held up by the section 104 Order which will complete the full range and effect of the reforms recommended by the Scottish Law Commission (SLC) and anticipated eagerly by those who deal with using financial instruments and financial collateral arrangements as a means of raising finance for business. I therefore welcome the Committee’s intention to seek an update from the Scotland Office on this issue.

Fees

As I explained in my letter to the Committee ahead of the Stage 1 debate, section 110 of the Land Registration (Scotland) Act 2012 provides for the Keeper of the Registers of Scotland to charge fees to cover the costs of maintaining and operating the registers under her control.

The fees which will apply for registration events and searches in the two new registers will be the subject of consultation before the fee structure is established.

I do not believe that it would be appropriate to bring forward any part of the fees structure for the two new registers in advance of that consultation. I am therefore unable to give any commitment to a fee structure that would makes searches free for not-for-profit money advisers.

It is, however, worth reiterating that, while it is therefore not possible to give more specific information at this stage about what the fees are likely to be, the SLC Business and Regulatory Impact Assessment indicated that search fees may be up to only £4.

Professor Steven, the Scottish Law Commissioner responsible for the Moveable Transactions Report has commented that the Register of Assignations is not something

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which money advisers would normally would normally look at when advising clients, for the following reasons.

To take an example, where debts have been assigned in a bulk assignation transaction, it is highly unlikely that the debtor's name will be on the register. It will be in an off-register schedule. Furthermore, under section 31(2)(a) of the Bill, the register can only be searched by reference to the assignor of the debt (not the debtor). It is worth bearing in mind also that, under section 10 of the Bill, the debtor is entitled to continue to pay the creditor last known to them (ie the assignor) if there has been no intimation of assignation, which is almost invariably the case as payment will continue to the original creditor even if the claim has been assigned.

I hope this explanation is helpful.

Tom Arthur

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