

# **MOVEABLE TRANSACTIONS (SCOTLAND) BILL**

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## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial Memorandum is published to accompany the Moveable Transactions (Scotland) Bill, introduced in the Scottish Parliament on 25 May 2022.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 15-EN);
  - a Policy Memorandum (SP Bill 15-PM);
  - a Delegated Powers Memorandum (SP Bill 15-DPM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 15-LC).
3. This Financial Memorandum has been prepared by the Scottish Government to set out the costs associated with the measures introduced by the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.
4. The Bill provides the legal framework to implement the recommendations of the Scottish Law Commission (SLC) Report on Moveable Transactions (Scot Law Com No. 249)<sup>1</sup> published in December 2017. These recommendations relate to the assignation of claims (a personal right to the performance of an obligation, typically payment of money) and security over moveable property.
5. The estimates of costs and savings contained in this Memorandum are compiled from information provided by bodies affected by this Bill. The figures and projections provided are the best estimates available for the costs and savings that will be generated as a result of the provisions contained in this Bill.
6. This Financial Memorandum assumes that most of the Bill provisions will take effect in the financial year 2023-24.

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<sup>1</sup> <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/security-over-corporeal-and-incorporeal-moveable-property/>

## **OVERVIEW**

7. Moveable transactions law enables businesses and individuals to use their moveable property (i.e. property other than land and buildings, such as plant and machinery, vehicles and intellectual property) to access finance by selling debts or by granting security over that moveable property. The Bill will make various types of commercial transactions more efficient, less expensive and less complicated than they currently are. This will lead to greater access to finance for businesses in Scotland.

8. The SLC summarised the problem:

“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. It is particularly important for small and medium sized enterprises (SMEs) which are more likely to suffer cash flow problems. If SMEs cannot fully exploit their assets to raise finance, they might otherwise have to resort to riskier and therefore more expensive types of lending, such as unsecured overdraft facilities or loans (assuming they can access such facilities at all). It is therefore economically and socially important for these transactions to be regulated by a legal regime that is fit for the 21<sup>st</sup> century”.<sup>2</sup>

9. The SLC went on: “The restrictive legal backdrop in Scotland may be having a serious impact on access to finance...[with] an estimated funding gap for Scottish SMEs of up to £0.75 billion per annum”.

10. For example, a business may wish to raise funding by transferring to a financial institution its claims to payment of its customer invoices. This would be done by means of an assignation. Alternatively, it may want to retain assets such as vehicles, equipment and intellectual property, but to use these as collateral to obtain loan finance. Individuals might wish to use art work or vehicles to secure finance.

11. Current Scots law in this area is very outdated, mainly non-statutory and unclear in some important respects (the principal relevant statute on assignation dates from 1862). It is also unnecessarily restrictive and unfit to meet the needs of modern Scottish commerce. The “workarounds” which are employed to deal with the restrictive nature of the current law (for example, using leaseback arrangements, trusts or licensing) are inevitably more expensive to effect. English law is sometimes used instead which involves Scottish businesses registering in England.

12. Other jurisdictions, and particularly England, have moveable transactions laws which are more commercially user-friendly than is the case in Scotland, which places businesses in Scotland at a competitive disadvantage.

13. The Bill will make various types of commercial transactions more efficient, less expensive and less complicated than they currently are. This will lead to greater access to finance for individuals and businesses in Scotland, particularly small and medium-sized businesses (larger

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<sup>2</sup> [https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business\\_and\\_Regulatory\\_Impact\\_Assessment\\_-\\_Report\\_on\\_Moveable\\_Transactions\\_Report\\_No\\_249.pdf](https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf)

businesses are better placed to use the workarounds which inevitably cost money which smaller firms cannot afford). The Bill will clarify the existing law, encouraging people and businesses in Scotland to use Scots law with confidence.

14. The Bill is necessary to ensure that Scotland matches international standards and that individuals and companies are able to avail themselves of the means of accessing finance more easily, as is proposed in the Bill.

15. The SLC Report considered three main areas of moveable transactions law:

- (a) assignment of claims;
- (b) security over corporeal moveable property; and
- (c) security over incorporeal moveable property.

### **Assignment**

16. Assignment in Part 1 of the Bill means a transfer of a claim to the right to the performance of an obligation (typically the right to be paid money, such as under an invoice). Rights to payment of invoices can be sold to financiers (albeit in practice at a discount from the full value of the invoice payment), thus helping a business's cash flow.

17. Another common transaction which will be facilitated by the Bill is landlords assigning the rents due by prospective tenants in order to obtain loan finance to fund the construction or renovation of the property.

18. In 2017, the SLC described the rationale for reforming the law on assignment of debt thus: "Invoice factoring...is becoming an increasingly used means of obtaining finance as an alternative to bank loans: global factoring volume reached an all-time high in 2015, with annual turnover reaching €2,373 billion".<sup>3</sup>

19. The SLC went on: "Utilising these finance facilities can be particularly valuable for SMEs. The Scottish Government's Small Business Survey published in 2017 found that the main reason small firms sought external finance was to secure working capital and cash flow. 41% of SMEs stated their reason for seeking working capital was to cover a short-term gap until funds were received from customers, whilst 15% said they sought working capital to cover unexpected late payments. SMEs rely heavily on steady cash flow, but are often burdened by the late payments of debts owed to them. A House of Commons briefing paper published in 2017 shows that the average late payment SMEs face is around £32,000, a figure which puts many businesses at risk of insolvency. The paper also showed that 12% of the SMEs which experience late payments say it impacts on their ability to pay their own staff on time, while 20% have difficulty paying business

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<sup>3</sup> [https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business\\_and\\_Regulatory\\_Impact\\_Assessment\\_-\\_Report\\_on\\_Moveable\\_Transactions\\_Report\\_No\\_249.pdf](https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf) page 4

bills like energy, rates and rent. Some 29% rely on costly overdrafts to make up for cash flow shortfalls due to being paid late”.<sup>4</sup>

20. The Federation of Small Businesses in Scotland have indicated that 3,500 small businesses in Scotland fail each year not because the business is unsustainable, but because the firm cannot get its customers to pay due invoices.<sup>5</sup> The Late Payment of Commercial Debts (Interest) Act 1998 was introduced to give small and medium sized enterprises (SMEs) the right to claim interest on late payments. It is, however, understood that 80% of small businesses do not do so, for fear of jeopardising business relationships with customers who often have greater bargaining power.<sup>6</sup>

21. Businesses who wish to raise finance on the basis of invoices which are due to be paid to them can assign their debts (in the form of their invoices due) to an invoice factoring company. The invoice factoring company will typically pay the assignor 80-90% of the money due under the invoices. This obviously aids cash flow by providing the business with income much more quickly than if it had to wait to be paid by its customers. Meanwhile the invoice factoring company will pursue the assigned debt. When the invoice factoring company has been paid, it will pay the balance of the sums due under the invoices to the assignor, less the invoice factoring company’s fee, which will include an element of interest on the money advanced to the assignee based on the claims assigned.

22. At present, 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.

23. The effect is that some Scottish businesses elect to enter into contracts governed by English law in order to avoid the need for intimation. Invoice financiers can therefore charge more for their services in Scotland than they might in England.

24. The Bill will introduce a new Register of Assignations which will provide an alternative to intimation as a means of assigning debt. It will also modernise the law on intimation of assignation.

## **Security over moveable property**

### ***Current position***

25. At present in Scotland, while one can take out a standard security (mortgage) over buildings or land (heritable property), there is no easy method to take out a security which “fixes” on moveable property, either corporeal (tangible) or incorporeal (intangible). For example, a whisky

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<sup>4</sup> [https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business\\_and\\_Regulatory\\_Impact\\_Assessment\\_-\\_Report\\_on\\_Moveable\\_Transactions\\_Report\\_No\\_249.pdf](https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf) page 4

<sup>5</sup> [https://www.scotlawcom.gov.uk/files/1715/1361/1309/Report\\_on\\_Moveable\\_Transactions\\_-\\_Volume\\_1\\_Report\\_249.pdf](https://www.scotlawcom.gov.uk/files/1715/1361/1309/Report_on_Moveable_Transactions_-_Volume_1_Report_249.pdf) Para 3.25

<sup>6</sup> Federation of Small Businesses, Time to Act: The Economic Impact of Poor Payment Practice (2016) 12. Available at [http://www.fsb.org.uk/docs/default-source/fsb-org-uk/fsb-report---late-payments-2016-\(final\).pdf?sfvrsn=0](http://www.fsb.org.uk/docs/default-source/fsb-org-uk/fsb-report---late-payments-2016-(final).pdf?sfvrsn=0)

distiller can take out a standard security over a warehouse. But even though that warehouse may be full of maturing whisky, it is not possible to take out a security which affects only the whisky. A company or limited liability partnership can take out a floating charge, but this does not “fix” on one asset and has a low priority in the event of insolvency. The same problem of not being able to take out a fixed security arises in relation to intellectual property, which is of increasing importance to the Scottish economy.

26. Current Scots law on moveable transactions is a long way behind international standards and this makes some security transactions difficult or even impossible to execute in Scotland, necessitating the use of workarounds, all of which take longer and are more expensive for companies in Scotland.

27. In Scotland, there is no such thing as a mortgage over moveable, as opposed to heritable, property as there is in England. The only way to use incorporeal moveable property as security for a debt in Scotland at present (other than by means of a floating charge) is to transfer it into the name of the creditor. For example, intellectual property must be transferred to the lender and complicated licence-back arrangements put in place.

28. Effectively the only “fixed” security (other than a floating charge) over corporeal moveables is a pledge. In a consumer context this is known as “pawn”. It requires delivery of the encumbered property to the creditor. This is impractical commercially, as businesses require possession of their assets, such as vehicles and plant and machinery, in order to trade.

### ***Floating charges***

29. As noted above, floating charges are one of the few means by which a security can currently be taken out over moveable property. However, these do not provide a sufficient solution.

30. Floating charges can cover both corporeal and incorporeal moveable property and land. They give a relatively low ranking in the event of insolvency and lending rates are typically higher than they might be for fixed security. They were introduced by the Companies (Floating Charges) (Scotland) Act 1961 as a response to the restrictive nature of the common law in relation to security over moveable property, but they can only be granted by certain entities such as companies, limited liability partnerships and building societies. Private individuals and bodies such as sole traders, partnerships and limited partnerships cannot grant floating charges.

31. The effect of a floating charge is that assets acquired by an entity (for example, a company) automatically fall under the charge, but assets disposed of are automatically freed from the charge. The company therefore remains free to deal with its assets. So long as the company stays in business, the charge “floats” over its assets and the effect of the charge is limited. But if the company becomes insolvent and is liquidated or goes into administration or receivership, the charge attaches to the company’s assets and takes effect as if it were a fixed security.

### ***Consequences of the existing law and benefits of the proposed reforms***

32. It is understood that at least one major financial institution will not lend on plant and machinery in Scotland because of the state of the law on moveable transactions. Others will lend,

but at higher rates of interest due to the complex workarounds which are necessary to effect the security.

33. “Secured” lending in the manner proposed in the Bill would be a huge commercial benefit. Individuals or businesses would be able to grant a lender security against an asset (collateral) in exchange for a loan or credit arrangement. If the debt is unpaid, the lender has the right to enforce the security by realising (i.e. selling) the encumbered property, with any surplus returning to the debtor. Secured lending is therefore essentially a means by which creditors can mitigate risk, which in turn lowers the cost of borrowing.

### **Moveable Transactions (Scotland) Bill**

34. The Bill is split into three parts:

- Part 1: Assignment – this Part reforms and modernises the existing law on assignment of debt which currently requires intimation to the debtor of the assignment of the right to performance of the obligation. This is expensive and cumbersome if there are a large number of debtors and the arrangements do not permit the assignment of future invoices since the identity of the future debtor will not be known. Crucially, the Bill will allow for the registration of an assignment document in the new Register of Assignations as a means of completing the assignment process, which will remove the problem of intimation to large numbers of debtors and will permit assignment of future invoices so long as the type of invoice is sufficiently identified.
- Part 2: Security over moveable property – this Part reforms and modernises the existing law on pledge whereby a creditor takes possession of an asset in return for a loan. In the consumer context this is commonly known as “pawn”. The Bill will make it much easier, and cheaper, to take out a security over corporeal (tangible) moveable assets (such as vehicles, equipment, whisky or livestock) while the asset remains the property of the debtor. The new statutory pledge will be registered in the new Register of Statutory Pledges. This will be of particular assistance to companies who wish to use the equipment with which they carry out their business as collateral for the finance. Such assets can be used to secure loans at a lower cost because there is less risk to the lender as the security is fixed on the asset in question. This asset can then be sold if the loan is not repaid. This also means that it is only that asset which is at risk under the security, rather than all of the debtor’s possessions (unlike the position with a floating charge, which affects all of the debtor’s assets if the debtor becomes insolvent).

The Bill will also make it much easier to take out security over incorporeal (intangible) moveable assets which takes the form of intellectual property. This includes copyright, trademarks, design rights and patents. Intellectual property is an increasingly important asset worldwide in relation to obtaining loan finance. It is understood that intellectual property can now comprise 80% of some companies’ assets and so the ability to use that intellectual property as collateral for finance will be particularly helpful to smaller, starter companies and firms.

- Part 3: General provision – this Part includes provision in relation to matters such as subordinate legislation, interpretation and commencement.

## **COSTS ON THE SCOTTISH ADMINISTRATION**

35. The only cost on the Scottish Administration in relation to the reform of the law on moveable transactions will be the establishment and then the ongoing administration and maintenance of the Register of Assignations and the Register of Statutory Pledges. The new registers will be administered and maintained by the Registers of Scotland (“RoS”).

### **Establishment costs**

36. The reclassification of RoS as central government and not a separate public corporation (on the recommendation of the Office for National Statistics in accordance with international standards) meant that the Keeper’s financial reserves were returned to the Scottish Consolidated Fund at the end of March 2020 and therefore the cost of establishing the two new registers will be met from that Fund.

37. RoS anticipate that the total costs of establishing the two new registers will be £8.4 million (£8.2m capital/£0.2m resource). This is anticipated to be required over three full financial years (which began in 2021-22 in parallel with work on the Bill) as well as the first financial quarter of 2024-25. It is hoped that the Bill will be passed by the Parliament in 2023, but the commencement dates of the registers are anticipated to be late spring or early summer of 2024. The table below shows the development costs from discovery through to implementation, broken down as follows—

	<b>Capital</b>	<b>Resource</b>	<b>Total</b>
<b>2021-22</b>	£0.9 m	£0 m	£0.9 m
<b>2022-23</b>	£3.1 m	£0 m	£3.1 m
<b>2023-24</b>	£3.4 m	£0.1 m	£3.5 m
<b>2024-25</b>	£0.8 m	£0.1 m	£0.9 m
<b>Total</b>	<b>£8.2 m</b>	<b>£0.2 m</b>	<b>£8.4 m</b>

38. These figures are based on best estimates of the likely costs to RoS. The development costs have been established on the basis of discussions with the project team and comparison with the development costs of a recent relevant new register (the Register of Controlling Interests in Land). A small cost contingency (5%) has been applied to the development costs, mainly to reflect the ongoing uncertainty in future pay rates for contractors (which already have a 5% inflationary uplift assumed). Finally, the estimate reflects the impact of up to a three-month delay to the secondary legislation containing the rules of procedure for the two new registers being approved. If they were to be delayed further, the costs would require revision, but as the secondary legislation is to be developed during the Bill’s passage through Parliament, it is not expected that any further delay will arise.

39. The development/set-up costs include staff costs, cloud hosting, testing, assurance work, licence costs, costs for professional services for UX (User Experience) and Disability Assessment

Centre, and communications (including online guidance) and marketing costs. These costs are broken down as follows—

<b>Estimated Development Costs</b>	<b>Total to Q1 FY 24/25</b>
Staff costs	£6.63 m
RoS overhead costs	£1.02 m
Professional services – communications & marketing	£0.20 m
Cloud hosting (AWS) costs	£0.06 m
DAO Assurance Assessments	£0.05 m
Professional services – user research and assessment centre	£0.03 m
Penetration testing	£0.02 m
Contingency @ 5%	£0.36 m
<b>Total Costs</b>	<b>£8.37 m</b>

40. It was planned that separate development teams would work on the two registers, but similarities between them has meant that the work can be done by one team. As the two registers are being developed in tandem, it is not therefore meaningful or practical to separate out the costs of each.

#### **Routine running costs**

41. RoS estimate that the running costs for the new registers will be between circa £600,000 and £700,000 per annum and these figures are upper estimates in part to account for inflation. It is anticipated that costs will remain at broadly the same level on an ongoing basis with increases to take account of inflation as time passes. Due to the largely automated nature of the registers, changes in the volume of applications should not have an impact on ongoing running costs.

42. Ongoing running costs will include IT, staff costs for ongoing development and customer support roles, cloud hosting costs and costs of government services (notifications/payments). These costs are broken down as follows—

<b>Estimated ongoing running costs</b>	<b>From Q1 FY 24/25</b>
Operations staff costs	£0.16 m
IT staff costs	£0.42 m
Software/hardware/hosting costs	£0.04 m
<b>Total</b>	<b>£0.62 m</b>

43. It is expected that the new registers will be online and automatic, with little need for input from RoS staff. Once operational, it is expected that the ongoing running costs of the two registers will be funded by registration and search fees paid by users of the registers, with any income shortfall requiring support from the Scottish Consolidated Fund. Fees will be set in secondary

legislation after the Bill is passed, and the existing power in section 110 of the Land Registration etc. (Scotland) Act 2012 will allow for this. Fees will be set after soundings are taken from stakeholders on the likely usage of the registers. The level at which fees are likely to be set is discussed further at paragraphs 61 to 63 below.

44. The Law Society of Scotland have indicated that, while they cannot put a figure on a likely number of registrations, they believe that every commercial transaction in Scotland which involves funding will mean the use of at least one of the new registers. This appears to suggest significant usage of the new registers.

45. One member of the SLC's advisory group said in discussions that he thought that £7 billion of Scottish invoice financing would be registered per annum. This would mean a very high volume of registrations and it has been suggested that banks and invoice factoring companies will be early and frequent users of the Register of Assignations. The SLC have previously estimated that the annual number of registrations across both the Register of Assignations and the Register of Statutory Pledges will be in the region of 5,000 to 15,000.<sup>7</sup>

### **Compensation**

46. The Bill contains provision for the Keeper to pay compensation for certain losses suffered where an inaccuracy in the registers is attributable to the Keeper. The Keeper is also required to pay compensation for certain losses suffered as a result of incorrect information being issued by the Keeper in specified other cases (for example, in a verification statement or an extract) or where loss is caused due to applications being processed by the Keeper in the wrong order, being incorrectly accepted/rejected, or being unable to be submitted due to an error with the Keeper's systems.

47. Across both registers, changes to the register (registration and most corrections) will be applicant-led (through an online portal) and will be automated. Further, any notifications or verification statements to be issued by the Keeper will also be automated, based on email addresses and other information provided by applicants. As a consequence, any errors are likely to arise through data input errors by the applicant (in which case, the Keeper is not liable) or through some form of IT error at RoS leading to an error in the entry (which, based on RoS' experience of other registers, is extremely unlikely).

48. The potential may exist for the Keeper to have to make a manual correction to the Register of Statutory Pledges, increasing the potential for a correction to be carried out erroneously by RoS staff. However, such corrections are likely to be rare, and the nature of the correction process is likely to be straightforward in most cases.

49. It is therefore considered that the number of instances where the Keeper will be liable to pay compensation will be extremely low as a percentage of the overall number of applications.

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<sup>7</sup> [https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business\\_and\\_Regulatory\\_Impact\\_Assessment\\_-\\_Report\\_on\\_Moveable\\_Transactions\\_Report\\_No\\_249.pdf](https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf) page 45

However, it is impossible to estimate what compensation is likely to be payable by the Keeper in the rare cases where this might arise as this 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.

### **Other costs**

50. The Keeper is also entitled to participate in any civil proceedings where the accuracy of the assignments record or the statutory pledges record, or what is needed to correct it, is at issue. If the Keeper were to do so then there would inevitably be costs arising from doing so. However, it is not expected that this will occur other than very rarely: it is considered highly unlikely that the court will be asked to consider matters often, and the Keeper may not consider it necessary to enter into the proceedings even if they do arise. It is not possible to estimate a cost for this in the event that it were to occur, as costs would vary significantly depending on the nature of the proceedings.

### **COSTS ON LOCAL AUTHORITIES**

51. Local authorities are not directly affected by any of the measures in the Bill.

52. The Scottish Government contacted the Convention of Scottish Local Authorities (COSLA) to draw their attention to the SLC proposals on moveable transactions, but they did not believe that these were a particular issue for Councils. COSLA commented that it was unlikely that Councils would seek to grant or take security over movable property and, even if a Council did, the intent of the legal change was to make the process more straightforward.

### **COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES**

#### **Savings**

53. The Bill is expected to lead to a number of savings for those individuals and businesses who choose to make use of the new registers.

54. In relation to invoice factoring, it is understood from informal discussions with a practitioner in the field that the necessary workarounds used at present can lead to legal costs of up to £30,000, but that the changes proposed in the Bill will mean that the legal costs could be as little as £2,000 (plus the fee for registration in the Register of Assignations).

55. In relation to financial arrangements based on using an individual's or business's assets as collateral for a loan, it is understood that the workarounds mentioned in paragraph 26 which currently have to be used in Scotland due to the unsatisfactory state of the law can lead to legal costs ranging from £2,000 to £10,000, depending on the risk and size of the transaction. Once financial institutions have products which use the new statutory pledge, legal fees will be dramatically reduced and the only other cost will be the fee for registration in the Register of Statutory Pledges.

## **Nature and extent of impact**

56. There is no requirement for individuals or businesses to register assignments of claims in the Register of Assignations. Parties may wish to continue to assign by means of intimation to the debtor and will be able to do so under the law on intimation as updated by the Bill.

57. There is also no obligation on parties to register a statutory pledge in the Register of Statutory Pledges as a means of using their moveable property as collateral to raise finance. However, as it is very difficult to do this under the existing law, it is expected that registrations in the new register will grow, particularly as financial institutions develop new financial products involving the statutory pledge.

58. There will similarly be no obligation to search the registers and indeed in some places the Bill makes it clear that it is not necessary for, say, a purchaser in good faith to do so when buying from a seller who is acting in the ordinary course of their business. There will, however, be other instances where it is in the best interests of a purchaser to search the register (for example, a non-individual purchaser who is buying from someone who is selling the item other than in the ordinary course of their business), but search fees are expected to be modest.

59. The good faith rules in the Bill mean that innocent parties are protected and so there should be no costs to them if they do something in good faith but in ignorance of an assignment of a claim or the existence of a statutory pledge. They will still get credit for making payment to the wrong person where they are unaware that a claim has been assigned or, as the case may be, will receive what they paid for unencumbered of a statutory pledge of which they were unaware. In the latter case, this means that encumbered property becomes unencumbered, but that does not necessarily mean that the secured creditor will not recover the money owed to them: they will become an unsecured creditor but can still sue their debtor for outstanding sums. The risk of being unable to recover sums as an unsecured creditor will presumably be costed in to the loan rates that are offered, so it is not expected to be a real “cost” on creditors.

## **Costs of interacting with the registers**

60. For those who choose to engage with the new registers, fees are chargeable under the Bill for:

- initial registration of an assignment document or a statutory pledge,
- registration of an amendment to a statutory pledge,
- a correction of the register<sup>8</sup>,
- searches of the register,
- extracts of the register.

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<sup>8</sup> There is only a formal correction application process for the Register of Statutory Pledges. However, although likely to be less relevant due to the “snapshot” nature of the Register of Assignations, there is a power to introduce such a process in respect of it too and, if so, to charge a fee.

61. Many parties will see the advantages of registration. The SLC estimated in their Business and Regulatory Impact Assessment (BRIA)<sup>9</sup> that the registration fees required to cover operating costs for the estimated number of registrations would be in the range of £10 to £60. These costs were based on parallel fees for the Land Register of Scotland, which have since been increased to a £20 to £80 range for registration to cover cost increases since 2017. The figures in the SLC BRIA were based on 2017 costs and relied on volumes being sufficiently high to generate income to cover ongoing running costs of the registers. Accordingly, figures may require to be revised upwards if this proves not to be the case. As above, this will be done by Ministers in regulations, following appropriate consultation. However, this range of estimates compares with £15 to register a Scottish floating charge electronically or a mortgage or charge created by a UK company at Companies House and £80 to register a standard security in the Land Register.

62. It is expected that any fee for corrections (see footnote 8 for details) will likely mirror the fee for registration in the register which is the subject of the correction application. The SLC believed that searching fees would be £4 or less. Fees for extracts are expected to be reasonably modest (the fee for an extract from the Land Register is £35 + VAT). The Bill also expressly provides for printed and electronic search results to be admissible in evidence, in the expectation that these will be easier to obtain than extracts and likely slightly cheaper.

63. The Scottish Government believes that the cost of registration will be modest for applicants to the Register, particularly by comparison with the value of the debt to which the applications are likely to relate, and will be more than counter-balanced by the advantages to be derived from the modernisation of the law. In particular, applicants will no longer be obliged to use the expensive workarounds mentioned above or to use English law as a means to avoid the complexities caused by the unsatisfactory state of existing Scots law (which again implies extra costs).

64. Although it will not be compulsory to register an assignment, and the option of assignment by intimation will still exist, it is expected that the banking and invoice factoring sector will invariably register their assignments to avoid the need to intimate to possibly large numbers of debtors and because that is the only means by which it will be possible to assign invoices relating to future claims on as yet unknown debtors. This should lead to lowering of costs for those bodies.

65. The SLC have commented that: “Easy access to information at relatively low cost is the “primary element” through which to establish a transparent and harmonised market for secured credit. In the secured lending context, lenders will conduct investigations into a prospective borrower’s financial position in order to limit exposure to insolvency. Such investigations usually require gathering information on the extent to which assets are already subject to pre-existing security, as the risk of hidden an unquantifiable pre-existing securities can be a significant deterrent for lenders. These investigations cause the cost of credit to rise. With a publicly accessible register, financiers can discover the true picture without resorting to in-depth investigation, thus potentially lowering the cost of borrowing.”<sup>10</sup>

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<sup>9</sup> [https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business\\_and\\_Regulatory\\_Impact\\_Assessment\\_-\\_Report\\_on\\_Moveable\\_Transactions\\_Report\\_No\\_249.pdf](https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf)

<sup>10</sup> [https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business\\_and\\_Regulatory\\_Impact\\_Assessment\\_-\\_Report\\_on\\_Moveable\\_Transactions\\_Report\\_No\\_249.pdf](https://www.scotlawcom.gov.uk/files/7415/1359/9231/Business_and_Regulatory_Impact_Assessment_-_Report_on_Moveable_Transactions_Report_No_249.pdf) pages 33 and 34

## **Compensation**

66. In addition to the compensation that can be payable by the Keeper under the Bill (see paragraphs 46 to 49), there is also provision in the Bill for a person to be compensated by a third party other than the Keeper in certain circumstances. This applies if the person suffers loss as a result of an inaccuracy in an entry in one of the two new registers which is not attributable to the Keeper and where the person who made the application which gave rise to the entry failed to take reasonable care<sup>11</sup>. It also applies where the person suffers loss as a result of a person who is subject to an information duty under the Bill supplying incorrect information without taking reasonable care, or where they unreasonably fail to comply with the request.

67. It is expected that all such cases will be very rare, particularly given that the requirement to pay compensation applies only where the person has failed to take reasonable care or has acted without reasonable excuse. As with the comparable duty on the Keeper, the compensation and costs of seeking that compensation will again be dependent on the circumstances of individual cases. Again, it should be noted though 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.

68. Similarly, the Bill imposes liability on a secured creditor to pay compensation for certain losses suffered by a person as a result of the secured creditor's failure when enforcing a pledge to comply with the obligations imposed on them by the Bill. However, it is not expected that secured creditors will fail to comply with the obligations imposed on them (for example, as to the giving of notice, and compliance with reasonable standards of commercial practice). As such, costs should not arise under this provision. As in other cases, compensation is not payable though 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.

## **Other costs**

69. As with the introduction of any new legislation, solicitors will have to familiarise themselves with the changes to the law. At present it is thought that only a relatively small number of legal firms will deal with the law on moveable transactions, but it would be expected that more will be involved in future since the proposed greatly improved ability to use moveable property as collateral for finance is a major change to Scots law which will hopefully be widely used. It is anticipated that by the time the new legislation is commenced there be a range of lectures, seminars, academic papers etc. available to solicitors to facilitate training on the changes. RoS will publish and provide guidance on the new registers in the form which the Keeper considers to be most appropriate (see paragraph 39 above, where this is included in development costs).

70. There are also potential costs for individuals and other bodies in relation to interacting with the court system under:

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<sup>11</sup> Although the language of "application" is used here for brevity, this provision would cover an applicant for registration, an applicant for a correction, and a person who brings an apparent manifest inaccuracy to the Keeper's attention other than by means of an application route.

*This document relates to the Moveable Transactions (Scotland) Bill (SP Bill 15) as introduced in the Scottish Parliament on 25 May 2022*

- the information-gathering rules in both the Register of Assignations and the Register of Statutory Pledges;
- the enforcement rules for statutory pledges;
- the correction demand process in the Register of Statutory Pledges.

71. It is not anticipated that court action will arise other than rarely under the provisions of the Bill and it is not possible to estimate what those costs might be.



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# **MOVEABLE TRANSACTIONS (SCOTLAND) BILL**

## **FINANCIAL MEMORANDUM**

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