

Digital Assets (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Digital Assets (Scotland) Bill ("the Bill"). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 75–EN);
 - a Financial Memorandum (SP Bill 75–FM);
 - a Policy Memorandum (SP Bill 75–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 75–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Outline of Bill provisions

4. The Bill addresses the status of digital assets as a matter of Scots law, confirming that they can subjects of property rights (as a type of incorporeal moveable) and addressing how Scots law should approach transfers in their ownership. The Bill contains two delegated powers, both in a form found in most of the Parliament's Bills, namely a power to make ancillary provision (section 6) and a power to appoint the coming into force date for the Bill's substantive provisions (section 8). Further provision in connection with the Bill's delegated powers is made by section 7.

Rationale for subordinate legislation

5. The Scottish Government has had regard, when deciding what subordinate-legislation making powers are required and what parliamentary procedures should apply to them, to the need to:

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- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances without the need for primary legislation,
- make proper use of valuable parliamentary time,
- anticipate the unexpected, which might otherwise frustrate the purpose of provisions in primary legislation passed by the Parliament.

Delegated powers

Section 6: Ancillary provision

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if amending primary legislation, otherwise negative

Provision

6. Section 6 is a power, in customary form, allowing the Scottish Ministers to make, by regulations, ancillary provision for the purpose of giving full effect to the Act or provision made under it. For that purpose, the power can be used to amend other enactments (including primary legislation).

7. By virtue of section 7, the exercise of the power conferred by section 6 is subject to the affirmative procedure if it is used to textually amend Acts of the Scottish Parliament or the UK Parliament. Otherwise regulations made under the power are subject to parliamentary scrutiny under the negative procedure.

Reason for taking power

8. Such powers are commonly taken in Bills to provide flexibility to make technical adjustments to the law where the need for them comes to light after the Bill is passed. For example, a saving provision may need to be made before the Act resulting from a Bill comes into force to protect the expectation of parties around arrangements they had made on the basis of an understanding of the law as it operated prior to the change the Act will effect. Or the need for a consequential modification to another enactment may come to light later because, to give an example of an issue that could arise from the provisions of this Bill specifically, there may be an inconsistency between that other enactment's treatment of digital assets for its particular purpose and the proposition in this Bill that they are, generally, to be treated as incorporeal moveables.

9. The Government does not currently have any particular uses of the ancillary power in mind. By its nature, its purpose is to address the unanticipated. Without such a power it may be necessary to return to Parliament for further primary legislation to make trivial technical adjustments where it is obvious that the adjustment has to be made if the intentions of the Parliament in passing this Bill are to be given effect. That would not

be an efficient use of the resources by the Parliament or the Government. The power, whilst potentially wide in what can be done with it, is limited in what it can be used for, which is to say that it can only be used if the Scottish Ministers consider it appropriate to do so for the purposes of, or in connection with, or for giving full effect to any provision made by or under the Act resulting from the Bill. As discussed below, the Parliament will have an opportunity to scrutinise any use the Government makes of the power.

Choice of procedure

10. Section 7 provides that any regulations made under section 6 will be subject to the affirmative procedure if they contain provisions which make textual changes to an Act. Otherwise, they will be subject to the negative procedure. This is the usual approach to parliamentary scrutiny of regulations made under ancillary powers. It provides the appropriate level of parliamentary scrutiny for the textual amendment of primary legislation, while allowing efficient use of parliamentary time for regulations that do not require that level of scrutiny.

Section 8: Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

Provision

11. Section 8(2) confers a power on the Scottish Ministers to make regulations appointing the day, or days, on which the provisions of the Bill come into force (apart from the formal provisions, sections 6 to 9, which as is usual will come into force on the day after Royal Assent). By virtue of section 7(1), regulations appointing the commencement date for provisions of the Bill can appoint different days for different purposes.

Reason for taking power

12. There is, generally, a need for those affected by changes to the law that will be effected by the provisions of an Act resulting from a Bill to have advance notice of the precise date on which the law will change. People may need time to order their affairs before the law changes. While in the case of this Bill (as introduced at least), the Government's view is that it is principally confirming how the law operates in relation to digital assets rather than effecting a significant change to the law, it cannot safely be assumed that it will be of no moment to citizens precisely when the resulting Act's substantive provisions come into operation. Due to the inherent uncertainty around when any Bill will receive Royal Assent, the only reliable way to provide that certainty around the coming into force date is to have the Government specify it by regulations.

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Choice of procedure

13. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 will apply. This is considered appropriate on the basis that commencement regulations do not reflect any real policy decisions that the Parliament needs to review. The Parliament will have approved the substance of the Bill's provisions by passing it, and the only matter the regulations have to address is when those approved provisions come into legal effect.

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