

# Legislative Consent Memorandum

## Electronic Trade Documents Bill

### Background

1. This memorandum has been lodged by Neil Gray, Cabinet Secretary for Wellbeing Economy, Fair Work and Energy, under Rule 9B.3.1(a) of the Parliament's standing orders, and is supported by the Cabinet Secretary for Wellbeing Economy, Fair Work & Energy. The Electronic Trade Documents Bill was introduced in the House of Lords on 12 October 2022. The Bill can be found [here](#).

### Content of the Electronic Trade Documents Bill

2. The Bill is designed to modernise trade processes by allowing certain trade documents in electronic form to be recognised in law so that they can have the same legal status as paper versions of the same document. This gives businesses the choice whether to use electronic or paper documents. Whilst this is a desirable step, the Bill also grants UK Ministers powers in devolved areas without granting Scottish Ministers the same powers.

### Background

3. International trade involves moving goods across borders in order to get them from the seller to the buyer. Goods are often accompanied by numerous documents that need to be passed on through various stages of the trade process. At present, the law of each jurisdiction of the United Kingdom requires that these documents must be physically possessed<sup>1</sup>. These documents cannot therefore be used effectively in electronic form.
4. On 30 April 2021 the Law Commission for England and Wales published [Digital assets: electronic trade documents: A consultation paper](#) ("the consultation paper"). The consultation paper recommended legal recognition of trade documents in electronic form. The consultation paper includes a draft Bill with the long title "A Bill to make provision for trade documents in electronic form to have the same effect as trade documents in paper form" and the short title "Electronic Trade Documents Bill".
5. This Bill is substantially the same as the draft Bill put forward in the consultation paper. It provides that a trade document in electronic form that satisfies the

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<sup>1</sup> The Law Commission of England and Wales considered the history of paper documents as part of their report: "Commercial practice has, however, resulted in certain types of documents being used as symbols (or embodiments) of the right to claim performance of the obligations recorded in them, making such right transferable by transfer of the document itself". Law Com No 405, page 37.

criteria set out in the Bill (that is, an “electronic trade document”) is capable of possession, giving electronic documents the same legal recognition and functionality as their paper counterparts. The Bill will create a framework to enable the conversion of trade documents in paper form to electronic versions of those documents if certain criteria are met, and provide that “control” of electronic trade documents is the electronic equivalent of possession in respect of traditional paper trade documents.

6. The purpose of the Bill is to:
  - reduce transaction costs associated with paper trade documents by reducing resourcing and operational costs, and increasing productivity;
  - increase efficiency and encourage business growth by facilitating the development of digital products and services;
  - increase environmental benefits due to a reduction in paper documents; and;
  - increase security and transparency in documentation, and greater resilience of systems.

## Overview of the Bill

7. Clause 1(1) of the Bill sets out what is meant by a “paper trade document” for the purposes of the Bill. A paper trade document has three characteristics. The first is that it is paper form so the Bill does not apply to documents which are already held electronically. The second is that the document is commonly used in connection with international trade or transport of goods (or financing international trade or transport). The third is a characteristic of a paper trade document goes to its legal status. Physical possession of the document must be required to claim performance of an obligation. The requirement can arise either as a matter of law or standing custom.
8. Clause 1(2) provides an indicative list of documents which are commonly used as paper trade documents.
9. Clause 2 of the Bill establishes what an “electronic trade document” is for the purposes of the Bill. Clause 2(1) and (2) provide that “electronic trade document” is information in electronic form which contains the information that would be required in a paper equivalent for treatment as a “paper trade document”. To be an electronic trade document the information must be held on a reliable system which ensures the document is able to be distinguished from any copies, protected against unauthorised alteration, is secure, and that control of the document is able to be demonstrated.
10. Clause 2(3) provides that a person has “control” in this context if they can use the document and transfer or otherwise dispose of it (but simply being able to read the document does not constitute control of it, clause 2(4)).

11. The reliability of a system which holds an electronic document is dependent on multiple factors set out in clause 2(5), including the measures used to protect the security and integrity of an electronic document and the standards with which the system is maintained.
12. Clause 3 of the Bill gives legal effect to electronic trade documents and enables them to be used in the place of paper trade documents by providing that “a person may possess, indorse and part with possession of an electronic trade” (clause 3(1)) and that “An electronic trade document has the same effect as an equivalent paper trade document” (clause 3(2)). Clause 3(3) provides that anything done in relation to an electronic trade document has the same effect as if it were done to a paper trade document.
13. Clause 3(4) makes provision specifically applicable in Scotland by providing that an electronic trade document is corporeal moveable property for the purposes of any Act of the Scottish Parliament.<sup>2</sup>
14. Clause 4(1) of the Bill provides that a trade document in paper form may be “converted” to an electronic trade document, and vice versa, provided the converted document contains a statement that it is a converted document and any contractual or other requirements relating to the conversion of the document are complied with. Clause 4(2) provides that where a document is converted, the original document ceases to have effect, and all rights and liabilities relating to the original document continue to have effect in relation to the converted document. In other words, this clause provides for the “digitalisation” of trade documents to avoid two types of trade document existing for the same transaction simultaneously.
15. Clause 5 of the Bill sets out exceptions whereby a paper trade document may not be held in electronic form. The first exception is set out in clause 5(1) which provides that a document may only be held in paper form if that is the intention of the parties. The effect of clause 5(1) is that the Bill is non-proscriptive so that the parties to a transaction may continue to rely on paper trade documents.
16. Clause 5(2)(b) and (3) provide that the Bill does not apply to documents or instruments of a type specified by the Secretary of State in regulations. Constitutional issues with the drafting of these clauses are discussed below.
17. Clause 5(4) provides that the Secretary of State must consult, but not seek the consent of, Scottish Ministers before making such regulations. Regulations made under this power will apply across the United Kingdom and there is no corresponding power conferred on the Scottish Ministers.<sup>3</sup>

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<sup>2</sup> See for example, the Moveable Transactions (Scotland) Bill which is currently before the Parliament and would, if enacted, make provision in this regard: <https://www.parliament.scot/bills-and-laws/bills/moveable-transactions-scotland-bill>

<sup>3</sup> Clause 5(2)(a) provides a further exception in connection with systems established under the Uncertificated Securities Regulations 2001 (S.I. 2001/3755) which is not relevant to this Memorandum.

18. Clause 6 makes consequential provision and clause 7 contains provides for the Bill's extent, commencement and short title.

## Conferral of powers on UK Ministers

19. Following the introduction of the Bill, the Scottish Government has been engaged in discussions with the UK Government about the delegated power in clause 5(2)(b). As introduced, clause 5(2)(b) of the Bill grants UK Ministers sole power to make secondary legislation in devolved areas of competence. This would result in Scottish Ministers being unable to make bespoke changes in devolved areas. The provision would also give UK Ministers the ability to unilaterally dis-apply parts of the Bill's regime in Scotland in devolved areas.
20. The Bill states that UK Ministers must consult (but does not require the consent of) the Scottish Ministers. The Scottish Ministers can express concern or disapproval about the proposed exercise of powers (via consultation), but cannot prevent the UK Government from legislating in devolved areas in a way which it does not agree with.
21. The Scottish Government maintains that the most appropriate position would be for this Bill to require that UK Ministers can act in devolved areas exercisable only with the consent of the Scottish Ministers. At the very least, the Bill should confer powers on the Scottish Ministers in devolved areas.
22. Discussions between Scottish and UK Government officials regarding the specific drafting of the delegated powers commenced immediately upon the introduction of the Bill. That process to secure suitable amendments has been constructive, but is taking longer than anticipated. This has resulted in the delay in lodging this Legislative Consent Memorandum.
23. Negotiations are still ongoing, and the Scottish Government hopes to secure suitable amendments to the provisions on these powers. However, until suitable amendments are secured, the Scottish Government cannot yet recommend that the Scottish Parliament gives legislative consent to the Bill.

## Provisions which relate to Scotland

24. The Bill applies to Scotland in its entirety.

## Reasons for seeking a legislative consent motion

25. The Bill is a relevant Bill under Rule 9B of the Scottish Parliament Standing Orders.
26. The documents used in the course of international trade have developed over the centuries. There is no single set of rules which apply to them and custom

plays an important role. This is recognised in clause 1(2)(c) of the Bill which defines a paper trade document by reference to a requirement of possession “as a matter of law or commercial custom, usage or practice for a person to claim performance of an obligation”. Where rules have developed, they have done so to account for the custom and practice across the jurisdictions of the UK for the purposes of International Trade. Put simply devolved (legal) documents are used in and for a mixed or reserved purpose(s).

27. The legal effect of the Bill is to provide that an electronic trade document may be used in place of a paper trade document and that, accordingly, an electronic trade document is capable of possession. Regulating the conduct of transactions between parties is a matter of Scots private law. It is generally within the legislative competence of the Scottish Parliament to modify Scots private law. This Bill therefore makes provision which is within legislative competence and so requires a legislative consent memorandum under Rule 9B of the Scottish Parliament’s standing orders.

## Consultation

28. The UK Government (DCMS) asked the Law Commission to make recommendations to solve the problems caused by the law’s approach to the “possession” and transfer of trade documents in electronic form and to prepare draft legislation to implement those recommendations. The Law Commission consulted on provisional proposals and draft legislation in April 2021, and published its final recommendations for reform, along with the Bill, in March 2022. Involvement from the Scottish Law Commission was sought, but the Scottish Law Commission was unable to become involved, citing resource constraints.
29. UK Government officials engaged with Scottish Government officials from Summer 2020. The Scottish Government is supportive of the potential benefits of the Bill which aligns with its ambitions for modernising trade.
30. As the Bill is a ‘Law Commission’ Bill it goes through an expedited procedure at Westminster. This includes various committee hearings where UKG has brought in experts to give evidence regarding the Bill.

## Financial implications

31. There are no financial implications to this Bill.

## Conclusion

32. The Scottish Government is supportive of the main purpose of the Electronic Trade Documents Bill, to simplify and modernise trade processes. This is aligned to key aspects of the Scottish Government’s Vision for Trade. The Bill is technical and the policy content uncontroversial.

33. However, due to the provisions on delegated powers, the Scottish Government cannot yet recommend that the Scottish Parliament gives legislative consent to the Bill. The Scottish Government will provide further information to the Parliament when current discussions with the UK Government have concluded.

Scottish Government  
May 2023



This Legislative Consent Memorandum relates to the Electronic Trade Documents Bill (UK legislation) and was lodged with the Scottish Parliament on 16 May 2023

# Electronic Trade Documents Bill – Legislative Consent Memorandum

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