

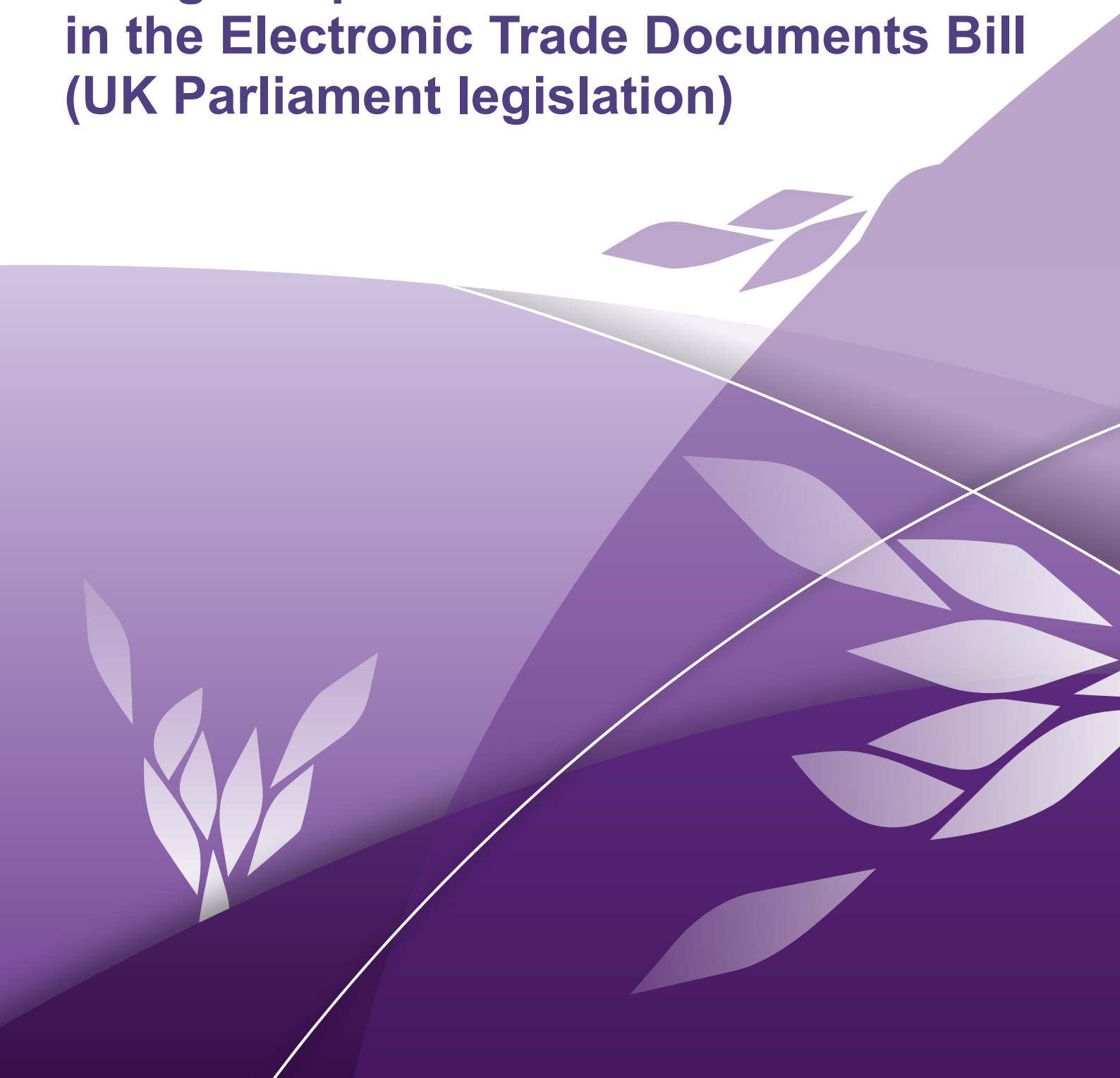


The Scottish Parliament
Pàrlamaid na h-Alba

Published 21 June 2023
SP Paper 407
42nd Report, 2023 (Session 6)

Delegated Powers and Law Reform Committee

Delegated powers relevant to Scotland in the Electronic Trade Documents Bill (UK Parliament legislation)



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Delegated Powers and Law Reform Committee

To consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1;

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule; and

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on 30 May and 20 June 2023, the Committee considered a delegated power in the [Electronic Trade Documents Bill](#) (“the Bill”) which is exercisable within devolved competence.
2. The Committee considered the delegated power under its wider remit as set out in Rule 6.11.1(b) and (c) of the Parliament’s Standing Orders which includes considering and reporting on proposed powers to make subordinate legislation in particular bills or other proposed legislation; and general questions relating to powers to make subordinate legislation. This definition encompasses powers to make subordinate legislation in UK bills, where exercisable within devolved competence.
3. The Electronic Trade Documents Bill is a UK Government Bill introduced in the House of Lords on 12 October 2022 by Lord Kamall. The Bill had its first reading in the House of Commons on 23 March 2023. The Bill was debated at the Second Reading Committee on 12 June and amendments were debated and accepted at Public Bill Committee stage on 19 June. [Relevant amendments](#) to the Bill affecting delegated powers were tabled on 7 June by the UK Government. This report considers those amendments.
4. The UK Government states that the Bill is concerned with documents used in trade and trade finance where their usefulness depends on their being capable of being physically possessed as tangible items which in turn gives rise to the possibility of transfer and implementation of rights and obligations enshrined in the documents. Domestic law in the UK does not recognise the possibility of ‘possessing’ electronic documents and therefore documents in digital form do not have legal effect in trade transactions. The Bill gives effect to recommendations in a report by the Law Commission for England and Wales to allow the legal recognition of trade documents in electronic form so that such documents have the same recognition and functionality as hard copy documents.

Overview of the Bill

5. The objectives of this Bill, as presented by the UK Government and set out in the Scottish Government's [Legislative Consent Memorandum \("LCM"\)](#) are:
 - to reduce transaction costs associated with paper trade documents by reducing resourcing and operational costs, and increasing productivity;
 - to increase efficiency and encourage business growth by facilitating the development of digital products and services;
 - to increase environmental benefits due to a reduction in paper documents; and
 - to increase security and transparency in documentation, and greater resilience of systems.
6. The Bill enables documents in electronic form which contain information equivalent to that in paper trade documents to be constituted as 'electronic trade documents' capable of possession and having the same legal effect as paper documents, subject to specific safeguards. Clause 7(1) of the Bill provides that the Bill extends to England, Wales, Scotland and Northern Ireland except for clause 3(4) which extends only to Scotland.
7. In Scots law corporeal moveable property is tangible property, other than land and buildings which form heritable property. An electronic document is intangible and would therefore not normally fall to be treated as corporeal property. Clause 3(4) provides that an electronic trade document is to be treated as corporeal moveable property for the purposes of any Act of the Scottish Parliament relating to the creation of a security in the form of a pledge over moveable property. The Moveable Transactions (Scotland) Act 2023, recently passed by the Scottish Parliament, makes provision for new types of loan arrangements secured over corporeal moveable property. Clause 3(4) of this Bill will enable creditors and debtors to treat electronic trade documents which confer rights and obligations in respect of goods as security for such transactions in Scotland

Legislative consent Memorandum

8. The Scottish Government lodged an LCM for this Bill on 16 May 2023. A [supplementary LCM](#) was lodged on 13 June 2023 dealing with relevant amendments tabled by the UK Government. The lead Committee in respect of this LCM is the Economy and Fair Work Committee to which this Committee directs its report.
9. The UK Government is seeking legislative consent for Clauses 1-5 and 7 of the Bill. According to the Explanatory Notes, these provisions of the Bill are considered to fall within the legislative competence of the Scottish Parliament. The Scottish Government agrees. It explains in the LCM that regulation of the conduct of transactions between parties is a matter of Scots private law, and that it is generally within the legislative competence of the Scottish Parliament to modify Scots private law.
10. The Scottish Government supports the main purpose of the Bill to simplify and modernise trade processes. Initially it did not recommend that the Scottish Parliament give consent to the Bill because it included a delegated power exercisable in devolved areas without a requirement for consent of the Scottish Ministers. Following amendment, the Scottish Government now intends to lodge a legislative consent motion in the following terms:
 - ” 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.

Questions asked of the Scottish and UK Governments

11. As part of the Committee’s consideration of the first LCM on the Bill, on 31 May 2023, it wrote to [the Secretary of State for Science, Innovation and Technology the Rt Hon Chloe Smith MP](#) and to [the Cabinet Secretary for Wellbeing Economy, Fair Work and Energy, Neil Gray MSP](#).
12. A [response](#) was received from Neil Gray MSP on 6 June 2023. A [response](#) was received from the Parliamentary Under Secretary of State for Science, Innovation & Technology, Paul Scully MP on 7 June 2023. Discussion of the responses from both Governments together with the supplementary LCM has been included in the Committee’s consideration of the powers in this Bill.

Committee consideration of the Bill

Power conferred on: Secretary of State and the Scottish Ministers acting separately, or jointly

Power exercisable by: Statutory instrument

Parliamentary procedure: Affirmative

Provision

13. Clause 5(2)(b) confers a power to exclude a type of document or instrument from the scope of clauses 1 to 4 of the Bill.
14. Clauses 1 – 4 make provision for electronic trade documents to be treated as if they were paper documents and to be given legal effect, and to allow paper trade documents to be converted into electronic trade documents, and vice versa. Clause 1(2) of the Bill gives a list of examples of documents commonly used in one or more parts of the UK in connection with trade in or transport of goods or financing such trade or transport which fall within the definition of ‘paper trade documents’. The list is not exhaustive.
15. Two types of exception are already provided for on the face of the Bill, in clause 5(1) and 5(2)(a). Clause 5(1) provides that if it is evident or if it can be inferred from an electronic trade document, or any terms which apply to it that are not contained within the document, that it is not intended to be possessed or that it should not have the same effect as if it were a paper document or that it should not be capable of conversion, then clauses 3 and 4 will not apply to the document.
16. Clause 5(2)(a) makes a further exception for documents or instruments entered in a relevant system under the Uncertificated Securities Regulations 2001 (SI 2001/3755). The Uncertificated Securities Regulations 2001 provide for a different statutory regime from one based on possession such as the regime in this Bill. To avoid potential confusion that could result from the fact that two statutory regimes could apply in relation to electronic documents or instruments, it is preferable for documents or instruments falling under that regime to fall outside the scope of the Bill.
17. Clause 5(2)(b), as introduced, conferred a delegated power on the Secretary of State alone to create further exceptions by disapplying clauses 1 to 4 of the Bill to any document or instrument which the Secretary of State specifies in regulations. The UK Government explained that this power may be exercised in circumstances where it is determined that a type of document or instrument which falls within the scope of the Bill requires more bespoke provisions to allow for its digitalisation, or where a type of document or instrument should not be capable of being used in electronic form. The Bill could lead to a significant change in practice for certain types of documents. It is important that the legislation includes a power to make further carve-outs if it proves necessary or desirable. Any Regulations made pursuant to clause 5(2)(b) would not amend clause 5 of the Bill and could themselves be amended or revoked by further Regulations.
18. Where such regulations contain provision that will have effect in relation to

Scotland, clause 5(4) provides that the Secretary of State must consult the Scottish Ministers before making the regulations.

19. In negotiations with the UK Government, the Scottish Government sought a requirement for the consent of the Scottish Ministers to regulations containing provision relating to devolved matters made by the Secretary of State alone. The Scottish Government also asked that the delegated power in relation to devolved matters be extended to the Scottish Ministers. Five amendments and a new clause were tabled. Together these have the effect that the power in clause 5(2)(b) is now exercisable by Scottish Ministers acting alone in relation solely to devolved matters, or jointly with the UK Government. The Bill retains the option for the UK Government alone to make regulations which affect Scotland, subject to consultation with the Scottish Ministers. The consultation requirement is disappplied where regulations are made jointly by the Secretary of State and the Scottish Ministers.
20. Regulations made under clause 5(2)(b) may include incidental, consequential, transitional or saving provision.
21. Regulations made under clause 5 would be subject to the affirmative procedure. Whilst the delegated powers in the Bill are narrow in scope, two of them are Henry VIII powers. The UK Government considers that it is proportionate to apply the affirmative procedure across the full suite of powers in the Bill, which, it considers, ensures an appropriate level of Parliamentary scrutiny for future changes to this framework.

Committee consideration

22. Trade crosses territorial and legal boundaries and the power to create and amend a list of excepted documents and instruments may impact on both reserved and devolved matters. The Committee considers that it is reasonable that the Secretary of State has a power to make provision which applies across legal jurisdictions and notes the amendments to clause 5 which enable the Scottish Ministers to make provision which would be within the legislative competence of the Scottish Parliament if acting alone, or, where appropriate, to do so jointly with the UK Government.
23. The UK Government is still able to make regulations within devolved competence acting alone, subject to the consultation mechanism in clause 5(4). There is still no statutory requirement for the Scottish Ministers' consent in these circumstances. If a consent requirement were included in the Bill the process for notification to the Scottish Parliament set out in Statutory Instrument Protocol 2 ([SI Protocol 2](#)) will not apply.
24. In response to the Committee's question about parliamentary scrutiny of Scottish Ministers' consent decisions in relation to regulations made under powers in the Economic Crime and Corporate Transparency Bill the Scottish Government stated that SI Protocol 2 as it currently stands only applies to UK SIs that include provisions that are within devolved competence and relate to matters that were formerly within the competence of the EU. However, the Scottish Government went on to say that SI Protocol 2 is currently under review and the future scope of the protocol is on the agenda for that review. The review is being carried out by Scottish Government and Scottish Parliament officials working together. It is hoped that the

review will make significant progress over the summer.

25. In order to have oversight as to how this delegated power is exercised by the UK Government insofar as it relates to the removal from the scope of the Bill of documents having effect in trade transactions in Scotland, or of the Scottish Ministers' position when consulted, the Scottish Parliament will be reliant on information provided by the governments.
26. In correspondence, the Committee asked the Secretary of State what consideration has been given to including a requirement for the Scottish Ministers' consent to exercise of this power by the Secretary of State in devolved areas rather than a requirement to consult, and what consideration has been given to giving the Scottish Ministers concurrent exercise of the delegated power in devolved areas. The UK Government advised that achieving the stated aims of the Bill through Scottish Ministers' consent rather than a consultation requirement would limit the Secretary of State's ability to intervene to remove areas of legal ambiguity and ensure a consistent framework on electronic trade documents across the UK and that to hinder such changes would remove the key advantages of the Bill to all UK business, namely that of certainty and adaptability in all potential scenarios.
27. The supplementary LCM confirms that the Scottish Government recommends that the Parliament gives legislative consent to the Bill. It states that 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 provides for technical changes to a specific aspect of this Bill. The Bill aims to ensure consistency in a mutually agreeable and workable way and the supplementary LCM states that in practice it is highly unlikely for Scottish Ministers to want different arrangements for trade documents to apply in Scotland.
28. The Minister for Small Business, Innovation and Trade gave evidence to the Economy and Fair Work Committee on 14 June 2023. He advised that he had assurance from the UK Government that it was unlikely to use the retained delegated power other than in extreme circumstances such as a cyber-attack or failure of digital systems which necessitated a reversion to paper documents for trade purposes. The Minister undertook to keep the Committee informed of anything that may arise in this area.

29. **The Committee accepts the delegated power in principle and is content that its exercise would be subject to the affirmative procedure.**
30. **The Committee notes that the UK Government has tabled amendments to the Bill giving the Scottish Ministers a concurrent power under clause 5(2)(b). The amendments also introduce a parallel option of a joint instrument procedure, whereby the Secretary of State and the Scottish Ministers may make regulations jointly. It considers that both options enable appropriate scrutiny by the Scottish Parliament.**
31. **It remains the case that the Secretary of State may make regulations within devolved competence, acting alone. The Committee therefore restates its**

position, as agreed in November 2022, in relation to delegated powers in UK Bills exercised in devolved areas which is, in general terms, that:

- a) The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.**
- b) Where such powers are exercised by UK Ministers in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.**
- c) If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.**

The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers' consent, and may suggest matters for the lead committee to consider.

- d) As a minimum, powers when exercised by UK Ministers in devolved areas should be subject to the process set out in the [SI Protocol 2](#) where the power is within the scope of that protocol.**

- 32. In order to have oversight of how this power is exercised by the UK Government insofar as it relates to the removal from the scope of the Bill of documents having effect in trade transactions in Scotland or of the Scottish Ministers' position when consulted, the Scottish Parliament will be reliant on information provided by the governments. The Committee notes the Minister's undertaking to the lead committee to keep the Parliament informed of developments in this area which give rise to the exercise of the power by the UK Government in devolved areas.**

