

LEGISLATIVE CONSENT MEMORANDUM

FINANCIAL SERVICES BILL

Background

1. This memorandum has been lodged by Humza Yousaf, MSP, Cabinet Secretary for Justice, under Rule 9B.3.1(c)(ii) of the Parliament's Standing Orders, following amendments tabled by UK Government on 6 January. The Financial Services Bill ("the Bill") was introduced in the House of Commons on 21 October 2020. The latest version of the Bill can be found at:

<https://publications.parliament.uk/pa/bills/lbill/58-01/162/5801162.pdf>

Content of the Bill

2. The principal objective of the Bill is to ensure the UK's regulatory framework continues to function effectively after leaving the EU. The Bill will enhance the UK's prudential standards and promote financial stability by enabling the implementation of the full set of Basel III standards, a new prudential regime for investment firms, and giving the Financial Conduct Authority (FCA) the powers it needs to oversee an orderly transition away from the LIBOR benchmark.

3. The Bill will also promote openness between the UK and international markets by introducing a new mechanism to simplify the process whereby overseas investment funds can be marketed in the UK and delivers a Ministerial commitment to provide long-term access between the UK and Gibraltar for financial services firms.

4. Finally, the Bill will introduce a number of measures to maintain the effectiveness of the financial services' regulatory framework and sound capital markets.

5. The Bill contains provisions which extend to Scotland, but relate to matters that are reserved to the UK Parliament by virtue of Schedule 5 of the Scotland Act 1998, and make no alteration to the executive competence of the Scottish Ministers or the legislative competence of the Scottish Parliament, such as provisions on financial services and, money laundering and terrorism.

Provisions which relate to Scotland and require legislative consent

6. The Bill contains provisions that apply to Scotland and which amend powers relating to freezing and forfeiture of recoverable property. In particular, the amendments extend the types of account in respect of which those powers can be exercised. Those powers are exercisable in relation to the proceeds of unlawful conduct in connection with both devolved and reserved offences. The amendments also alter the executive competence of the Scottish Ministers by means of extending the types of account to which Scottish Ministers can apply to the sheriff for a forfeiture order, both in relation to specific types of terrorist property and to money that is the proceeds of unlawful conduct.

7. The provisions amend Part 4B of Schedule 1 to the Anti-terrorism, Crime and Security Act 2001 (ATCSA) and Chapter 3B of Part 5 of the Proceeds of Crime Act 2002 (POCA), so that provisions for the forfeiture of terrorist money and money that is the proceeds of unlawful

conduct apply to money held in accounts maintained with electronic money institutions (EMIs) and payment institutions (PIs).

8. An explanation of the provisions is set out in the Annex.

Reasons for seeking a Legislative Consent Motion

9. The Bill makes provision applying to Scotland for certain purposes which are within the legislative competence of the Scottish Parliament. It also makes provision which alters the executive competence of the Scottish Ministers. This makes it a “relevant” Bill under Chapter 9B of the Standing Orders of the Scottish Parliament and consequently requires the consent of the Scottish Parliament.

10. The Scottish Government believes that legislative consent is required in relation to Clause 32 and Schedule 12 of the Bill covering the amendments to provisions in both the ATCSA and in POCA. However, the UK Government has set out a view that the provisions in the Bill amending Part 4 of Schedule 1 to ATCSA do not require legislative consent as there is considered to be no alteration of executive competence. The UK Government considers that consent is required only insofar as the amendments make provision within the legislative competence of the Scottish Parliament.

11. The Scottish Government does not share this view and believes that the amendments to the ATCSA alter the executive competence of Scottish Ministers, and has therefore included these provisions within the draft legislative consent motion to the extent that they alter executive competence of the Scottish Ministers.

Legislative Competence: Proceeds of Crime

12. The Scottish Government has undertaken to further strengthen proceeds of crime legislation in this Parliament. It therefore recommends that the Scottish Parliament gives consent for the UK Parliament to consider the proposed amendments to ATCSA and POCA that extend and apply to Scotland. The proposed changes are aimed at improving the civil recovery of terrorist and criminal money and, since POCA is a UK-wide regime, they can be most efficiently and effectively made on a UK basis by this Bill.

13. Although the criminal and civil law are generally devolved, POCA provides for the confiscation and civil recovery of the proceeds of reserved crime (e.g. drug trafficking and money laundering the proceeds of drug trafficking) as well as devolved crime. As POCA concerns a complex mix of both reserved and devolved matters, it is appropriate for the proposed amendments to be made through the UK Parliament. However, to the extent that the proposed amendments make provision in relation to the civil recovery of the proceeds of devolved crime, they are within the Scottish Parliament’s legislative competence and require its consent.

Executive Competence and Delegated Powers

14. The Bill extends the functions of the Scottish Ministers in relation to the types of account to which the Scottish Ministers can apply to a sheriff for a forfeiture order under ATCSA and POCA. As this alters the executive competence of the Scottish Ministers, the provisions require the consent of the Scottish Parliament in order to be considered by the UK Parliament.

Consultation

15. Scottish Government has considered the legal and policy implications of the Bill, and have sought the views of the Civil Recovery Unit. The Civil Recovery Unit has indicated that it welcomes the amendments.

Financial Implications

16. No significant additional costs to the Scottish Government, nor any significant additional direct costs to the Scottish Criminal Justice sector, are envisaged as a result of the provisions within the Bill.

17. In relation to the amendments to the civil recovery regimes under ATCSA and POCA, there is potential that these could result in a net benefit of POCA receipts which return to the Scottish Consolidated Fund.

Conclusion

18. Extending and applying the relevant provisions of the Bill to Scotland will help meet the Scottish Government's aim of maximising the tools available in Scotland so as to enable an efficient and effective law enforcement response to serious organized crime. The Scottish Government recognises that such crime has no respect for borders or boundaries and, so, must be tackled across multiple jurisdictions. The proposals in the Bill seek both to provide additional means to disrupt and combat this kind of criminality by making it less profitable. It will further ensure that Scotland, and the UK as a whole, is a more hostile place for those seeking to move, hide, use or re-invest the proceeds of crime or terrorism.

19. It is the view of the Scottish Government, therefore, that the relevant provisions of the Bill, as outlined above, will help to achieve its objective of reducing the harm caused by serious organized crime and making Scotland a safer, fairer and more prosperous country.

Draft Legislative Consent Motion

20. The draft motion, which will be lodged by the Cabinet Secretary for Justice, is:

“That the Parliament agrees that the relevant provisions of the Financial Services Bill, introduced in the House of Commons on 21 October 2020, relating to amendments to the Anti-terrorism, Crime and Security Act 2001 and the Proceeds of Crime Act 2002, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament.”

Scottish Government
January 2021

FINANCIAL SERVICES BILL: FURTHER INFORMATION**Provisions which relate to Scotland**

1. The following paragraphs describe the specific provisions which apply to Scotland and for which consent is sought in terms of the Legislative Consent Motion. Clause numbers refer to clauses in the Bill following the Report Stage in the House of Commons on 13 January 2021.
2. The provisions of the Bill amend Part 4B of Schedule 1 to the Anti-terrorism, Crime and Security Act 2001 (ATCSA) and Chapter 3B of Part 5 of the Proceeds of Crime Act 2002 (POCA), so that provisions for the freezing and forfeiture of terrorist money and money that is the proceeds of unlawful conduct apply to money held in accounts maintained with electronic money institutions (EMIs) and payment institutions (PIs).
3. The Civil Recovery Unit, which exercises these powers on behalf of Scottish Ministers, have seen and are content with the amendments.
4. The draft LCM and CSCL submission are enclosed alongside this submission as a separate document.

Key Clauses in the Bill

5. Clause 32 provides for a new Schedule 12 to the Bill to amend provisions in ATCSA and POCA about the forfeiture of money so that they apply to money held in accounts maintained with EMIs and PIs.
6. Section 303Z1 (1A) of POCA, and Paragraph 10Q to Schedule 1 of ATCSA are amended to define a “relevant financial institution as:
 - (a) a bank,
 - (b) a building society,
 - (c) an electronic money institution, or
 - (d) a payment institution.
7. Section 303Z14(7)(a) of POCA, and paragraph 10Z2(7)(a) of ATCSA are amended to substitute “financial relevant institutions” for “bank or building society.”
8. Schedule 12 to the Bill amends both the ATCSA and POCA to the effect that the forfeiture of money regimes included therein apply to accounts maintained by EMIs and PIs in addition to bank and building society accounts and sets out definitions of what constitutes an EMI and a PI.
9. Sub-section 6 of Section 3030Z1 of POCA, and sub-paragraph (7) of Paragraph 10Q to Schedule 1 of ATCSA are also amended to insert the following definitions of EMIs and PIs:

“electronic money institution” has the same meaning as in the Electronic Money Regulations 2011 (S.I. 2011/99) (see regulation 2 of those Regulations);”, and

““payment institution” means an authorised payment institution or a small payment institution (each as defined in regulation 2 of the Payment Services Regulations 2017 (S.I.2017/752))”

Proceeds of Crime

10. Paragraphs 10 through 21 of Schedule 12 of the Bill amend Chapter 3B of POCA to amend the types of account within the asset freezing and forfeiture regime provided in that Chapter, and in relation to which Scottish Ministers can apply to the sheriff for a forfeiture order in respect of money that is the proceeds of unlawful conduct, to include EMIs and PIs.

11. They extend the powers of Scottish Ministers to apply to the sheriff for a forfeiture order under section 303Z14(2) of POCA and therefore require the Scottish Parliament’s consent in so far as they confer functions on the Scottish Ministers so as to alter their executive competence.

12. Further, these amendments also amend provisions more generally in relation to asset freezing and forfeiture. These powers are exercisable in both relation to the proceeds of offences which are devolved, as well as those which are reserved (e.g. drug trafficking and money laundering the proceeds of drug trafficking). To the extent that the provisions relate to the civil asset recovery regime in respect of devolved offences, they would be within the legislative competence of the Scottish Parliament. The provisions therefore also require the Scottish Parliament’s consent on that basis.

Terrorist Property

13. Paragraph 8 of Schedule 12 to the Bill amends paragraph 10Z2(7)(a) of Schedule 1 to the ATCSA to amend the types of account to which Scottish Ministers can apply to the sheriff for a forfeiture order in respect of specific types of terrorist property to include EMIs and PIs. This is where such property or money is intended to be used for the purposes of terrorism, consists of resources of a proscribed organisation, or is (or represents) property obtained through terrorism.

14. Although these provisions are considered to relate to a reserved matter (terrorism), they extend the powers of Scottish Ministers to apply to the sheriff for a forfeiture order under paragraph 10Z2(7)(a) of Schedule 1 to ATCSA and therefore require the Scottish Parliament’s consent in so far as they confer functions on the Scottish Ministers so as to alter their executive competence.

This Legislative Consent Memorandum relates to the Financial Services Bill (UK legislation) and was lodged with the Scottish Parliament on 20 January 2021

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