

Supplementary 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(c)(ii) of the Parliament's standing orders, and is supported by Richard Lochhead, Minister for Small Business, Innovation & Trade. The Electronic Trade Documents Bill was introduced in the House of Lords on 12 October 2022. The Bill can be found [here](#). The tabled amendments 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.

3. The first Legislative Consent Memorandum ("first LCM") in respect of this Bill was lodged on 16 May 2023. It addressed provisions in the Bill as introduced and can be found here: [Electronic Trade Documents Bill | Scottish Parliament Website](#).

4. Amendments to the Bill in regards delegated powers were tabled on 07 June by the UK Government. The Bill was debated at the Second Reading Committee on Monday 12th of June and will be heard at Public Bill Committee stage on 19 June, where amendments will be debated. This supplementary legislative consent memorandum addresses those amendments.

Provisions which relate to Scotland

5. As noted in the first LCM, the Bill applies to Scotland in its entirety.

6. As introduced, clause 5(2)(b) of the Bill grants UK Ministers sole power to make secondary legislation in devolved areas of competence. The provision would also give UK Ministers the ability to unilaterally dis-apply parts of the Bill's regime in Scotland in devolved areas.

7. Clause 5(4) of 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.

8. The conferral of powers on UK Ministers in devolved areas without the need for the consent of the Scottish Ministers has been an ongoing concern for the Scottish Parliament.

9. However, this Bill is not in the same category as major pieces of Brexit legislation (being a highly technical Bill). The power in clause 5(2)(b) is narrowly drawn.

10. The amendment tabled in the House of Lords would confer powers on the Scottish Ministers in devolved areas. This is set out in clause 5A(2)(b).

11. The amendments also introduce a parallel option of a joint instrument procedure (the Scottish Ministers and the Secretary of State acting jointly in making regulations) but it is optional.

12. The UK Government is still able to act in devolved areas by a regulation-making power conferred on the Secretary of State which is exercisable “in any case”, subject to the consultation mechanism under Clause 5(4).

13. There is still no requirement for consent from Scottish Ministers on the face of the Bill.

Reasons for seeking a legislative consent motion

14. There are a number of factors to revise the Scottish Government’s recommendation and now recommend to the Parliament that it consents to this Bill.

15. Firstly, the Scottish Government’s assessment is that the Bill could not be wholly recreated in Scotland by the Scottish Parliament.

16. The Bill originates from the Law Commission of England and Wales (LCEW). As LCEW Bills progress through an expedited parliamentary procedure which is only available for non-politically contentious law reform Bills, there is a high likelihood that United Kingdom Government will remove Scotland from the scope of the bill in the absence of legislative consent, in line with the Sewel Convention.

17. Equivalent primary legislation in the Scottish Parliament could be extremely challenging. Legal analysis suggests that a Scottish Parliament Bill could not wholly recreate the effects of the Bill as it covers a mix of devolved and reserved matters. Where the framework applies to electronic trade documents which the Scottish Parliament cannot legislate for, then it could not be extended to Scotland.

18. A Scotland Act Order would also be required to allow Scottish Parliament legislation to enact the Bill in its entirety. Any scenario where the UK Bill did not apply to Scotland would create legal ambiguities and additional costs for businesses trading in Scotland.

19. In addition, there is no current legislative opportunity at Holyrood to make equivalent provision for Scotland.

20. Secondly, the amendments discussed in paragraphs 10 to 11 are an improvement on the Bill as introduced which conferred powers to UK Ministers only. The nature of the power itself is extremely limited. It enables the UK Secretary of State (and Scottish Ministers) to remove a type of document from the scope of the Bill so that it cannot be used in electronic form.

21. The exercise of this power will not alter Scots law in any other way. Electronic trade documents will have the same status as their paper counterparts and will be usable for the same transactions. The amended Bill will not change trade policy, for example by allowing a new form of import or transaction.

22. The third factor is that Scottish Ministers would have equivalent powers to make changes to the regime for Scotland, separate from any made by UK Ministers.

Conclusion

23. This is a technical and non-controversial law reform Bill and there are advantages in ensuring there are common arrangements for trade documents in Scotland. While the amendments proposed by the UK Government do not provide a full statutory consent provision, on balance, the Scottish Government recommends that the Parliament grants legislative consent in this case for the following reasons:

- The policy objective of the Bill is strongly supported by both the Scottish Government and stakeholders.
- There is no current legislative opportunity at Holyrood to make equivalent provision for Scotland, and any such legislation would not be as comprehensive as the UK Bill.
- The power involved is extremely limited, and unique to this law reform Bill.
- The aim is to ensure consistency in a mutually agreeable and workable way and that in practice it is highly unlikely for Scottish Ministers to want different arrangements for trade documents to apply in Scotland.

Draft Legislative Consent Motion

24. The draft motion, which will be lodged by the Cabinet Secretary for Wellbeing Economy, Fair Work and Energy is:

“That the Parliament agrees that the relevant provisions of the Electronic Trade Documents Bill, introduced in the House of Lords on 12 October 2022 and subsequently amended, 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
June 2023

This Supplementary Legislative Consent Memorandum relates to the Electronic Trade Documents Bill (UK legislation) and was lodged with the Scottish Parliament on 13 June 2023

Electronic Trade Documents Bill– Supplementary Legislative Consent Memorandum

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at: www.parliament.scot/documents