

# **ELECTRONIC TRADE DOCUMENTS BILL**

## **Memorandum from the Department for Digital, Culture, Media and Sport to the Delegated Powers and Regulatory Reform Committee**

### **Introduction**

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Electronic Trade Documents Bill (“the Bill”). The Bill will be introduced in the House of Lords on [DATE]. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

### **Purpose and effect of the Bill**

2. The Bill gives effect to the recommendations made by the Law Commission of England and Wales in its report on Electronic Trade Documents to allow for the legal recognition of certain trade documents in electronic form<sup>1</sup>. It does so by providing that a trade document in electronic form that satisfies the criteria set out in the Bill has the same effect as its paper counterpart. It further makes provisions relating to the practical use of such documents in electronic form and also repeals sections 1(5) and 1(6) of the Carriage of Goods by Sea Act 1992. In addition, the Bill makes consequential amendments to section 89B(2) of the Bills of Exchange Act 1882.

3. International trade - principally the movement of goods across borders often involving multiple parties - still largely relies on a special category of document that entitles the holder of the (paper) document to claim performance of the obligation recorded in the document, and to transfer the right to claim performance of that obligation by transferring possession of the document. Legal recognition of these documents currently relies on them being physically held or “possessed”. However, the current law in the United Kingdom does not recognise the possibility of possessing electronic documents due to their intangible nature; possession is currently associated only with tangible property. By providing for certain documents in electronic form that satisfy specified criteria to be recognised in law as capable of possession, the Bill ensures that such documents have the same legal treatment, effects and functionality as their paper counterparts.

4. Specifically, the Bill:

- i. defines “paper trade document” and “electronic trade document”. It sets out the criteria that a document must satisfy in order to qualify as one of these documents. It also sets out a non-exhaustive list of trade documents that are commonly used in connection with trade in or transport of goods, or financing such trade or transport;
- ii. provides for the possession and indorsement of electronic trade documents, ensures that an electronic trade document has the same effect as an equivalent paper trade document, and that anything done in relation to an electronic trade document has the same effect (if any) as it would have in relation to an equivalent paper trade document;

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<sup>1</sup> Report published on 16 March 2022 ((2022) Law Com No 405).

- iii. provides for a change of medium or form of a document, i.e. the conversion of a paper trade document into an electronic trade document, or an electronic trade document into a paper trade document; and
- iv. excludes documents or instruments entered in a relevant system under the Uncertificated Securities Regulations 2001 (S.I. 2001/3755) from the scope of the substantive clauses of the Bill, as well as providing an 'opt-out' provision if there is an intention that the core provisions of the Bill as to possessability and legal equivalence should not apply to a particular electronic trade document. The excluded documents are either cited in the Bill itself or will be cited in regulations made under a power conferred by the Bill which will also include a power to remove or amend an exclusion.

## **Delegated Powers**

5. On introduction, the Bill contains three individual provisions containing delegated powers. Two of them are Henry VIII powers in respect of making amendments to or removing the exclusion set out on the face of the Bill, as well as making incidental or consequential etc provisions. All of the delegated powers are subject to the affirmative procedure.

**Clause [5(2)(b): power to specify further types of documents or instruments that are outside the scope of the Bill]**

**Clause [5(3): power to amend or remove the uncertificated securities carve out from the Bill]**

**Clause [5(5)(b): power to make incidental, consequential, transitional or saving provision further to the use of the powers in Clauses 5(2)(b) and 5(3)]**

*Power conferred on:* Secretary of State (Note: the power in Clause 5(2)(b) is only to be exercised following consultation with the Scottish Ministers when it is concerned with provisions that will have effect in relation to Scotland)

*Power exercised by:* Regulations made by statutory instrument

*Parliamentary Procedure:* Affirmative procedure

## Context and Purpose

6. Clause 5(2)(a) excludes documents or instruments entered in a relevant system under the Uncertificated Securities Regulations 2001 (S.I. 2001/3755) from the scope of clauses 1 to 4 of the Bill. Clause 5(3) contains a power for the Secretary of State to amend Clause 5(2)(a) of the Bill so as to remove or amend this carve out.

7. Clause 5(2)(b) contains a power for the Secretary of State to specify further types of documents or instruments that are outside the scope of clauses 1 to 4 of the Bill, in addition to uncertificated securities already cited in Clause 5(2)(a). 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. When Regulations made pursuant to this power will have effect in relation to Scotland, the Secretary of State must first consult the Scottish Ministers.

8. Clause 5(5)(b) contains a further power for any Regulations made under Clauses 5(2)(b) and 5(3) to make incidental, consequential, transitional or saving provision.

## Justification for taking the power

9. The use of electronic documents in trade remains limited due to the existing legal prohibition on the ability to possess electronic documents. However, it is envisaged that the passing of this Bill will trigger an increasingly digitalised market, bringing with it efficiencies and innovation in the use of electronic trade documents, both in trade and wider markets. Given the potential for significant changes in the future as to the practices and regulation around certain electronic trade documents, it is necessary that the Bill contains a power to further carve out types of documents and instruments from the scope of the Bill, to amend or remove those further carve outs, and to remove or amend the existing carve out.

10. The purpose of the exclusion in clause 5(2)(a) is to avoid potential confusion that could result from the fact that two statutory regimes in relation to electronic instruments could apply. For example, a type of debt security known as “commercial paper” (which is technically a promissory note) could meet the requirements of the Uncertificated Securities Regulations 2001, and also fall within the scope of the Bill. Since the Uncertificated Securities Regulations 2001 provide for a different statutory regime entirely from one based on possessory concepts, it is preferable for documents or instruments falling under that regime to fall outside the scope of the Bill. However, it is necessary to include a power in the Bill to amend or remove this exclusion in the event that the Uncertificated Securities Regulations 2001 are amended etc., thereby necessitating consequential amendments to the exception provision in the Bill.

11. Clause 5(2)(b) provides a power to further exclude a type of document or instrument from the scope of clauses 1 to 4 of the Bill by specifying that document or instrument in Regulations made by the Secretary of State. 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. Given that 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. In addition, the power in Clause 5(2)(b) could be necessary when, for example, particular digitised documents fall to be regulated under more bespoke legislation and a carve out would be necessary to avoid confusing duplication of regulation.

12. Clause 5(4) stipulates that the power in Clause 5(2)(b) is subject to a requirement for consultation with the Scottish Ministers before regulations are made when those regulations contain any provision that is to have effect in relation to Scotland, ensuring both that the legislation remains fully effective in Scotland as it adapts to future changes and that there is a clear mechanism for feeding in updates on Scottish law and practices in the relevant areas.

13. The power to make incidental, consequential, transitional or saving provision in clause 5(5)(b) is necessary to ensure that any changes brought about by using the powers in Clauses 5(2)(b) and 5(3) are comprehensive.

#### Justification for the procedure

14. Whilst the powers taken are narrow in scope, as two of them are Henry VIII powers it is considered proportionate to apply the affirmative procedure across the full suite of powers, ensuring an appropriate level of Parliamentary scrutiny for future changes to this framework.

**Department for Digital, Culture, Media and Sport**

**19/08/22**