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**Advice to Global Witness on the Application of the ECHR and the TFEU to  
Transparency Proposals for Part 3 of the Land Reform (Scotland) Bill**

**G3129.1**

**1. Executive Summary**

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Executive Summary on the European Convention of Human Rights (the “ECHR”)

- Whilst there is no clear case-law precedent on this point, based on the general legal principles, it is possible that the Global Witness (“GW”) Proposals (see Section 4 below) engage the application of Article 8 (right to private and family life) and Article 1, Protocol 1 (right to peaceful enjoyment of property) of the ECHR. In particular, it is possible that GW Proposal 1, read together with Proposal 2, engage these ECHR provisions because they will require certain personal information to be made public, and if this measure is supported with enforcement sanctions imposed on individuals for non-compliance that may interfere with property ownership. It may also be argued that in certain circumstances such measures may deter buyers from purchasing the land, thus prohibiting the sale of land by the current land owners. It is unlikely that Proposal 3 engages Article 8; but it is possible that Article 1, Protocol 1 is invoked because it requires current land owners to transfer their ownership to a legal entity registered in the EU; and may do so in a discriminatory fashion, thus potentially also engaging Article 14 of the ECHR.
- The rights enshrined in these ECHR Articles are qualified. It is therefore necessary to consider whether such interference as proposed by GW can be justified. A number of arguments are provided in this note that may be used to justify such interference with these ECHR rights.
- If the interference as proposed is justified within the meaning of Article 8(2), it also has to be shown that it is necessary for the democratic society, which engages questions on proportionality and Member States’ “margin of appreciation” in balancing their aims and interests with the rights in question. Similarly, if the interference as proposed is justified, for the purposes of Article 1, Protocol 1, it also has to be proportionate. For this purpose it is necessary to show that a “fair balance is struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”. Safeguard provisions may be included in any measure to ensure that proportionality requirement is met.

Executive Summary on free movement of capital provisions of the Treaty on the Functioning of the EU (the “TFEU”)

- The definition of capital restriction has been interpreted expansively by the Court of Justice of the EU (the “CJEU”) and any measures which are likely to have a dissuasive or deterrent effect on capital movement can act as a prohibition on the free movement of capital. There is no clear Court precedent on whether transparency measures such as the GW Proposals may constitute a capital restriction; it is therefore possible that they, *prima facie*, would impinge the EU rules on free movement of capital.
- It seems more likely that, due to its discriminatory nature, Proposal 3 would be relatively more likely to be held to be a capital restriction.
- However, it may be possible to argue that the effects of such measures would be *de minimis*, in particular, due to the significant transparency requirements that real estate investors are already required to abide by in the EU.
- Alternatively, even if the measures proposed by Global Witness are held to be capital restrictions contrary to EU law it may be argued that they are justified on public policy grounds. Relying on this argument, however, would, in particular, require strong arguments that the aims of the Proposals could not be achieved by less restrictive means (i.e. that they are proportionate).

## 2. The Scope of this Advice

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The purpose of this note is to provide Global Witness (“**GW**”) with a legal opinion addressing the position that progressive transparency and disclosure proposals for Part 3 of the Land Reform (Scotland) Bill (the “**Bill**”) (as set out in Section 3 of this note) are incompatible with the European Convention on Human Rights (the “**ECHR**”), and the Treaty on the Functioning of the European Union (the “**TFEU**”), as well as the case-law of the European Court of Human Rights (the “**ECtHR**”) and the European Union Courts.

The transparency provisions included in Part 3 of the current draft of the Bill and the criticisms expressed of their ineffectiveness are not analysed for the purposes of this note.

## 3. Legal Context

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### 3.1 The Land Reform (Scotland) Bill

The Bill was laid before the Scottish Parliament on 22 June 2015 and is currently going through the legislative procedure.

### 3.2 Objectives of the Transparency Provisions

The objectives of the transparency provisions included in Part 3 of the Bill may be summarised as follows:

- Enable better engagement between those that control land and communities and allow communities to have more influence over the control of land;
- Provide a better understanding of wealth inequality and promote fairer access to land; and
- Aid the design of policies aimed at getting the most out of land.<sup>1</sup>

### 3.3 The Legislative Competence of the Scottish Parliament

As with all legislation of the Scottish Parliament, the GW Proposals will have to be considered in terms of the legislative competence of the Scottish Parliament as laid out in the Scotland Act 1998<sup>2</sup> (and further enhanced by Scotland Act 2012). The Scottish Parliament cannot pass law contrary to the EU law or the ECHR. Additionally, the legislation passed by the Scottish Parliament must not relate to a Reserved Matter.

If the Scottish Parliament passes an Act which is outside its competence, the Act may be struck out by the courts by way of a judicial review.

### 3.4 Reserved Matters

One of the limits on the Scottish Parliament’s power is that it cannot legislate on Reserved Matters. These are areas of governance which have been specifically retained by the Westminster Parliament. Reserved Matters are specified in Schedule 5 of the Scotland Act 1998. The Scotland Act 2012 lists further matters to be devolved to the Scottish Parliament or the Scottish Ministers.

Matters relating to the law of Scottish land, property and land registration are not listed in Schedule 5 and are therefore within the competency of the Scottish Parliament.

However, there are other reservations which may concern Part 3 of the Bill to the extent that the objectives of these provisions deal with Reserved Matters. In addition to the objectives listed in section 3.2 above, it has been suggested that the proposed transparency provisions may also serve the purpose of combatting money laundering or increasing tax transparency.<sup>3</sup> Anti-money laundering, as well as anti-terrorism, are reserved matters under Schedule 5. Tax matters are also largely reserved, with the exception of the Scottish Rate of Income Tax, the Land and Building Transaction Tax (“**LBTT**”) and Scottish Landfill Tax.<sup>4</sup>

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<sup>1</sup> Paragraph 94 of the Explanatory Notes of the Land Reform (Scotland) Bill

<sup>2</sup> Sections 28-29, Scotland Act 1998

<sup>3</sup> [Land Reform \(Scotland\) Bill Policy Memorandum](#)

<sup>4</sup> Scotland Act 2012

Whether a provision in a Bill concerns a reserved matter would be determined by reference to the purpose of the provision and its effect.<sup>5</sup> This is a matter of statutory interpretation.

### 3.5 Small Business, Enterprise and Employment Act 2015

It is important to consider the Small Business, Enterprise and Employment Act 2015 (the “**SBEE**”) because it contains measures aimed at increasing transparency around the control of UK companies and to deter and sanction those who hide their interests. SBEE inserts a new Part 21A in the Companies Act 2006 which:

- Requires companies to keep a register of people with significant control (“**PSC**”) over the company, and to make that register public;
- Imposes duties on companies to gather information, and obligations on others to supply information, to enable that register to be kept; and
- Includes provisions excluding certain material from the information available to the public.

These provisions apply to all companies (other than an issuer to which Chapter 5 of the Disclosure and Transparency Rules sourcebook applies). The Secretary of State has the power to make regulations to take other companies of any description outside the scope of these provisions. The draft PSC Regulations include an exemption for companies that have voting shares admitted to trading on a regulated market in an EEA State.

These provisions do not extend to limited liability partnerships. However, the Government confirmed in its June 2015 consultation paper that it intends to create a requirement for all limited liability partnerships to hold a PSC register from January 2016. The Government pushed back the date from which Companies will need to keep a PSC register from January 2016 to April 2016.<sup>6</sup> We understand that the Government has not made an official statement on whether this delay extends to LLPs, however, this seems likely to be the case.

## **4. Proposed Revisions by Global Witness to Part 3 of the Bill**

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GW proposes the following revisions to Part 3 of the Bill.

- Proposal 1: Beneficial owner(s) of legal entities owning land (all vehicles, with a number of listed exceptions) must be named as part of the information provided when the title is registered with the Keeper (“**Proposal 1**”).
- Proposal 2: Scottish Ministers should develop regulations defining ‘beneficial owners’ for the purposes of this context, building on the definition already in force across the UK for companies based on section 790C(5) of the Companies Act as inserted by Part 1 of Schedule 3 to the Small Business Act 2015 (“**Proposal 2**”).
- Proposal 3: All legal entities wanting to register titles with the Keeper must be registered within the EU (“**Proposal 3**”) (all together, “**GW Proposals**”).

## **5. ECHR – Article 8 and Article 1, Protocol 1**

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### 5.1 Article 8

*Right to respect for private and family life*

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

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<sup>5</sup> Section 29(3), Scotland Act 1998

<sup>6</sup> <https://www.gov.uk/government/news/the-small-business-enterprise-and-employment-bill-is-coming>

Traditionally, Article 8 has been invoked to protect, for example, issues in respect of family life (e.g. child custody and care orders,<sup>7</sup> or immigration and deportation<sup>8</sup>) and the right to personal and psychological integrity and to engage in personal relationships (e.g. protection from unjustified surveillance<sup>9</sup> or media intrusions<sup>10</sup>). The concept of “private life” is, however, a very broad term, and the jurisprudence from ECtHR suggests that there is no exhaustive definition.<sup>11</sup>

Recently, indeed, with the increasing proliferation and sophistication of personal data gathering and retention, the protection of personal data is now recognised as an issue falling within the scope of Article 8. GW Proposals, in as far as they compel the publication of personal data through specific land registration requirements, therefore have the potential to impact upon the rights protected by Article 8.

Article 8 is not, however, an absolute right. Interference by a public authority with the right to private life may, therefore, be legal if it is considered to meet certain criteria. Specifically, the interference must be (i) in accordance with the law, (ii) have a legitimate aim, and (iii) be considered necessary in a democratic society.<sup>12</sup>

#### 5.1.1 In accordance with the law

Interference by the State with Article 8 right must have some basis in domestic law, whether that is statute or common law. The principle of lawfulness also requires that the applicable domestic law is sufficiently accessible, precise and foreseeable.<sup>13</sup> For example, interference by surveillance agencies with privacy caused by telephone intervention could not be justified by the UK because there were no legal rules concerning the scope and manner of exercise of the discretionary power enjoyed by the public authorities.<sup>14</sup> The scope of the authorities' discretion and the manner in which the discretion was exercised was not defined with sufficient clarity to give the individual protection against arbitrary interference, and thus did not satisfy the ECHR test for legality.

#### 5.1.2 Legitimate objective

The list of ‘legitimate aims’ provided for in Article 8 are exhaustive, but with a wide scope: national security; public safety; national economic well-being; prevention of disorder or crime; protection of health; protection of morals; and protection of the rights of others.<sup>15</sup> Academics have commented that “*only in exceptional cases will it be difficult for a state to show that one or more of the prescribed interests will not be applicable*” in the context of Article 8.<sup>16</sup>

#### 5.1.1 Necessary in a democratic society

In general, the approach of the ECtHR is to accept a contention as to the legitimate aim but to focus on whether the particular measure is necessary in a democratic society. Even if interference is lawful and pursues a legitimate aim, it will breach Article 8 unless it is “*necessary in a democratic society*”. To satisfy this requirement, there must be a “*pressing social need*” for the interference, and the interference must be proportionate to that need.<sup>17</sup>

The Court will allow national authorities a margin of appreciation when assessing the necessity of interference. In determining whether interference is necessary within the meaning of Article 8(2), the ECtHR assesses whether the State has exercised its discretion reasonably carefully and in good faith,

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<sup>7</sup> See, for example, *Olsson v Sweden (no. 1)* [1988] A130

<sup>8</sup> See, for example, *Krasniqi v Secretary of State for the Home Department* (2006) EWCA Civ 391

<sup>9</sup> See, for example, *PJ & JH v United Kingdom* [2001]

<sup>10</sup> See, for example, *Campbell v MGN Ltd* [2004] 2 AC 457

<sup>11</sup> *Pretty v United Kingdom*, [2002] ECHR 423

<sup>12</sup> ECHR Article 8(2)

<sup>13</sup> *Hentrich v France* [1994] 18 EHRR 440, [1994] ECHR 29, Lithgow

<sup>14</sup> *Malone v UK* [1984] ECHR 10

<sup>15</sup> ECHR Article 8(2)

<sup>16</sup> Human Rights Law in Scotland, R. Reed and J. Murdoch (paragraph 6.50)

<sup>17</sup> *Dudgeon v UK* [1981] ECHR 5

and considers whether the interference is proportionate.<sup>18</sup> Proportionality is therefore intrinsic to the Court's assessment of this element.

## 5.2 Article 1, Protocol 1

1. *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
2. *The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

### 5.2.1 Meaning of 'possessions'

The ECtHR has adopted a broad definition of "possessions" that is independent from the formal classification in domestic law.<sup>19</sup> The Court also confirmed that the right to property does not include the right to acquire property in the future.<sup>20</sup> Depriving someone of their property without compensation is only justifiable in exceptional circumstances. Compensation should be reasonably related to the market value of the property. Article 1, Protocol 1 states that every natural or legal person enjoys the right to peaceful enjoyment of their possessions; thus corporate property is protected as well as the property of individual citizens.

### 5.2.2 The right of the State to interfere

The State has a wide margin of appreciation in implementing social and economic policies that have the effect of interfering with the right to property.<sup>21</sup> The burden of proof is with the State to show that (i) interference with the right to property serves a legitimate objective in the public, or general, interest, (ii) such interference is proportionate (principle of fair balance), and (iii) is subject to the requirement of legal certainty, or legality (is lawful).

### 5.2.3 Legitimate objective

In contrast to Article 8, Article 1, Protocol 1 does not contain a catalogue of objectives, which may justify interferences. Paragraph 2 of this Article only requires the State to justify control of the use of property "*in the general interest*"; this gives public authorities considerable leeway in defending their actions. The Court ascertains on a case-by-case basis whether the interference with the right to property pursues a legitimate aim. Member States enjoy a wide margin of discretion when deciding which aim is legitimate.<sup>22</sup>

Some examples of the kind of policy aims the Court has held to be legitimate include: the improvement of public housing;<sup>23</sup> rent control as an example of social policy;<sup>24</sup> planning policy;<sup>25</sup> protecting national cultural heritage.<sup>26</sup>

### 5.2.4 Proportionality or principle of fair balance

The principle of a fair balance requires the interference must not impose an excessive or disproportionate burden on the individual. The Court stated that it must "*determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.*"<sup>27</sup>

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<sup>18</sup> See for example, *Lustig-Prean and Beckett v UK* [1999] ECHR 71; *McCann v UK* [2008] ECHR 385

<sup>19</sup> *Broniowski v Poland* (2005) 40 EHRR 21

<sup>20</sup> *Marckx v. Belgium*, A 31 (1979), also see A 8410/78, *X v. the Federal Republic of Germany* (1979)

<sup>21</sup> *James v UK*, A98, [1986], para 46

<sup>22</sup> *James v UK* [1986] 8 EHRR 123; *Jacobson v Sweden* [1990] 12 EHRR 56

<sup>23</sup> *Magiulli v UK*, Application 12736/87

<sup>24</sup> *Kilbourn v UK* [1986] 8 EHRR 81

<sup>25</sup> *Ryder v UK* [1989] 11 EHRR 80

<sup>26</sup> *Beyeler v Italy* [2000] ECHR 1, [2001] 33 EHRR 52

<sup>27</sup> *Sporrong and Lönnroth v Sweden* [1983] 5 E.H.R.R. 35 at para 69

Retrospective measures (i.e. measures that apply to rights that were in existence before the legal Act came into force) that engage Article 1, Protocol 1, may be justified and are assessed on a case-by-case basis on whether a “fair balance” is achieved.<sup>28</sup>

For example, the following factors were considered relevant in determining whether a fair balance has been struck:

- The existence of procedural safeguards to protect property owners' rights, or lack of them;<sup>29</sup>
- The severity of penalties imposed on property owners;<sup>30</sup>
- The manner and duration of the interference with peaceful enjoyment,<sup>31</sup>
- The extent to which the owner of the property is at fault or innocent.<sup>32</sup>

#### 5.2.5 Legality

Article 1, Protocol 1 states that deprivation of property must be “subject to the conditions provided for by law” and that control of use must be based on “such laws as it [the State] deems necessary”. This requirement of lawfulness is intended as a safeguard against arbitrary measures. The principle of lawfulness also requires that the applicable domestic law is sufficiently accessible, precise and foreseeable.<sup>33</sup>

## 6. Application of these ECHR provisions to GW Proposals

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### 6.1 Article 8 and Article 1, Protocol 1 of the ECHR may be engaged

#### 6.1.1 Proposal 1

It is possible that a requirement to name the beneficial owner of the land engages Article 8, in particular if read together with Proposal 2, which stipulates that this information will be available to the public. Therefore, the justification and proportionality of these measures must be assessed.

It is also possible, that Proposal 1 invokes Article 1, Protocol 1. In particular, if this measure is supported with enforcement sanctions imposed on individuals for non-compliance. It may also be argued that a requirement in Proposal 1 in practice may restrict the right of current land owners to sell their land because the buyer may be deterred by additional transparency requirements. Even though such a possibility of such an impact may be considered as tenuous, it is necessary to assess if the measure is justified and whether it is proportionate.

It is noted that an analysis may be required to assess whether the exceptions that will be included in Proposal 1 engage Article 1, Protocol 1 when read together with Article 14 of the ECHR, because it is discriminatory within the meaning of Article 14.<sup>34</sup> If these ECHR provisions are engaged, then it would be necessary to assess if the exceptions are justified and proportionate.

The rights of the future property owners are unlikely to be protected by Article 1, Protocol 1. In a different scenario, the ECtHR confirmed that the right to property does not include the right to acquire property in the future.

#### 6.1.2 Proposal 2

Proposal 2 in effect provides for the implementation of Proposal 1 and therefore the same considerations apply as listed above in section 6.1.1.

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<sup>28</sup> *A, B, C and D v. the United Kingdom* (Application No. 8531/79) [1981] DR 203

<sup>29</sup> *Sporrong and Lönnroth v Sweden* [1983] 5 E.H.R.R.

<sup>30</sup> *International Transport Roth v Home Secretary* [2002] EWCA Civ 158

<sup>31</sup> *Sporrong and Lönnroth v Sweden* [1983] 5 E.H.R.R.

<sup>32</sup> *Air Canada v UK* [1995] 20 EHRR 150

<sup>33</sup> *Hentrich v France* [1994] 18 EHRR 440, [1994] ECHR 29, Lithgow

<sup>34</sup> Article 14, ECHR: “The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Although, as stipulated in Proposal 2, it is intended that the Scottish Ministers will make a final determination on the definition of “*beneficial owner*”, it is recommended that this is in line with the definition provided in section 790C(5) of the Companies Act 2006.

Such an approach will avoid the unintended consequence of a divergence in the definitions adopted by the Scottish Ministers and in the SBEE, (which implemented the amendments to the Companies Act 2006). Any such divergence could result in a situation whereby natural persons having “significant control” of a legal entity are different in Companies House and the Land Register, which would not enhance the legal certainty sought by these provisions. This opinion is given on the basis of the Scottish Ministers following the relevant provisions of the SBEE in respect of the Bill.

The Companies Act uses the terminology “*person of significant control*” in determining who is considered to be beneficial owner and includes five conditions.<sup>35</sup> If a person is considered to be a person of significant control, then certain of their personal details must be registered on a PSC Register, some of which is accessible to the public. This information includes name, service address, nationality, date of birth and usual residential address.

The SBEE and the draft Regulations contain safeguards on how this personal information may be used and disclosed. For example, full DOB will only be disclosed on the PSC Register and will not necessarily on the publically searchable register held at Companies House (unless the company in question has elected to keep its PSC Register at Companies House). In respect of residential address information, the Act expands the protection regime already in place in the Companies Act 2006 in relation to directors' residential addresses and applies it to persons on the PSC Register. This means the company must not use or disclose that information except in very limited circumstances (e.g. to identified public authorities).

However, as the individuals that are determined to be persons of significant control are compelled by the legislation to provide the specific personal details, some of which would be publicly exposed, it was considered that this had the potential to infringe Article 8. Likewise, Proposal 2 has the potential to engage Article 8, because it would compel individuals to share their personal data, some of which would be made public.

### 6.1.3 Proposal 3

It is unlikely that Proposal 3 will engage Article 8. There is, however, ECtHR jurisprudence that would suggest that private life may also encompass activities of a “professional or business nature”.<sup>36</sup> A potential argument could be raised therefore, that the resulting restrictions of Proposal 3 on an individual's ability to organise their business in a manner chosen by them may equate to a breach of Article 8. The risk of this being brought as a challenge is, however, considered low, as we have not come across any specific precedent of this situation, and the impact of the Proposal on an individual's business freedoms are likely to be limited. Engagement of Article 8 is therefore unlikely.

It is possible that Proposal 3 engages Article 1, Protocol 1. In particular, if the effect of this proposal will mean that current land owners that are non-EU registered legal entities will have to transfer their titles to a legal entity registered in the EU. This proposal may also invoke Article 1, Protocol 1, if applied together with Article 14, because it will prevent non-EU registered legal entities from the Member States of the Council of Europe from registering titles. For these reasons, it is necessary to assess whether there is a legitimate objective for this proposal and whether this measure would be proportionate.

## 7. Is there a legitimate objective?

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As set out above, interference with Article 8 may be justified if it falls within the exhaustive list of 'legitimate aims', which are interpreted broadly: national security, public safety, national economic well-being, prevention of disorder or crime, protection of health, protection of morals, and protection of the right of others. Interference with property rights need be of “general interest” for the purposes of Article

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<sup>35</sup> SBEE, Schedule 1A, Part 1. “Person of significant control” includes individuals who meet at least one of the following five conditions: (i) directly or indirectly hold more than 25% of the nominal share capital; (ii) directly or indirectly control more than 25% of the votes at general meetings; (iii) directly or indirectly be able to control the appointment or removal of a majority of the board; (iv) actually exercise, or have the right to exercise, significant influence or control over the company; and / or (v) actually exercise or have the right to exercise significant influence or control over any trust or firm (which is not a legal entity) which has significant control (under one of the four conditions above) over the company.

<sup>36</sup> *Niemeitz v Germany* [1992] 16 EHRR 97

1, Protocol 1, ECHR. Thus, any justification that applies to Article 8, will also apply to Article 1, Protocol 1.

We set out here a number of justifications that may apply to GW Proposals (some of these may have already been raised during the legislative procedure of the Bill).

First, and as stated in the Policy Memorandum of the draft Bill, “[a]s a matter of public policy it is of fundamental importance to know who owns land, who has the power to make decisions on how the land is managed and who is benefitting from the land”.<sup>37</sup> Thus, the ultimate goal of the GW Proposals is to promote greater transparency of land ownership in Scotland, as is detailed in a number of GW papers. It has been noted by a number of prominent academics that were a disclosure of personal data (such as is foreseen by Proposals 1 and 2) would “contribute to a strong and public debate” then the general interest in transparency should be given more weight.<sup>38</sup> Therefore, if access to certain personal data helps achieve another public interest, such as those outlined below, and said disclosure is proportionate, then it should be granted.<sup>39</sup>

Such transparency will, in turn, assist in the achievement of a number of legitimate aims, which are considered below.

## 7.1 National economic well-being

### 7.1.1 Tax Efficiency

In Scotland, certain devolved taxes are the responsibility of the Scottish tax authorities. Of particular relevance to this purpose, Revenue Scotland has the power to administer certain land taxes,<sup>40</sup> namely LBTT<sup>41</sup> and Scottish Landfill Tax.<sup>42</sup> Revenue Scotland has been setting rates for and collecting LBTT since April 2015 and will do likewise with Scottish Landfill Tax as of April 2016.

In accordance with Revenue Scotland and Tax Powers Act 2014,<sup>43</sup> one of the functions of Revenue Scotland is “protecting the revenue against tax fraud and tax avoidance”.

The increased transparency that will be acquired through GW’s Proposals will assist the Scottish tax authorities in the effective administration and collection of these taxes related to land ownership. It will likewise support the tax authorities in the enforcement of any sanction or penalty for non-compliance with Scottish tax legislation. Transparency provisions may also act as deterrence against tax fraud.

The ability to effectively apply and collect taxes will benefit the Scottish economy and can therefore be seen as a legitimate aim of any derogation from Article 8 and Article 1, Protocol 1.

### 7.1.2 Economic Activity

There may also be a wider economic benefit in increasing the transparency of the Land Register. In the Department for Business, Innovation and Skills’ (“BIS”) Memorandum on the SBEE’s compliance with ECHR, the general economic benefit of transparency was discussed. BIS linked greater transparency on ownership and control to a reduction in risk in economic activity, increasing links between those who trade with, or invest in, companies and those that control it.<sup>44</sup>

The same principle could be applied in relation to property and land, i.e. other companies or individuals would be more likely to invest in, purchase and or trade in property when the ownership structure is transparent. For example, it could be difficult for prospective investors to approach the owner of land in

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<sup>37</sup> [Land Reform \(Scotland\) Bill Policy Memorandum](#), para 95. See also “A New Proportionality Test for Fundamental Rights”, A. Lind and M. Strand, where it is suggested that “the underlying interest of access to documents has a clear connection to democracy and is part of the general interest of transparency of Government”. The same could be said to apply to access to information about the owners of land.

<sup>38</sup> *Access to Documents and Data Protection in the European Union: on the Public Nature of Personal Data*, H. Kranenborg, (pp 1110 and 1094)

<sup>39</sup> “A New Proportionality Test for Fundamental Rights”, A. Lind and M. Strand

<sup>40</sup> Scotland Act 2012, s28 - 31

<sup>41</sup> The Land and Buildings Transaction Tax (Scotland) Act 2013

<sup>42</sup> The Landfill Tax (Scotland) Act 2014

<sup>43</sup> Part 2, Section 3

<sup>44</sup> [Small Business, Enterprise and Employment Bill: European Convention on Human Rights, Memorandum by Department for Business, Innovation and Skills](#) (paragraph 103)

Scotland to offer to purchase or perhaps develop the land if it is not possible to trace the ultimate owner.<sup>45</sup> Such transparency could therefore lead to a greater investment and trade in land in Scotland, enhancing the economy and justifying the potential application of the two ECHR provisions.

## 7.2 Prevention of disorder or crime

### 7.2.1 Prevention of use of land for criminal purposes

It is possible that through companies or other opaque legal entities, the ultimate land owners may more easily use the land in Scotland for criminal purposes without the legal consequences, for example illegal hunting and fishing and other wildlife crimes or the storage, distribution and disposal of hazardous and / or illegal substances.

If GW's Proposals are adopted, this will assist the police force and other crime prevention agencies in Scotland in identifying and sanctioning those ultimately responsible for the misuse of the land. Transparency provisions may also act as a deterrent.

### 7.2.2 Identification of persons responsible for delicts and crimes committed on the land

There is a risk for those living, entering or working on land owned by a legal entity that they cannot trace the person ultimately responsible for a delict or crime in respect of the land.

For example, Occupier's Liability (Scotland) Act 1960 requires the occupier, defined as a person occupying or having control of land, to take reasonable care towards the person entering the premises.<sup>46</sup>

It may also be important in relation to neighbouring land, which may be affected by a variety of issues, for example pollutions, environmental interferences, or encroachment. Without the ability to effectively trace the beneficial owner, or 'person of significant control', of the land in question, the individuals suffering may not be able to effectively deal with the issue. This may in turn infringe their rights and more generally hinder the prevention of crime (see Section 7.3 for further discussion).

It may also be the case that the ultimate owner of the land is vicariously liable for the acts of those living or working on the land and it will be important that said individuals can be effectively traced if liability is to be attributed accordingly. Scotland has legislation, for example, that entails that landowners may be vicariously liable for wildlife crimes committed on their land.<sup>47</sup> It is possible to contrast the results of two recent cases in connection with such vicarious liability. In the first, a landowner was convicted under the Wildlife and Countryside Act 1981 for being vicariously liable as landowner for the criminal acts of his gamekeeper in the unlawful killing of rare birds on his land.<sup>48</sup> In the second, a gamekeeper was convicted under the same legislation for the unlawful killing of rare birds on a Scottish estate.<sup>49</sup> The similarity of the two cases would lead to the conclusion that the landowner in the second case should likewise be prosecuted for vicarious liability.

However, despite investigations by both Police Scotland and the Crown Office Procurator Fiscal Service (COPFS) no definitive answer could be found as to who had ultimate ownership of the estate upon which the crime had been committed, due to the opaque company structure through which the land was held.<sup>50</sup> Should the GW Proposals be adopted, this situation may be avoided in future. Such transparency, ensuring that the perpetrators of delicts and other crimes can be effectively traced and ultimately prosecuted, can therefore be seen as a legitimate aim justifying the potential breach of the ECHR provisions.

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<sup>45</sup> [Publicity and Privacy in Land Reform in Scotland](#), A. Berlee and Dr. J. Robbie,

<sup>46</sup> Section 2.1, Occupiers Liability (Scotland) Act 1960

<sup>47</sup> Wildlife and Natural Environment (Scotland) Act 2011, (s24), amending the Wildlife and Countryside Act 1981, s18A

<sup>48</sup> Stranraer Sheriff Court, 23 December 2014. (<http://copfs.presscentre.com/News-Releases/Crown-Office-First-wildlife-vicarious-liability-conviction-in-Scotland-21d.aspx>)

<sup>49</sup> Aberdeen Sheriff Court, 11 December 2014 (<http://copfs.presscentre.com/News-Releases/Aberdeen-gamekeeper-jailed-for-killing-Goshawk-226.aspx>)

<sup>50</sup> <http://www.andywrightman.com/archives/4377>; <http://www.andywrightman.com/archives/4024>

### 7.2.3 Enforcement of environmental law, regulation and policy

Scotland has in place a number of specific laws, regulations and policies in respect of the environment and land. The environment is a devolved matter. The enforcement of these would be simplified and made more effective if there was a higher degree of transparency in land ownership.

For example, Scotland's latest environmental policy release in 2014<sup>51</sup> includes as a national outcome to make "*environmental data and information openly accessible to employees and the public*" amongst other objectives, such as educating the population on environmental laws. The adoption of the GW Proposals would assist in the achievement of these policy aims.

Scotland also has a strong tradition of public rights of way. In a situation where these are then blocked, it may be necessary to know the ultimate beneficial owner. The Scottish Outdoor Access Code<sup>52</sup> enshrines the public's right to wander private land, including woodlands, provided that they behave responsibly. The code expressly excludes right of access for hunting, shooting and fishing. To carry out any of these activities, a member of the public must have permission from the landowner; and in the case of deer stalking (the expression used for tracking and shooting deer), or fishing for salmon or sea trout, the permission must be in writing.

Transparency on ownership would, therefore, assist in the enforcement against the correct person(s) of these various laws, regulations and policies and can therefore be seen as a legitimate aim of the GW Proposals.

### 7.3 Protection of the right of others

As stated in in the Policy Memorandum on the bill, where it was noted that "*there is anecdotal evidence to suggest that there are examples where the decisions and actions of certain individuals, who are not named as the legal owners, are exerting considerable influence over land that results in practical difficulties for the owners of adjoining or related land, people trying to access the land (either through a right to roam or a legal right of access) or affecting the sustainable development of local communities*)."<sup>53</sup>

As noted above, there is a risk that, without greater transparency in the Land Register, the effective enforcement of the rights of other individuals living, working or otherwise utilising the land may be frustrated.

Indeed, Article 8, the right to private and family life, encompasses the right to establish and maintain a home.<sup>54</sup> An individual and / or their family may be unable to effectively enjoy these rights if affected by the issues raised above. The Government could therefore justify a derogation from certain individuals' Article 8 rights in order to protect the fundamental rights of others. Indeed, it could be suggested that the Government and the authorities would be unsuccessful in their positive obligations to protect these rights by failing to establish an effective mechanism to enforce them, *vis-à-vis* an open and transparent Land Register. A similar view can be taken in respect of a right to peaceful enjoyment of property.<sup>55</sup>

The Scottish Government is also required to observe and implement international obligations.<sup>56</sup> For example, as a signatory to the ICCPR<sup>57</sup> and the ICESCR (through the UK),<sup>58</sup> the Scottish Government has a duty to ensure a right to housing and an adequate standard of living.<sup>59</sup>

It may be argued that transparency in land ownership will assist Scottish citizens in the enforcement of their rights, and reduce the risk of the Scottish Government or other public authorities being accused of

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<sup>51</sup> <http://www.gov.scot/Resource/0045/00458528.pdf>

<sup>52</sup> Available here: <http://www.outdooraccess-scotland.com/>

<sup>53</sup> Policy Memorandum, paragraph 108

<sup>54</sup> Precedent has suggested that this includes the right to protection of the home from environmental hazards. For example, in the case of *Lopez Ostra v Spain* (1994) A 303-C, the court concluded that pollution of land had negatively impacted the enjoyment of the individuals in questions home and family life to the extent that a failure to deal with the issue had breached Article 8/

<sup>55</sup> ECHR Protocol 1, Article 1

<sup>56</sup> Scotland Act, Schedule 5, s7(2)(a)

<sup>57</sup> International Covenant on Civil and Political Rights

<sup>58</sup> International Covenant on Economic, Social and Cultural Rights

<sup>59</sup> ICCPR, Article 12 (Right to choose residence); ICESCR, Article 11 (Right to adequate standard of living)

preventing effective enforcement of the same. The Scottish Commissioner on open access to information has in fact noted that “[a]ccess to information is ... fundamental to the concepts and aims of equality... to enable someone to exert their human rights effectively.”<sup>60</sup>

## **8. Is the interference according to the law?**

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The Land Reform (Scotland) Bill is a recognised legal instrument that deals with matters devolved to the Scottish Parliament. The provisions that will be contained within the final act will, therefore, be in accordance with the law of Scotland.

## **9. Necessity and Proportionality**

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Although the requirements for ‘proportionality’ in any derogation from Article 8 and Article 1, Protocol 1 are not identical, in as far as the requirements for Protocol 1 are less prescriptive; there are similarities in the way in which the interference will be assessed. They are therefore considered together here for the purpose of this note.

At the outset, it may be argued that without more robust transparency provisions in Part 3 of the Bill, the overall objectives of the Bill could not be achieved. For this purpose, it may be necessary to show that any less robust provisions would not be workable in practice.

### **9.1 Article 1, Protocol 1**

For the purposes of Article 1, Protocol 1, it must be established that the property owner (individual) does not bear ‘an individual and excessive burden’. First, it may be argued that it is a legitimate requirement of a government to impose administrative burdens for the purposes of land registration, and this includes provision of various documents and imposing conditions on land registration. These provisions do not require an individual to adjust their ownership structure, but merely require provision of additional information.

Proposal 3 on the other hand may pose an excessive burden on an individual, because it prevents individuals from using non-EU structures (this may also engage Article 14). It may be argued that objectives of transparency may be achieved by less restrictive means included in Proposals 1 and 2.

To ensure that the interference is proportionate, the legislation may include adequate safeguards. For example, for the purposes of Article 1, Protocol 1, it may specify that the transparency provisions as proposed will not apply retrospectively, but will apply only to land registered after the Act is enacted (albeit it is accepted that this may weaken the practical application of these provisions during the transitional period).

A useful illustration of the proportionality assessment for the purposes of Article 1, Protocol 1, is a case that concerned adverse possession of land.<sup>61</sup> In this case, the regime on adverse possession under the Land Registration Act 1925 and Limitation Act 1980, which led to claimant losing its paper title without payment of any compensation from the adverse possessor, constituted a justifiable interference with the right to peaceful enjoyment of possessions because limitation periods were necessary to achieve certainty, to prevent stale claims existing and to avoid litigation where evidence may be unreliable because of the passage of time.

### **9.2 Article 8**

The test of “*necessity*” requires an assessment of proportionality in assessing whether the relationship between the action taken and the aim of the intervention is acceptable. The following arguments support this position:

- 9.2.1 Concerning Proposals 1 and 2, it is understood that that appropriate safeguards will be put in place to ensure that specific pieces of information, for example, residential address and date of birth, will not generally be available to the public. Although the detail on these safeguards has not yet been seen, on the assumption that these will reflect the safeguards included in the SBEE, then they assist in the argument that the

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<sup>60</sup> [FIO 10 Years On: Are the right organisations covered?. Scottish Information Commissioner](#)

<sup>61</sup> *J.A. Pye (Oxford) Ltd and J.A.Pye (Oxford) Land Ltd v The United Kingdom*, Application no. 44302/02

Proposals 1 and 2 do not go further than is necessary to achieve the aim of greater transparency.

- 9.2.2 The information that the 'persons of significant control' will be compelled to provide is likely to be information already in the public domain (e.g. name and service address) *vis-a-vis* Companies House or an alternative international companies register.
- 9.2.3 The GW Proposals are similar to those accepted in respect of SBEE, and in respect of the creation of a Crofting Register through the Crofting Reform (Scotland) Act 2010. Neither of these pieces of legislation was considered to breach the right to privacy.<sup>62</sup>
- 9.2.4 The GW Proposals are restricted only to those who are in 'significant control' of the legal entity that owns the land, which is to be defined by the Scottish Ministers. It does not encompass a wider group of, for example, company directors. This arguably only goes as far as is necessary to ensure the aims of the GW Proposals can be achieved.
- 9.2.5 The GW Proposals are in-line with the general move by both the EU and the UK Parliament to achieve greater transparency in respect of ownership.

### 9.3 ECHR considerations concerning the SBEE transparency provisions

Due to the reference in the Proposals to the provisions brought about by the SBEE we consider it worthwhile to provide a more detailed review of the ECHR considerations given to the SBEE transparency provisions.

Whilst both Parliaments of Westminster and Holyrood are subject to the provisions of the ECHR, the consequences of non-compliance are slightly different. Provisions in breach of the ECHR are explicitly outside of the competence of the Scottish Parliament and as a consequence are invalid and unenforceable.<sup>63</sup> By contrast, Remedial Orders are available to Westminster Parliament, which allow the primary legislation to be amended to comply with the ECHR without invalidating it.<sup>64</sup> Whilst the consequences of non-compliance with the ECHR during the legislative process are different for the two jurisdictions, the underlying legal analysis of whether a measure complies with the ECHR and relevant case-law remains the same.

The Department for Business, Innovation and Skills prepared a memorandum that addresses issues arising under the ECHR in relation to the Small Business, Enterprise and Employment Bill (the "**ECHR Memorandum**"). While the provisions are in relation to the Bill, they serve as a useful indication of the Government's approach to the interaction of the SBEE with the ECHR.

#### 9.3.1 Article 8

To the extent that the requirement in the SBEE for registering certain particulars (such as name, address, etc.) of PSCs interfere with the right to private life, the Government considers this to be necessary in the interests of the economic well-being of the country and the prevention of crime. In particular the register is necessary as a means of:

- Helping law enforcement and tax authorities identify and sanction those who control companies for criminal purposes; and
- Deterring the criminal misuse of UK companies.

The Government also pointed to a wider economic benefit associated with increased transparency. This is linked to reducing the risks around economic activity and increasing trust by reducing information asymmetry.

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<sup>62</sup> Crofting Reform (Scotland) Bill, Policy Memorandum (paragraph 90)

<sup>63</sup> Scotland Act 1998, s 29(2)(d)

<sup>64</sup> Remedial Orders are a form of delegated legislation amending primary legislation following a declaration by a UK court that it is incompatible with the ECHR or a Strasbourg judgment in a case concerning the UK, which appears to a Minister to show that a provision of legislation is incompatible.

The Government considers the provisions to be proportionate to the aims. There are safeguards where the release of information would be harmful to the individual. For example, certain information in the PSC register will never be publicly available and instead will be available only to law enforcement bodies and other special authorities.

### 9.3.2 Article 1 Protocol 1

The SBEE creates a procedure that enables a company to restrict certain interests in that company thus controlling the individual's use of the property. Where a company imposes such restrictions, a person will not be able to enjoy the benefit, exercise, transfer or otherwise make use of the interest. This engages Article 1, Protocol 1.

Given that Article 1, Protocol 1 is a qualified right, the Government considers this to necessary and proportionate in the public interest for the legitimate purpose of enforcing the law in relation to the PSC register. The PSC register as discussed above, being necessary for the economic well-being of the country and the prevention of crime.

The Government considers this particular enforcement mechanism necessary and proportionate because where a person wishes to hide their identity in relation to an interest in a company, they may not respond to a notice from the company. The restriction on the interest in the company is intended to incentivise a response to the notice. There are also safeguards to prevent disproportionate infringement of Article 1 Protocol 1 rights. For example, an aggrieved party can apply for a Court order that removes or relaxes the restriction.

Although the specific detail of the 'aims' of SBEE may differ from those of the GW Proposals on the Bill in as far as they, to a certain extent, deal with Reserved Matters, the key principles such as prevention of crime are as valid to the Bill as to the SBEE, as discussed above. It is not clear why, on the one hand, it would be seen as proportionate for these aims to be given greater weight in respect of the SBEE, but to be rejected in respect of the Bill.

## **10. Other ECHR provisions that may apply**

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### 10.1 Article 6

The ECHR Memorandum notes that Article 6 may be engaged by the provisions of the SBEE in respect of a company's ability to restrict an individual's civil rights (in relation to rights as to property). In respect of SBEE, the Government considers that the freedom to a fair hearing in the determination of the legal rights provided for by law is guaranteed by the provision for an individual to apply to the court for an order overturning or relaxing the restrictions. The Government also considers that the route for appeal sufficient to be Article 6 compliant.

There is, therefore, a possibility that an ability by the Keeper to restrict an individual's right to property in the Land Reform (Scotland) Bill could also potentially engage Article 6. Any such provisions should therefore be accompanied by appropriate safeguards to seek Article 6 compliance.

### 10.2 Article 14

In some cases, there may be a violation of Article 1, Protocol 1 when read together with Article 14 of the ECHR (which prohibits discrimination). It is possible that this may apply to Proposal 3, because the requirement to restrict land registration to the entities registered within the EU would arguably discriminate against non-EU entities registered in the Member States of the Council of Europe.

But Article 14 would not prohibit every difference in treatment in the exercise of the Convention rights and freedoms. The principle of equality of treatment would be violated only if the particular distinction had no objective and reasonable justification, and would not be proportionate.

## **11. Treaty on the Functioning of the European Union**

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### 11.1 Introduction

Articles 63 to 66 of the TFEU contain the principal rules of EU law on the free movement of capital.

Article 63 TFEU contains an absolute prohibition on "*all restrictions on the movement of capital between Member States and between Member States and third countries.*" This prohibition, however, is subject to the various exceptions found in Articles 64-66 TFEU.

The salient questions in respect of the GW Proposals are therefore:

- i. Is investment in property in a Member State by a non-resident a capital movement?
- ii. May the GW Proposals constitute a prohibition under Article 63 TFEU?
- iii. If so, could they nonetheless benefit from one of the exceptions to that prohibition outlined in Articles 64-66 TFEU or any other relevant exception?

Lastly, in the past there have been some strict, and Member State specific, derogations from these principles, and these are discussed briefly in the last section.

### 11.2 Is investment in property a capital movement?

A capital movement is not defined in the TFEU. Rather, the definition fundamentally comes from the case law of the CJEU. However, there is a classification of various activities as capital movements in Directive 88/361 (the “**Classification Directive**”).

The Classification Directive sought to further define capital movements and put an express obligation on Member States to remove barriers to the specific capital movements it defined. The Classification Directive does not provide an exhaustive or definitive classification of capital movements, but the CJEU has repeatedly referred to its terms when defining a capital movement for the purpose of the Treaty.<sup>65</sup>

The Classification Directive denotes a number of activities as capital movements.<sup>66</sup> In particular, investments in real estate on Member State territory by non-residents are defined as capital movements in the Classification Directive.<sup>67</sup> Therefore, *prima facie*, a non-UK resident investing in property in Scotland would likely constitute a capital movement and as such any state action which potentially restricted such a person’s ability to make such an investment would need to be considered with reference to Article 63 TFEU.

### 11.3 Are the GW Proposals a prohibition on the free movement of capital?

The CJEU has stated that a measure which impedes, or may impede, the movement of capital or which is likely to have a dissuasive or deterrent effect on capital movement can act as a prohibition on the free movement of capital. This is potentially the case even if such a measure is non-discriminatory between Member State residents and non-residents.<sup>68</sup>

Moreover, there is CJEU precedent that makes clear that national legislation which renders real estate investments in Member State less attractive may, dependent on the circumstances, be a restriction on capital movement.<sup>69</sup>

However, there is no clear precedent from the CJEU on whether transparency regimes such as the GW Proposals would be characterised as restrictions on the free movement of capital contrary to Article 63. It is difficult, therefore, to come to a determinative view on the merit of the Scottish Government concern that this may be the case. We would caution that the CJEU has been relatively expansive in its definition of what constitutes a capital restriction and it is therefore possible that measures such as the GW Proposals could reasonably be seen as likely to have a dissuasive or deterrent effect on capital movement.

Nonetheless, it should be noted in respect of Proposals 1 and 2 that the CJEU has held in the context of other fundamental freedoms that if the effects of the potentially restrictive measure are too uncertain or indirect then it will not represent a restriction on the freedom at issue, as long as it is non-

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<sup>65</sup> e.g. Case C-222/97 *Trummer and Mayer*, Case C-367/98 *Commission v Portugal*, Case C-122/05 *Commission v Germany*

<sup>66</sup> Directive 88/361/EEC Article 1 and Annex I

<sup>67</sup> *ibid.* Annex I paragraph II(a)

<sup>68</sup> C-367/98 *Commission v Portugal*, in particular, at paragraph 44 where the court states “Article 73b of the Treaty [now Article 63] lays down a general prohibition on restrictions on the movement of capital between Member States. That prohibition goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets.”

<sup>69</sup> For example, see Case C-376/03 *D v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen Buitenland te Heerlen* and Case C-443/06 *Erika Waltraud Ilse Hollmann v Fazenda Pública* in respect of tax measures having such an effect. Similarly, see Case C-302/97 *Konle v Austria*, Case C-423/98 *Re Albore*, Joined Cases C-515/99 and 527-540/99 *Reisch and Others v Bürgermeister Der Landeshauptstadt Salzburg and Another*, Case C-300/01 *Re Salzmann* and Case C-213/04 *Burtscher v Stauderer* in respect of requirements for prior administrative requirements before selling or disposing of property.

discriminatory.<sup>70</sup> While such an approach has not been expressly adopted by the CJEU in respect of a case involving Article 63, there appears to be no reason in principle why such a *de minimis* threshold for negative effects should not also apply to the free movement of capital. Even if the Scottish Government has some valid concerns that the GW Proposals could be construed as having some dissuasive effect on investment, we consider that there may be an argument that the possible negative effects at the heart of this concern are too uncertain or indirect to represent a restriction. In particular, it may be argued that measures such as the GW Proposals could not be said to directly or certainly have a dissuasive effect on investment in real estate as investors would need to disclose very similar information to their solicitors, bankers and other professional advisers due to EU anti-money laundering requirements. Moreover, companies registered in the EEA will shortly need to maintain a public register of people with 'significant control' over the company, as discussed above.

As noted in the above paragraph, Proposal 3 needs to be analysed separately due to its potentially discriminatory nature. Article 63 applies equally to Member States and third countries and, as such, the general prohibition on discrimination on the grounds of nationality would also cover discrimination against nationals of third countries. It therefore seems more likely that, due to its discriminatory nature, Proposal 3 would be relatively more likely to be held to be a capital restriction.

#### 11.4 Would the GW Proposals, nonetheless, benefit from an exemption?

Notwithstanding the conclusion made above, even if the GW Proposals would be *prima facie* prohibited by Article 63 they may be permitted under Article 65(1)(b) which allows Member States to take measures which are justified on grounds of public policy or public security.

As with all exceptions to a general rule of EU law, the exception found in Article 65(1)(b) will be construed narrowly by the CJEU.<sup>71</sup> A Member State cannot unilaterally confer the exemption on its own national measure; rather, the national measure needs to be assessed in line with the case law of the CJEU.<sup>72</sup> The requirements for an acceptable derogation are as follows:

- i. the public policy or public security derogation may only be relied upon if there is a genuine and sufficiently serious threat to a fundamental interest of society;
- ii. the derogations cannot be misapplied to serve purely the economic ends of the Member State in question;
- iii. any person affected by the derogation restricting the free movement of capital must have access to legal redress; and
- iv. the derogation must be necessary and unable to be attained by less restrictive measures.<sup>73</sup>

Clearly, the above tests require an in-depth factual and policy analysis of the GW Proposals and the other possible options open to the Scottish Government to achieve the measures aimed at by the Bill which is beyond the scope of our current advice. However, we would particularly highlight point 4 above as being a key factor to consider. There is clear scope for the Scottish Government to argue that a combination of the current provisions of the Bill in respect of disclosure of control/ownership of land and the existing EU anti-money laundering regime attain the same objectives as the GW Proposals by, arguably, less restrictive means and as such compelling arguments will need to be put forward as to why this is not the case if the exemption in Article 65(1)(b) is to be relied upon.

For the sake of completeness, it should also be noted that, aside from the specific derogation outlined in Article 65(1)(b), the CJEU has accepted that non-discriminatory capital restrictions<sup>74</sup> may be justified by overriding requirements in the general interest.<sup>75</sup> There is no explicit or express definition of such

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<sup>70</sup> See Case C-412/97 *ED v Italo Fenocchio* at para 11 in respect of Article 34 (free movement of goods) and Case C-190/98 *Graf v Filmoser Maschinenbau* in respect of Article 45 (free movement of workers)

<sup>71</sup> Case C-54/99 *Association Eglise de scientologie de Paris*, in particular, paragraphs 17-18

<sup>72</sup> *ibid*

<sup>73</sup> *ibid*

<sup>74</sup> Note, in particular, that this requirement likely means that the GW proposal to bar non-EU companies from investing in real estate would not be able to benefit from this exemption.

<sup>75</sup> See Case C-367/98 *Commission v Portugal*, paragraph 49

requirements, but the CJEU has made clear that they cannot simply be economic in nature.<sup>76</sup> Various overriding requirements in the general interest have been recognised by the CJEU, including, perhaps saliently in respect of the GW Proposals, environmental protection<sup>77</sup> and town and country planning.<sup>78</sup> This exemption, however, is subject to the same proportionality requirement as Article 65(1)(b) and, as such, there may be similar difficulties in relying on it.<sup>79</sup>

#### 11.5 Examples of derogations historically allowed under the EU Treaties

While free movement applies to all Member States, at the time of the accession of the new Member States in 2004,<sup>80</sup> transitional periods and some exceptions were negotiated for the free movement of capital. In particular, these concerned, to a highly limited extent, the purchase of property and agricultural and forest land in specific Member States.<sup>81</sup>

Similarly, in 1992, upon accession, Denmark received a special 'opt out' Protocol in the Maastricht Treaty allowing it to impose certain qualified conditions for the purchase of holiday properties in Denmark. Austria obtained a similar derogation in 1995. These derogations have now expired.<sup>82</sup>

The European Commission, which is tasked with enforcing the EU Treaties, pursues Member States vigorously where such 'opt out' provisions have not been agreed, or expired. For example, in 2014 it launched legal action against Hungary arguing that certain restrictions on foreign ownership of agricultural land in Hungary was contrary to the EU law.<sup>83</sup>

## **Shepherd and Wedderburn LLP**

**11 January 2016**

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<sup>76</sup> Case C-96/08 *CIBA*, paragraph 48

<sup>77</sup> See for example, Case C-302/86 *Commission v Denmark* at paragraph 9; Case C309/02 *Radlberger Getränkegesellschaft and S. Spitz* at paragraph 75 and Case C- 384/08 *Attanasio Group Srl v Comune di Carbognano* at paragraph 50. Please note that the cases detailed in this footnote are in respect of other Fundamental Freedoms under the TFEU, however, the principle is equally applicable to the free movement of capital under Article 63.

<sup>78</sup> See for example, Case C-567/07 *Woningstichting Sint Servatius*, paragraph 29 and Case C302/97 *Konle v Austria*, Case C423/98

<sup>79</sup> *ibid*

<sup>80</sup> Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia signed in Athens on 16 April 2003

<sup>81</sup> [Purchasing property in another Member State](#)

<sup>82</sup> Gareth Davies, *European Union Internal Market*, page 91

<sup>83</sup> [Free movement of capital: Commission opens infringement procedure against Hungary on rights of cross-border investors to use agricultural land](#)