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Financial Services Bill 2019-21

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Summary

The *Financial Services Bill 2019-21* was introduced in the House of Commons on 21 October 2020. Second Reading was on 9 November 2020. Committee Stage concluded on 3 December with little amendment to the Bill.

Financial services contributed £75.5 billion[1] in UK tax revenue in 2018/19[2], employing around 1.1 million people. The 2019 Queen's Speech background paper expressed a desire to bring forward, in the upcoming parliamentary session, legislation to:

> Ensure that the UK maintains its world-leading regulatory standards and remains open to international markets after we leave the EU.[3]

The Bill, Explanatory Notes, Delegated Powers Memorandum, Human Rights Memorandum and Impact Assessment have been published on the Bill page. The Bill's stated objectives are to:

- enhance the UK's world-leading prudential standards and promote financial stability;
- promote openness between the UK and international markets; and
- maintain an effective financial services regulatory framework and sound capital markets.[4]

The Bill takes an incremental approach, introducing technical reforms in these areas. The Treasury has consulted on some areas of the Bill.

Perhaps given the technical nature of the changes, few have attracted significant media interest thus far.

The Bill amends existing laws on financial services in 17 distinct areas. In brief, grouped by its three stated objectives, these areas are:

Objective 1: Enhancing the UK's world-leading prudential standards and promoting financial stability

1. **Investment Firms Prudential Regime**

Prudential rules require financial firms to hold assets and put in place procedures so that financial markets stay stable even in tough economic times. EU prudential rules passed in 2013 were viewed as requiring reform, in part because they applied largely the same rules to many different types of financial firms, without fully catering for their size and how risky their activities were. The EU therefore passed reforms in 2019 to create a new tailored prudential regime for investment firms, which will apply from 2021 - after the UK has left the European single market.

[1] City of London/PwC, The total tax contribution of UK financial services in 2019, January 2020

[2] PwC estimate that financial services contributed £75.5 billion in tax in 2018/19. This is made up of £33.4 billion of taxes borne by the industry (including corporation tax, business rates and employer's NICs) and £42.1 billion collected by the industry from employees and customers

[3] Prime Minister's Office, The Queen's Speech 2019, 19 December 2019

[4] HM Treasury, Financial Services Bill introduced today, 21 October 2020

Clauses 1 and 2 of the Bill therefore provide a framework for the UK's own Investment Firms Prudential Regime, to be similar in substance to that being introduced in the EU and largely implemented in rules to be made by the UK Financial Conduct Authority (FCA).

2. **Implementation of Basel III**

The Basel III standards are a set of prudential rules which were internationally agreed after the 2008/2009 financial crisis. The UK has committed to implementing the Basel III standards in full by 2023. Some of these standards have already been implemented through legislation passed at EU level; clauses 3 to 7 of the Bill therefore amend existing laws, and grants the Treasury the power to make further amendments in future, in connection with the implementation of the Basel III standards. Since the UK Prudential Regulatory Authority (PRA) will also play a part in implementing these standards through its existing rule-making powers, the Bill also introduces an enhanced "accountability framework" with a list of matters the PRA must have regard to when exercising its rule-making powers.

3. **LIBOR transition**

The London Interbank Offered Rate (LIBOR) is an interest rate benchmark used to indicate banks' costs of funding their activities (for example, the cost of obtaining money for a loan it will make). It is used as a reference in hundreds of trillions of pounds' worth of financial contracts around the world. The FCA has said that, after 2021, it will no longer persuade or compel banks to submit the underlying data that goes to calculating LIBOR, causing concern that it could cease to exist. Existing powers on benchmarks granted to the FCA, passed under EU law and to form part of UK law from 2021, are seen as insufficient to ensure a smooth transition away from the use of LIBOR. Among other things, clauses 8 to 19 therefore grant the FCA greater powers to compel the continued publication of benchmarks, to prohibit the use of benchmarks, and to oversee the orderly "wind-down" of benchmarks.

4. **Benchmarks: extension of third-country transitional period**

Current EU law, which will form part of UK law from next year, will prohibit referencing benchmarks administered by a foreign country (from 2022, after a transitional period ends), unless one of three "access routes" are used by the administrator of that benchmark. Foreign-administered benchmarks are important to the UK market, which is a global hub for currency and interest rate swap transactions. Fears that many important foreign benchmark administrators would be unable or unwilling to use the "access routes" that allow their benchmarks to continue to be used led the Government to extend the transitional period for the ban on foreign-administered benchmarks to 2023. Clause 20 extends this transitional period again for a further three years while the Government considers a longer-term response to this issue. Clause 21 makes minor and consequential amendments as a result of the changes made in the Bill.

Objective 2: Promoting openness between the UK and overseas markets

5. **Gibraltar Authorisation Regime**

Because the UK and Gibraltar will no longer be subject to EU arrangements from 31 December 2020, the Bill would establish a new Gibraltar Authorisation Regime to allow financial services firms based in Gibraltar to continue to offer regulated activities in the UK. The Bill sets out arrangements for implementing and running the new regime, which would be based on compliance with the objectives of the Bill, alignment of law and regulatory oversight in both jurisdictions, and cooperation between parties on both sides.

6. **Overseas Funds Regime**

After leaving the European single market, "passporting" rights will be lost. European Economic Area (EEA) investment funds which currently market themselves to retail (non-professional) customers in the UK using a passport will therefore need to seek UK recognition to continue marketing. The Government has introduced a temporary marketing permissions regime to avoid this "cliff-edge" (which the Bill raises to five years long) following which such funds will need to have gained UK recognition to continue operating as they do. The Government considers the current process for granting marketing approvals to foreign retail funds to be expensive and time-consuming, so clauses 24 to 26 introduce a simplified new regime for granting marketing approval to overseas retail funds (including non-EU funds), based on whether the Treasury considers the jurisdiction where that fund is based to have "equivalent" investor protections to its own regime. A separate "equivalence" regime will also be introduced for money market funds (broadly, funds that invest in short-term debt). For funds whose countries do not benefit from an equivalence determination, the existing recognition process is being simplified.

7. ***Markets in Financial Instruments Regulation*** **(MiFIR)**

MiFIR, an EU regulation adopted in 2014, introduced the "Title 8" regime under which foreign firms whose countries benefit from an "equivalence" decision could provide certain investment services or undertake certain investment activities in the EU without needing to obtain authorisation. From next year the power to grant "equivalence" in respect of the UK will pass to the Treasury. Clause 27 amends MiFIR (which will become part of UK law from 2021) to broadly reflect changes made by the EU. The changes include granting the FCA powers to specify reporting requirements, changes to the "equivalence" assessment criteria, granting the Treasury powers to impose specific requirements on firms registered under the regime, and additional powers for the FCA (under a procedure) to restrict or withdraw the recognition of specific firms using the regime.

Objective 3: Maintaining the effectiveness of the financial services regulatory framework and sound capital markets

8. Cancellation of the authorisation of firms

Clause 28 introduces a new procedure to allow the FCA to cancel or vary an inactive firm's authorisation to perform certain regulated activities. The new procedure would be available where an authorised firm fails to pay required fees or provide required information, with the aim of keeping the Financial Services Register of authorised persons accurate and up-to-date to allow consumers to make informed decisions, and to deter fraud caused by the use of identities of inactive authorised firms.

9. Amendments to the *Market Abuse Regulation* (MAR)

The Government is seeking to make two changes to MAR (as it will apply in the UK from 2021) which are said to be aligned with changes to be made by the EU. The first concerns the requirement to maintain insider lists (lists of people with access to certain sensitive information within listed issuers). The Bill clarifies that both issuers and those acting on their behalf or on their account must maintain such lists. The second change extends the time issuers have to notify the public of senior managers' transactions in their instruments (such as shares) from within three business days of the transaction to within two working days of it being notified by the senior manager.

10. Extending the maximum criminal sentence for market abuse

Insider dealing and market manipulation are criminal offences, which include, for example, someone dealing in securities like shares in circumstances where they have an unfair advantage, or giving out false information to influence the price of securities to make a gain or cause loss.

The maximum sentence for both these offences is currently seven years' imprisonment. Clause 30 increases the maximum sentences to ten years' imprisonment to bring it into line with fraud, which the Government considers to be a comparable economic crime.

11. Application of money laundering regulations to overseas trustees

The *Sanctions and Anti-Money Laundering Act 2018* (SAMLA) sets the framework the UK will use to implement sanctions and anti-money laundering policy after leaving the European single market. Clause 31 amends SAMLA to ensure that regulations made by the Government relating to the enabling, detection or investigation of money laundering can apply to foreign trustees of trusts with links to the UK. Without it, the Government is concerned that any powers HMRC sought to exercise to access information on such trustees are at risk of being held invalid under legal challenge.

12. Debt Respite Scheme

The Bill provides greater powers for the Government to implement the second part of the Debt Respite Scheme, the Government's strategy to help individuals struggling with problem debt: the statutory debt repayment plan (**SDRP**). The SDRP will be introduced by regulations.

Clause 32 would amend the *Financial Guidance and Claims Act 2018* to empower the Government to make regulations which will compel creditors to accept amended repayment terms; provide for a charging mechanism through which creditors will contribute to the cost of running the scheme and repayment plans; and include in SDRPs debts owed to central government departments.

13. **Successor accounts for Help-to-Save savers**

Help-to-save is a scheme introduced by the Government from 2018 to encourage those on low incomes or in receipt of certain benefits to save money. Participants set up and deposit money into savings accounts on which the Government will pay a bonus after two and four years. However, no provision is currently made for the use of the savings after the scheme is over, for savers who do not withdraw their savings. Clause 33 therefore amends existing legislation to allow the Treasury to make regulations for the transfer of these savings into successor accounts (which may be interest-bearing) in the absence of instructions from the account holder.

14. **Amendments to the *Packaged Retail and Insurance-based Investment Products* (PRIIPS*) Regulation***

The EU PRIIPs Regulation introduced a new disclosure regime for certain investment products that are regularly provided to retail (non-professional) investors. There has been market uncertainty on which products are within its scope and the accuracy of the information which it requires to be disclosed to investors. Clause 34 therefore amends the PRIIPs Regulation, as it applies in the UK from 2021, to empower the FCA to make rules to specify which products are within the scope of the PRIIPs Regulation and to amend the disclosure requirements for products within its scope, with the aim of increasing the accuracy of information provided to investors.

15. **Amendments to the *European Markets Infrastructure Regulation* (EMIR)**

Clause 35 amends EMIR, as it applies in the UK from 2021, to reflect changes made at EU level which will only come into force after the UK leaves the European single market. The changes are intended to improve access to derivative "clearing" services (through which a heavily-regulated third party becomes the middleman for a derivative transaction so that the parties need not take credit risk on each other) by explicitly requiring that these services are provided on fair, reasonable, non-discriminatory and transparent terms. It also imposes enhanced requirements for trade repositories (entities which collect and maintain data on derivative contracts) to maintain data verification, reconciliation and transfer policies and procedures.

16. **Financial Collateral Arrangements**

The EU *Financial Collateral Directive* (adopted in 2002) sought to simplify the process of taking financial collateral across the EU. However, whereas it was intended to apply to transactions involving certain financial institutions (including public authorities and many banks), the UK implementing regulations applied the provisions to transactions between all institutions and businesses. Clause 36 affirms that the legislation is valid and should be treated as such, to avoid any doubt that might be raised by a future legal challenge as to whether the UK implementing regulations were correctly made. It also provides that the Government's power to make secondary legislation relating to financial collateral arrangements in future should be subject to the draft affirmative rather than the made affirmative procedure.

17. **Appointment of the FCA Chief Executive**

Clause 37 requires that appointments for the Chief Executive of the FCA be limited to a fixed, once-renewable five-year term (so for a maximum of ten years). Currently, legislation does not set out a term length for the FCA Chief Executive. The new limits are consistent with requirements for appointments for the post of Deputy Governor of the Bank of England.

1. Extent and commencement

1.1 To whom does the Bill apply?

Legislating on financial services is a matter reserved for the UK Parliament,[5] so the Bill's provisions extend to and are applicable in England, Wales, Scotland and Northern Ireland.

The exception to this is clause 32 (Debt respite scheme) - debt is not a reserved matter. This clause will not extend to Scotland on the basis that Scotland has its own similar scheme. The Explanatory Notes explain that consent motions have been sought for this clause in the Welsh Parliament and the Northern Ireland Assembly, in accordance with convention.[6]

1.2 When does the Bill come into effect?

The majority of the Bill's provisions do not have defined dates for entering into force – instead the Treasury is empowered to set this date (or, in the case of clause 31 (Application of money laundering regulations to overseas trustees), the Treasury or the Secretary of State).

The following substantive clauses, however, come into force on the day on which the Bill becomes law:

- clause 33 (Successor accounts for Help-to-Save savers);
- clause 36 (Regulations about financial collateral arrangements); and
- clause 39 (Power to make consequential provision),

and the following substantive clauses come into force two months after the Bill becomes law:

- clause 29 (Insider lists and mangers' transactions);
- clause 32 (Debt respite scheme); and
- clause 37 (Appointment of chief executive of FCA).

[5] Introduction to devolution in the UK, Commons Library briefing CBP 8599, 19 June 2019, pp7, 13 and 20
[6] Ibid, p41

2. The Bill

The Bill's substantive provisions are discussed below.

2.1 Investment Firms Prudential Regime (clauses 1 and 2)

Prudential regulation rules require financial firms to maintain sufficient capital and have adequate risk controls in place.[7] The idea is to ensure financial institutions (such as banks and investment firms) can continue operating in both good and bad times, so that the market remains stable. A basic example of a prudential rule would be one requiring a bank to hold a certain amount of cash (or similar liquid assets) for every mortgage loan it made.

Background: the Basel III rules

The UK was one of ten countries whose central bank governors (in the UK, the Bank of England) established what is today known as the Basel Committee on Banking Supervision (BCBS). It was created in 1974 in response to disruption in international banking markets. The BCBS is a respected international standard-setting body whose membership now comprises 28 jurisdictions, including the European Union, the United States and the United Kingdom.[8]

The financial crisis of 2007/08 was widely perceived to have exposed weaknesses in the then-existing prudential regulation rules agreed by the BCBS. As a result, reforms were agreed at the end of 2010. Various further reforms were then agreed between December 2010 and December 2017. These post-financial crisis reforms became known as **Basel III** (see section 2.2 below for more detail on Basel III).

In 2013 the European Union (of which the UK was then a member state) passed two pieces of legislation to implement Basel III: the *Capital Requirements Regulation*[9] (CRR) and the *Fourth Capital Requirements Directive*[10] (CRD). Together, the CRR and the CRD are known as **CRD IV**.

The Basel III rules were designed for banks. The EU however had for some time taken the view that financial institutions, whether structured as banks or investment firms, were essentially competing with each other, and so should be treated equally.[11] The EU's CRD IV legislation therefore applied the rules to both:

- credit institutions - deposit-taking firms like banks and building societies), and
- investment firms - the definition of which is complex, but includes people in the business of providing certain investment services or

[7] See Bank of England website
[8] See Bank for International Settlements website
[9] OJ L 176/1, 27 June 2013
[10] OJ L 176/338, 27 June 2013
[11] See the Recitals to Directive 93/6/EEC, OJ L 141, 11 June 1993

performing certain investment activities, such as some asset managers and share brokers.[12]

Although CRV IV categorised investment firms, with different requirements depending on the activities they performed,[13] over time applying fundamentally the same rules to credit institutions and investment firms seemed inappropriate. This was for a number of reasons, including that:

- unlike credit institutions, investment firms do not accept deposits so are not exposed to the risk of a number of people withdrawing their deposits at short notice;
- the rules did not properly reflect the size and types of activities carried out by different investment firms; and
- the rules were complex and not always consistently applied in different EU member states.[14]

As a result in December 2017 the European Commission proposed two pieces of fresh legislation: the *Investment Firms Regulation*[15] and the *Investment Firms Directive*[16] (together, the IFR/IFD). IFR/IFD introduces a new prudential regime specifically tailored for investment firms. It categorises investment firms into three categories, with different requirements for each:

  - class 1 investment firms include large investment firms (with assets over EUR 30 billion) performing certain systemically important activities such as dealing on own account (generally, trading with its own money or assets). These firms would remain subject to the CRD IV framework, and some will be reclassified as credit institutions;
  - class 2 investment firms are those that meet certain financial thresholds, such as managing assets worth over EUR 1.2 billion, or having gross revenues of over EUR 30 million. Class 2 firms would be subject to new rules tailored to their size and level of risk; and
  - class 3 investment firms are those in neither of the above two classes and would be subject to the least complex requirements, since such firms are not deemed to pose significant risks to market stability.[17]

Passed in December 2019, the IFR/IFD are intended to apply from 26 June 2021. As EU law will no longer apply to the UK at that date, legislation is needed to implement a similar regime in the UK.

The new regime

[12] CRR, Article 4
[13] See, for example, the European Banking Authority's December 2014 Report on Investment Firms, pp 14 and 15
[14] See the European Commission, Frequently asked questions: Revised Framework for Investment Firms, 20 December 2017
[15] OJ L 314/1, 5 December 2019
[16] OJ L 314/64, 5 December 2019
[17] European Commission, Frequently asked questions: Revised Framework for Investment Firms, 20 December 2017. For more information on the classifications and the corresponding obligations see Clifford Chance, IFR/IFD: The New EU Prudential Regime for Investment Firms, December 2019

The Treasury stated that:

> The UK was heavily involved in the policy development of IFR/IFD at EU level, and supports its overall goals of a more appropriate prudential regime that upholds financial stability and promotes competition.[18]

The *European Union (Withdrawal) Act 2018* states that EU regulations, such as the CRR, will form part of UK law from the end of the transition period on 31 December 2020. This process of making EU law form part of domestic law is known as **onshoring**. From the end of the transition period, therefore, the UK will be able to amend the onshored CRR (from here onwards referred to as the UK CRR) as it would any other piece of domestic law.

Clauses 1 and 2 of the Bill contain provisions to implement the UK equivalent of the IFR/IFD, known as the Investment Firms Prudential Regime (the IFPR).

Will we diverge from the EU?

The Treasury has stated that the IFPR is intended to achieve "similar outcomes to the EU's IFR/IFD but tailored to the specificities of the UK market".[19] As the legislation intends that the UK Financial Conduct Authority (FCA) will set the precise rules for the IFPR, the extent to which it is intended to differ from the EU regime is not yet clear.

One area where the Treasury has identified that the UK regime will differ from that of the EU is that it will not reclassify any "class 1" investment firms as credit institutions, on the basis that the CRD IV framework will still apply to all "class 1" firms and that the UK Prudential Regulation Authority (PRA) already has the supervisory powers over such firms that achieve the same objectives.[20]

Clause 1 amends the UK CRR to ensure that only systemically important PRA-designated investment firms (roughly equivalent to class 1 under the EU regime) will remain within the scope of CRD IV. The PRA will be responsible for designating and regulating these firms. Schedule 1, Part 1 to the Bill makes consequential amendments to the UK CRR to implement this change. Schedule 1, Part 2 to the Bill contains amendments to the *Capital Requirements (Country-by-Country Reporting) Regulations 2013*, which requires investment firms to publish certain tax and financial data for countries in which they have branches or subsidiaries. The amendments ensure that these obligations will continue to apply to investment firms moving from the CRD IV regime to the new IFPR regime and, like the EU's IFR/IFD, excludes small and non-interconnected investment firms (roughly equivalent to class 3 under the EU regime) from these reporting requirements.

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[18] HM Treasury, Financial Services Bill Impact Assessment, 21 October 2020, p9
[19] Impact Assessment, para 2.12
[20] HM Treasury, Prudential standards in the Financial Services Bill: June update, June 2020, paras 1.39 and 1.40

Clause 2 inserts a new Part 9C into *the Financial Services and Markets Act 2000* (**FSMA**). The new part 9C will form the legal base for the IFPR regime. Amongst other things these provisions:

- require the FCA to make prudential rules on certain matters (such as the minimum amount of capital required to be held, and remuneration policies) for investment firms (and, in some cases, their parent firms) within the scope of the IFPR. A list of matters to consider when making rules is set out in clause 143G; these matters are (i) any relevant standards set by an international body; (ii) the likely effect of the rules on the UK's standing as a place for internationally active investment firms to carry on activities; and (iii) any other matters which the Treasury may specify;
- grant the FCA the right, where two or more FCA-regulated investment firms have a parent with its head office outside the UK, to require those investment firms to establish a parent in the UK. This would apply where in the FCA's opinion the law and practice in the country of the parent does not have "equivalent effect" to the FCA's rules (clause 143J);
- provide that where the FCA imposes a requirement on a non-FCA authorised parent requiring assets to be transferred to an FCA-approved trustee, it will be a criminal offence (punishable on summary conviction by a fine) for a trustee holding those assets to release or deal with them without the consent of the FCA (clause 143Q);
- require non-FCA authorised parents to take reasonable care to ensure that members of their management bodies are of sufficiently good repute and possess the knowledge, skills and experience to perform their duties effectively (clause 143R). Where it appears to the FCA that a person does not have these characteristics it may, after following a warning procedure, issue a prohibition order banning that person from performing a particular function. An individual breaching such a prohibition order would commit a criminal offence (punishable on summary conviction by a fine) (clauses 143S, 143T and 143V); and
- grants the FCA, as a disciplinary measure, the power (after following a warning procedure) to impose fines or statements of censure on non-FCA authorised parents and individuals knowingly involved in the contravention, for breaches of obligations, and restrictions or bans on managers and employees of such parents (clauses 143W and 143X).

Powers granted to the Treasury under these provisions are subject to the draft affirmative parliamentary procedure, except for the power to amend certain defined terms which does not in turn require amending FSMA (which is subject to the negative procedure).

Powers granted to the FCA are not subject to a parliamentary procedure. This is on the basis that the powers are granted within a built-in accountability framework (such as the list of matters to be taken into account, detailed at clause 143G, discussed above) and that the rule-making powers of the FCA are consistent with its existing role and powers under FSMA.[21]

Impact

The Treasury has stated that there are currently 3194 investment firms operating in the UK. Eight of these are expected to be designated as systemically important firms that would remain subject to the CRD IV requirements.[22] Under the new regime, the FCA has estimated that total so-called "Pillar 1" general minimum capital requirements will decrease by 5%, although 57% of individual "FCA investment firms" (roughly those equivalent to classes 2 and 3 in the EU regime) may observe an increase in this requirement. This should be a reflection of the fact that minimum requirements more accurately reflect the risks of individual firms, and should enable less reliance to be placed on firm-specific "Pillar 2" requirements.[23]

The Treasury estimates that as a result of these reforms, confidence in investment firms should grow which will benefit market stability.[24] Other benefits are likely to include lower administrative costs for firms stemming from the simplification of reporting requirements.

However, there may be administration, familiarisation compliance costs – compliance costs for some firms could reach tens of thousands of pounds.[25]

2.2 The Basel III standards (clauses 3 to 7)

The "**Basel III**" standards are a loose term used to refer to the reforms agreed by the BCBS following the financial crisis, in December 2010. These rules followed on from the "Basel II" rules agreed in 2004. Basel II had introduced rules through a three-pillar approach focusing on:

- minimum capital requirements for banks (Pillar 1), setting standards for the minimum and type of capital to be held to protect against risks;
- supervisory review (Pillar 2), which includes banks performing internal assessments of their capital requirements and requiring national regulators to assess banks' risk profiles to determine

[21] See the Delegated Powers Memorandum, paras 7-53
[22] Impact Assessment, para 2.4
[23] Ibid, paras 2.49-2.52
[24] Ibid, paras 2.42-2.46. The costs estimate detailed in the Impact Assessment refers to euros rather than GBP, as it was the result of a European Commission workshop on the IFR/IFD regime, but would apply similarly to the IFPR regime in the UK

whether capital requirements should exceed that specified in Pillar 1; and

- market discipline (Pillar 3), requiring banks to disclose information to the market to improve transparency and market stability.[26]

Basel III retained and built on this three-pillar approach, intending to increase both the quantity and quality of capital that banks needed to hold.

The EU primarily implemented these initial Basel III standards through the CRD IV legislation discussed above. Further Basel III standards agreed between 2010 and 2017 were then implemented through the *Second Capital Requirements Regulation*[27] (CRR II) and the *Fifth Capital Requirements Directive*[28] (CRDV).

EU member states are required to implement CRDV from 29 December 2020, before the end of the UK-EU transition period, and it therefore is required to be incorporated into UK law. However, CRR II will largely apply from 28 June 2021, after the end of the transition period. The Government is therefore able to choose not to implement CRR II and instead introduce its own legislation to implement these standards, in addition to further Basel III reforms (nicknamed Basel 3.1) which have not yet been legislated for in the EU.

The Government has stated that it remains committed to the implementation of Basel III, including Basel 3.1,[29] although it plans to take advantage of the opportunity to implement prudential standards independently of the EU by not replicating CRR II in its entirety, to provide "flexibility to tailor the actual details of these subject areas to the UK".[30]

Clauses 3 to 7 of the Bill are therefore aimed at ensuring that the Treasury has the necessary powers to implement the Basel III rules and ensure a coherent system of prudential regulation. Clauses 3 and 4 grant the Treasury the power to make regulations to revoke provisions of the CRR which, generally, relate to matters within the scope of the Basel III rules or are connected with them. It also covers any future standard-setting documents that might be published by the BCBS which are due to take effect at the same time as or before existing Basel III standard-setting documents, which are listed in the clause. All such regulations will be subject to the draft affirmative parliamentary procedure.

Where the Treasury revokes provisions under its powers above, it is intended that the PRA will fill any gap created by using its existing

[26] Basel Committee on Banking Supervision, International Convergence of Capital Measurements and Capital Standards, June 2006
[27] OJ L 150/1, 7 June 2019
[28] OJ L 150/253, 7 June 2019
[29] See for example the Joint PRA and HMT statement on the delay to implementation of the Basel 3.1 standards, 2 April 2020, in which the Treasury and PRA reiterated their commitment to implementing these standards
[30] Impact Assessment, para 3.34

general rule-making powers under FSMA.[31] Amongst other things, clause 5 introduces an enhanced "accountability framework" listing matters for the PRA to have regard to when exercising its rule-making powers in implementing the updated prudential regime (subject to certain limited exceptions). These matters are, in summary: (i) standards recommended by the BCBS; (ii) the likely effect of the rules on the UK's standing as an attractive place for financial services; (iii) the likely effect of the rules on the ability of regulated firms to provide finance; and (iv) any other matter specified by the Treasury in regulations. It also introduces an extended rule-making power for the PRA in relation to certain holding companies of regulated firms, which is not considered to require parliamentary oversight in light of the enhanced accountability framework and the independence of the PRA from the Government.[32]

Clause 6 grants the Treasury a power to make regulations to amend the onshored EU *Credit Rating Agencies Regulation*[33] where necessary or desirable for the implementation of Basel III. It is intended that any amendments made will be minor and in any case subject to the draft affirmative procedure.[34] Clause 7 makes limited amendments to the CRR in connection with the implementation of Basel III.

Impact

It is anticipated that the proper implementation of Basel III would reduce the possibility of a future banking crisis, with its knock-on effects on the Government's fiscal position. The consistent application of prudential standards is intended to assist with ensuring that rules which apply in the UK are equivalent in outcome to the corresponding rules in the EU, which will help to facilitate access to the EU for UK firms in the important area of financial services.

These benefits are expected to offset the increased costs for UK banks and other institutions of complying with Basel III and the short-term transitional and familiarisation costs associated with its implementation. Familiarisation costs alone for UK financial institutions are estimated to be just under £1.8 million.

It is currently anticipated that all necessary rules and regulations for the implementation of the Basel 3.1 reforms will be in place by 1 January 2023, to enable the UK to meet its international commitments.[35]

2.3 Benchmarks: LIBOR transition (clauses 8 to 19)

Background: LIBOR

[31] Delegated Powers Memorandum, para 57
[32] Ibid, para 102
[33] OJ L 302/1, 17 November 2009
[34] Ibid, paras 106 and 107
[35] Impact Assessment, paras 3.100 to 3.147

Banks fund their activities, such as making loans, in a number of ways. These might include customer deposits and issuing shares. However, banks also lend to one another in the wholesale banking market.

The London Inter-bank Offered Rate (**LIBOR**) is an interest rate benchmark that is used to set prices for a huge number of financial contracts around the world. This and other benchmarks are used as a tool to set prices, measure performance, or work out amounts payable under financial contracts.[36]

Over time LIBOR emerged as a standardised way of measuring banks' costs of funding, administered from 1986 by the British Bankers' Association (the **BBA**, a trade organisation representing the banking sector).

As time passed banks began to fund their activities in increasingly different ways. However, LIBOR remained a useful, clear benchmark for financial transactions, even when a bank's source of funding for a transaction was not the wholesale banking market.

The global financial crisis is perceived to have exposed weaknesses in the methodology of how LIBOR was calculated, including concerns that it was prone to rigging.[37]

In 2014 a separate company, ICE Benchmark Administration (**IBA**), took over administration of LIBOR from the BBA,[38] as part of attempts to increase regulatory oversight and transparency in line with the recommendations of the Government-commissioned Wheatley Report in 2012.

Today, LIBOR is calculated for five currencies (including GBP and USD) for seven different tenors (periods of time), ranging from overnight to 12 months. This means 35 individual rates are published. It is calculated using a numerical average from submissions received from a panel of banks and generally published on each business day at 11:55 am.[39]

It is estimated that around US$400 trillion[40] of contracts globally reference LIBOR. This includes not only complex financial instruments, bonds, corporate loans or derivative contracts, but also some UK mortgages.[41]

Transition

In July 2017, the then Chief Executive Officer of the FCA and current governor of the Bank of England, Andrew Bailey, announced that after

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[36] See for example, the FCA's description: Benchmarks, last updated 6 August 2020
[37] See for example the BBC, Timeline: LIBOR fixing scandal, 6 February 2013
[38] See for example the useful summary produced by Clifford Chance, LIBOR - A Brief History, December 2018
[39] See the various sections of the website of the administrator, ICE LIBOR
[40] Bank of England, Financial Stability Report, August 2020, p93
[41] See for example the Financial Times, £1m-plus mortgage borrowers pay over the odds, April 16 2020

the end of 2021 the FCA would no longer seek to persuade or compel banks to submit data to sustain LIBOR. This was due to concerns:

- about LIBOR's sustainability, given that it relies heavily on there being an active wholesale interbank market for data, and banks increasingly do not fund themselves in this way; and
- that it was not appropriate for many of the products that reference it (such as mortgages).[42]

Without the FCA performing these functions, panel banks will be able to stop submitting the data that goes towards calculating LIBOR, and it is possible that the benchmark will end as a result.

In 2018 the bulk of the EU *Benchmarks Regulation*[43] (**BMR**) became directly applicable in the UK. It imposed obligations on those involved in providing, contributing to and using benchmarks. The BMR also granted powers to national competent authorities (in the UK, the FCA) in certain circumstances to impose requirements on persons to administer or continue contributing to a benchmark.

Following the transition period, the BMR will be onshored and will form part of UK law. The Government does not feel that the existing powers available to the FCA under the onshored BMR (from here onwards, the UK BMR) will be sufficient to enable it to manage an orderly transition from LIBOR after its possible cessation at the end of 2021. Clauses 8 to 19 of the Bill therefore amend the UK BMR to grant additional powers. Whilst the provisions are concerned with benchmarks more generally, they are introduced with the upcoming LIBOR transition in mind.

In summary, these provisions (among other things):

- amend the criteria by which a benchmark can be designated as a "critical benchmark" (following which enhanced requirements apply in relation to it) so that a benchmark which meets the volume threshold can be designated as "critical" even where there are appropriate substitutes for it but it is not reasonably practical for one or more users of that benchmark to switch to those substitutes (clause 8(6));
- extend the maximum period the FCA can compel a benchmark administrator to continue to publish a critical benchmark from five to ten years, and requires the FCA to conduct assessments to assess whether the designated benchmark properly measures the underlying market or economic reality when using its compulsion power) (clause 9);
- give the FCA the power to prohibit some or all new use of a critical benchmark, in circumstances where the administrator intends to cease providing it (clause 10);

[42] FCA, The future of LIBOR, last updated 27 July 2017
[43] OJ L 171/1, 8 June 2016

- retain the requirement under the BMR, with clarifications, for the administrator of a critical benchmark to submit an assessment of the capability of that benchmark to measure the underlying market or economic reality every two years, and retain the power to compel contributors to continue submitting data in certain circumstances for up to five years (clauses 11 and 12);
- grant the FCA the power to "designate" a critical benchmark where it has become or is at risk of becoming unrepresentative, following which its use will be prohibited. However the FCA will be permitted to make an exception for certain "legacy use" (i.e. existing use) of the benchmark – this could be relevant to contracts where there will not be appropriate fallbacks or alternatives to LIBOR when it ceases to be published so the Government will seek to allow the use of LIBOR in circumstances where it has otherwise been prohibited.[44] Where a critical benchmark has been designated the FCA will be able to impose requirements on the administrator (such as on how the benchmark is calculated) to ensure an orderly wind-down. Use of this power must be reviewed every two years (clauses 13 to 16);
- require the FCA to publish policy statements in relation to the exercise of certain of its power granted to it under the amended BMR (for example, the power to prohibit use of a critical benchmark where the administrator intends to cease providing it). It will also clarify that where so-called "umbrella" critical benchmarks are published in different currencies and periods (as with LIBOR), each version may be treated for certain purposes as a separate benchmark. So it may be possible for example for LIBOR to at one point become a "designated" benchmark under one currency but not others. The Treasury will also be empowered to make regulations about how the provisions of the UK BMR should apply to umbrella benchmarks – this is considered to be necessary to allow for flexibility as it cannot be predicted at this stage which powers might be necessary and whether they will be required at "version level" for umbrella benchmarks. Given this power would allow the Treasury to amend the BMR, use of this power will be subject to the draft affirmative procedure[45] (clauses 17 and 18); and
- require benchmark administrators to have enhanced and updated procedures in the event of changes to or the cessation of a benchmark, and grants the FCA oversight over these procedures (clause 19).

Impact

[44] Impact Assessment, para 4.32
[45] Delegated Powers Memorandum, paras 153 and 154

The potential cessation of LIBOR in the near future poses a risk to financial stability, given the volume of transactions referencing it. These provisions seek to give the FCA the powers necessary to ensure a smooth transition. The Treasury is of the view that the legislation in itself will not impose additional costs to businesses – the impact will be dependent on how the FCA uses the additional powers granted to it.[46] Whilst tailored for LIBOR, these powers are also considered helpful to deal with transitions from any critical benchmarks in the future.

Stakeholder views

The FCA has published a statement welcoming the Bill, and "particularly" these provisions.[47]

Amongst the "risk areas" that have been raised in commentary by an international law firm on these provisions are:

- that these provisions provide a shell framework leaving much of the detail to be filled in by the FCA. This is considered to increase the risk of legal challenge and prolonged market uncertainty; and
- the provisions are intended to apply to all contracts referencing LIBOR, not just those governed by the laws of a nation in the UK. This is expressly recognised by provisions that require the FCA to have regard to the effect of the exercise of certain of its powers outside of the UK. It is not clear how this would work in a situation where a LIBOR-referencing contract is governed by the laws of a country that may have adopted a conflicting position on benchmark transition; and
- there is no provision of a "safe harbour" that insulates firms from legal claims brought against it as a result of implementing or complying with these provisions. In circumstances where similar laws in another country are more favourable to it on this issue, this may encourage disputes between parties on which is the correct regime to use.[48]

As the powers granted in some cases involve potential interference with the economic assets and rights of benchmark administrators, contributors and contract parties, the Treasury has considered the impact of the proposals on Article 1 of Protocol 1 to the European Convention on Human Rights (right to peaceful enjoyment of possessions). It considers that the provisions are a proportionate interference with these rights in pursuit of a legitimate aim and strike a

[46] Impact Assessment, para 4.34
[47] FCA, FCA welcomes Financial Services Bill, 21 October 2020
[48] See Herbert Smith Freehills, LIBOR transition measures in the new Financial Services Bill: the legal framework, market impact and risks, 26 October 2020

fair balance between the public interest and the interests of those affected, such that Article 1 of Protocol 1 will not be breached.[49]

2.4 Extension of the transitional period for benchmarks with non-UK administrators (clause 20 and 21)

In April 2019 43% of global live currency trading (spot FX) and 50% of directly negotiated (over-the-counter) interest rate derivatives transactions by turnover took place in the UK.[50] Many of these transactions reference foreign-administered (or third country) benchmarks – for example, the Tokyo Interbank Offered Rate (TIBOR) is administered in Japan and is used as an interest rate benchmark for transactions in Japanese Yen.

The BMR prohibits the use by "supervised entities" (which encompasses a variety of regulated financial institutions) of third country benchmarks unless one of three access routes are used:

- Equivalence: an equivalence decision is required by the European Commission, stating that a third country has "equivalent" regulatory outcomes to it. To date equivalence decisions have only been adopted in relation to seven benchmarks in Australia and Singapore. Achieving equivalence will be challenging for many countries as they may not specifically regulate benchmarks;
- Endorsement: the third-country benchmark is endorsed by a supervised entity. This has only been used twice to date; or
- Recognition: the third-country administrator appoints a UK legal representative. This has been used six times.

The prohibition on use of unauthorised third-country benchmarks was due to come into force following the end of a transitional period on 31 December 2019.

The procedures for endorsement and recognition are still not fully established. Many administrators also do not necessarily benefit economically from widespread use of their benchmarks so may not be incentivised to use one of these access routes. Concerns regarding the impact of the prohibition of foreign non-authorised benchmarks on domestic markets led the EU Commission to announce the extension of this transitional period to 31 December 2021.[51] In September last year the UK separately legislated to extend the transitional period applicable to it to 31 December 2022.

Clause 20 of the Bill seeks to extend this transitional period again to 31 December 2025. This is due to concerns that many third country

[49] Human Rights Memorandum, paras 13 to 20
[50] Bank of England, BIS Triennial Survey of Foreign Exchange and Over-The-Counter Interest Rate Derivatives Markets in April 2019 – UK Data, 16 September 2019
[51] European Commission, Sustainable finance: Commission welcomes agreement on a new generation of low-carbon benchmarks, 25 February 2019

benchmark administrators will be unable or unwilling to gain authorisation. Existing "legacy" use of third country benchmarks would be permitted for contracts concluded before that date.

The Government considers this extension to be an interim measure while it considers a longer-term "policy response" in the interests of UK users. As it is simply an extension of the existing regime, the Government believes it should not impose any additional costs on UK firms.[52]

Clause 21 amends the UK BMR to insert minor and consequential amendments as a result of the changes made in clauses 8 to 20. One such change allows the Treasury to make regulations (subject to the negative procedure) regarding the procedure to be used where information is to be provided or requirements are to be imposed under the BMR.

2.5 Market access arrangements for financial services between the UK and Gibraltar (clauses 22 and 23)

Why is legislation needed?

Gibraltar is an Overseas Territory of the UK with internal self-government. The UK is responsible for Gibraltar's external relations. The Government of Gibraltar is responsible for the territory's financial services, which are in turn regulated by the Gibraltar Financial Services Commission (GFSC).

Until the UK left the EU, Gibraltar was also part of the EU. It was not a member state but a European Territory under the responsibility of the UK. This meant that EU treaties and law applied to Gibraltar via the UK's membership. They will continue to do so until the end of the transition period.

But in order to address the changed circumstances more sustainably, the *Financial Services Bill* would introduce a new framework – the **Gibraltar Authorisation Regime** (GAR). This would enable certain financial businesses based and authorised in Gibraltar to operate in the UK market in line with the *Financial Services and Markets Act 2000* (FSMA) without needing to seek separate and prior authorisation from UK regulators.[53] It would also facilitate access to the Gibraltar market by UK businesses.

The regime would be based on three following conditions, which the Treasury would periodically re-assess:

[52] Impact Assessment, paras 5.1 to 5.25
[53] The Bill generally refers to firms authorised under the FSMA as "authorised persons"

1 **Compliance** with certain general objectives set out in paragraph 7 of Schedule 2A of the Bill, including consumer protection and financial market stability.

2 **Alignment** of law and practice in the UK and Gibraltar – this would ensure consistency of approach in the two jurisdictions. It would take account of how Gibraltarian law and regulatory practices (including supervision and enforcement) operate. It would also take account of wider relevant issues, such as data protection and insolvency law. It gives Gibraltar autonomy to diverge (which might however lead to an end to access to the UK market for affected services). In considering alignment the Treasury would take advice from UK regulators. The historic close alignment between the two markets and the extent of access available means that the tests for alignment would more stringent than those applied to other countries.

3 **Cooperation** – implementation, management and review of the GAR would require the Gibraltarian Government and the GFSC on one side, and HM Treasury and relevant UK regulators and agencies – including the Financial Conduct Authority, the Prudential Regulation Authority and the Financial Services Compensation Scheme (FSCS)[54] – on the other to effectively communicate, support each other in the fulfilment of their respective duties and exchange information, amongst other things. The Treasury would keep the effectiveness of cooperation under review and report on its operation to Parliament. (See also below.)

Development, implementation and oversight of the GAR would be likely to involve further secondary legislation on both sides.

How would Gibraltarian firms gain or maintain access to the UK market?

- The GFSC would manage all authorisations and communications with UK regulators and authorities.
- Gibraltarian firms would not be permitted to operate any regulated services in the UK that they are not authorised to offer in Gibraltar.
- The GFSC would have to give consent to firms to offer **new** regulated activities in the UK, but they might choose not to give such consent, even if the firm is authorised to offer such activities in Gibraltar.
- Firms **already** offering regulated activities in the UK would have to inform the GFSC of their intention to continue to do so.

[54] The FSCS is also referred to in the Bill as the "compensation scheme" or "scheme manager"

How would UK firms gain access to the Gibraltar market?

Decisions about access to the Gibraltar market are a matter for the Government of Gibraltar. But the Bill would make provision for UK firms to follow similar arrangements with UK regulators.

UK oversight of effectiveness

The Treasury would periodically review how far the regime is meeting the conditions of compliance, alignment and cooperation. This would involve independently verified information provided by the Government of Gibraltar. UK regulators might be asked for their views. The Treasury would try to resolve any concerns with the Government of Gibraltar.

The Treasury would report to Parliament on its review every two years. It would be required to consult with the Financial Conduct Authority and the Prudential Regulation Authority on its report, which would in turn focus on how well the regime was achieving its three conditions with regard to approved and new activities. The report might include proposals to adjust regulations or the range of regulated activities approved.

Regulatory supervision

Although the GFSC would continue to supervise Gibraltarian firms, UK regulators would have powers to protect UK consumers or financial stability in narrowly defined circumstances. In particular, they would have powers to impose requirements, or to vary or cancel a GAR permission in specific circumstances. They would also retain the powers currently available to them under the GAR. UK regulators and the FSCS would be required to work together and with the GFSC to resolve potential concerns – and to update memoranda of understanding accordingly.

UK regulators would also maintain their current FSMA powers over Gibraltar-based firms. Those firms would in turn be able to make representations and refer matters to the Upper Tribunal.

Consumer protection

UK financial services regulation attempts to ensure that consumers are protected through the Financial Services Compensation Scheme. The Bill would make provision for Gibraltar-based firms to participate in FSCS, IT wold also give the Treasury the power to prescribe which Gibraltar-based firms would **not** be eligible to participate in the FSCS. The intention is that most consumers should be eligible for a similar level of compensation whether they purchase products from Gibraltar or UK-based firms, either through the FSCS or through the equivalent Gibraltarian schemes.

Similarly, the Government would work with the FCA to ensure that UK-based customers[55] of Gibraltar-based firms would have access to the Financial Ombudsman Service's dispute resolution service. Some such customers already have access and their rights would not be altered by the implementation of the GAR.

What would happen if market access were to be withdrawn?

Sudden withdrawal of market access could adversely affect UK businesses and consumers, so the Bill provides for transitional arrangements that would allow Gibraltar-based firms to undertake relevant activities for a limited period. The firms concerned might use that time to reduce activities and leave the UK market or to apply for authorisation from UK regulators. Those regulators would also be able to specify which activities the firm concerned would be able to undertake.

Dealing with further Gibraltar-specific rights

The overall logic of the GAR is to replace the approaches implemented under the *Financial Services and Markets Act 2000 (Gibraltar) Order 2001* (SI 2001/3084), also known as "the Gibraltar Order". But some other regimes give rights to Gibraltar-based persons in the UK. By their nature or size they can neither readily be brought under the GAR nor incorporated into parallel regimes. For this reason the Bill would give powers to the Treasury to maintain access for the activities concerned, adopting principles and mechanisms similar to those offered in the GAR.

2.6 Overseas Funds Regime (clauses 24 to 26)

UCITS: Background

UCITS (Undertakings for the Collective Investment in Transferable Securities) are a type of investment fund that have been regulated by the European Community (now EU) since 1985 (initially by the *UCITS Directive*[56]) with the aim of creating a harmonised single market for these funds. UCITS are only permitted to invest in certain liquid assets (such as certain shares and bonds) and are required to diversify the assets they invest in. As a result, they are generally seen as safe investments and are common among retail (non-professional) investors. The UK Overseas Funds Regime established by the Bill is intended to apply to retail investment funds in general, not only UCITS, which are a creation of European regulation (starting from the *UCITS Directive*). However, the EU Commission has estimated that around 75% of retail investments in Europe are in UCITS,[57] so UCITS will necessarily form an important part of the new UK regime.

[55] These services are available to individuals and certain small businesses
[56] OJ L 375, 31 December 1985, replaced by OJ L 302/32, 13 July 2009
[57] EU Commission, Investment funds, undated

A key benefit of being a UCITS, established by the *UCITS Directive*, is the ability to market the UCITS fund across the EEA. Without being able to use this "passport", the fund would need to gain permission in each country where it wanted to market itself, which would be a costly and time-consuming administrative burden. Recent data from the European Fund and Asset Management Association shows that there were over 34,000 European UCITS funds, with the largest numbers being domiciled in Luxembourg and Ireland.[58] The Government has stated that there are around 9,000 EEA UCITS funds currently operating in the UK using a "passport"[59]. It anticipates that the vast majority of these funds would wish to continue accessing the UK market in the longer-term.[60]

Following the end of the UK-EU transition period on 31 December 2020, the UK will leave the European single market and passporting rights will no longer be available. Without further action, this would require these 9,000 funds to immediately cease offering their products to retail investors in the UK.

To avoid this "cliff edge", the Government has introduced a Temporary Marketing Permissions Regime (the **TMPR**), currently set at three years although the Bill proposes to raise this to five years,[61] to temporarily allow such funds to continue marketing while they seek full recognition in the UK.[62] After the end of the TMPR, without the changes in the Bill, these EEA UCITS funds would need to follow the same procedure as funds in the rest of the world, so will need to have individually obtained recognition under the procedure set out in section 272 of FSMA to be able to continue marketing.

Background: money market funds

Money Market Funds (MMFs) are a type of fund that invest in short-term debt (being assets with a remaining maturity of two years or fewer) such as commercial paper (which is similar to a short-term bond). Some UCITS are also money market funds. MMFs are regulated by the EU *Money Market Funds Regulation*[63] and are used by, amongst others, financial institutions, corporations and governments to help spread their credit risk, rather than simply relying on bank deposits.[64]

There are currently very few MMFs domiciled in the UK. Most MMFs which are active in the UK are domiciled in the EEA and access the UK through "passporting". After the UK-EU transition period ends on 31 December 2020, this passporting right will no longer be available. Existing MMFs will still be able to access the UK market through the

[58] EFAMA, Trends in the European Investment Fund Industry in the Second Quarter of 2020, September 2020
[59] Explanatory Notes, para 106
[60] Impact Assessment, para 7.8
[61] Ibid, para 7.106
[62] See Part 6 of the Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019
[63] OJ L 169/8, 30 June 2017
[64] Recital 1, Money Market Funds Regulation

TMPR, following which they would need to have obtained authorisation under section 272 of FSMA.

Section 272

Section 272 of FSMA allows overseas funds to become recognised, and gain UK market access, by applying to the FCA for recognition. The Government does not believe, however, that requiring all funds to go through the section 272 FSMA process is a suitable solution. Amongst other reasons this is because:

- going through the section 272 process can be expensive and time consuming. The Government refers to one example of a fund which incurred costs of over £100,000 and spent over 8 months going through the process. Requiring such funds to go through this process could act as a deterrent to them entering the UK market which, in turn, reduces choice for UK investors; and
- only around 30 funds have been recognised under section 272, so the system is not equipped to handle large numbers of applications. The FCA authorisation team currently has the equivalent of 12 full-time employees.[65]

In light of these perceived shortcomings the Government therefore proposes to introduce a new regime governing access to the UK market for retail funds (such as UCITS) and MMFs. Funds outside the scope of the regime would be able to apply for access under a reformed section 272 process.

Proposed changes

The Bill creates a new category of "recognised scheme". Becoming such a recognised scheme would allow funds to bypass the restriction on promotion of their schemes in section 238 of FSMA.

Instead of requiring all firms to go through the process of obtaining recognition under section 272, the new regime would allow the Treasury to declare that another country had "equivalent" investor protections to that of the UK.

Two equivalence regimes will be in place: one for retail funds (largely encompassing UCITS) and a separate one for MMFs. MMFs which are also retail funds may therefore have to comply with both.

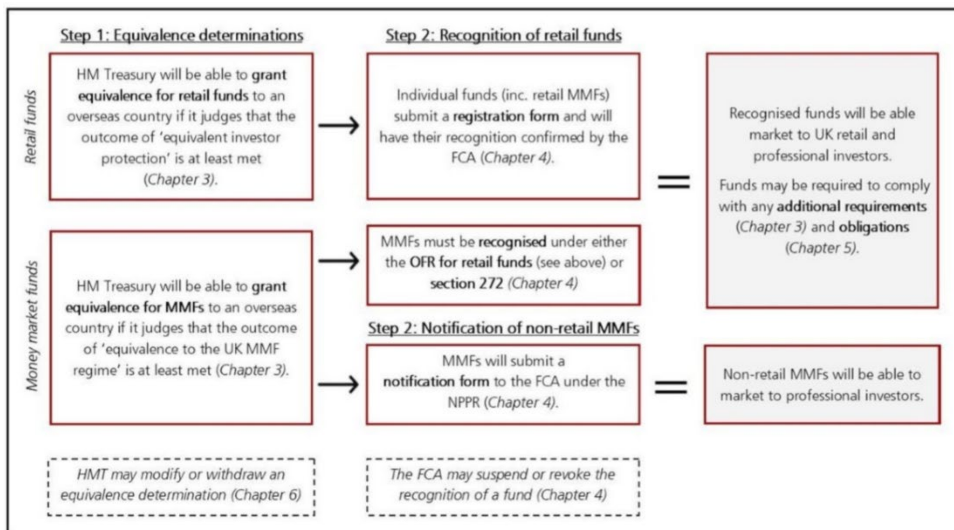
Where the Treasury has declared a jurisdiction to have "equivalent" investor protection outcomes for retail funds, funds within that jurisdiction will be able to register with the FCA and market to retail investors in the UK.

Where the Treasury has declared a jurisdiction to have "equivalent effect" to the requirements of the *Money Market Funds Regulation* (which will form part of UK law after the UK leaves the European single market), the process will depend on whether an MMF within that

[65] Impact Assessment, paras 7.47 to 7.49

jurisdiction is seeking to market to retail investors in the UK. If not, it would be able to market to professional investors by utilising the National Private Placement Regime, a mechanism permitting the marketing to professional clients by non-UK funds. If however the MMF sought to market to retail clients, it would also need to be based in a jurisdiction that had obtained a retail fund equivalence decision from the Treasury, or would otherwise need to apply for recognition under section 272 of FSMA.

The diagram below, taken from the Treasury's consultation paper,[66] summarises the proposed regime:



The Government has stated that in assessing whether countries are "equivalent" for the purposes of the retail funds regime, it does not expect those regimes to be identical to its standards but is looking for "similar outcomes".[67] Since such outcomes may not be identical, the Treasury reserves powers to impose "additional requirements" to be complied with by certain firms seeking UK market access. The Treasury will be able to revise these additional requirements from time to time, as well as withdraw equivalence determinations already granted.

The FCA will also be granted powers to temporarily suspend or revoke a fund's recognition where it deems it necessary. Lastly, for funds (including MMFs) wishing to market to retail investors which do not benefit from an equivalence determination for their country, section 272 will be amended to streamline the process.

Clauses 24 to 26 implement the new regime. The broad structure is that:

- clause 24 amends FSMA to create the new category of "recognised scheme" and introduces sections 271A to 271S of FSMA. These sections grant the Treasury the power to make equivalence determinations (subject to the negative parliamentary procedure) in respect of collective investment schemes (which

[66] HM Treasury, Overseas funds regime: A consultation, March 2020, p13
[67] Explanatory Notes, para 110

broadly includes UCITS) and set out the process for such schemes to become recognised. These sections also set out obligations on schemes and the FCA, and the powers delegated to the FCA (including the FCA's power to publicly censure a scheme in contravention of regulations or rules);

- clause 25 seeks to simplify the recognition process under section 272 of FSMA and amends section 277 of FSMA to simplify the circumstances in which recognised scheme operators need to provide written notice to the FCA of changes or replacements to their scheme. For example, written notice will no longer be required to all changes to a scheme's operations or management, only material alterations; and
- clause 26 amends the *Money Market Funds Regulation* to, amongst other things, grant the Treasury a power to make regulations to approve a country as being "equivalent" in respect of MMFs.

Impact

If the Treasury was to find the EU (as a jurisdiction) to have equivalent protections for both overseas retail funds and MMFs, this would have significant cost benefits for EEA UCITS and other schemes within the scope of such a determination. As the TMPR is being extended from three years to five years (i.e. until 2025) the Government believes sufficient time will be available for it to make equivalence determinations in respect of the EU (either as a whole or in respect of individual member states) should it decide to do so. The Treasury has also indicated to us that the regime could be used to facilitate access to the UK market for non-EU member countries in the future too.

As for the FCA, the Government estimates that cost savings, when compared to the alternative of requiring all firms to go through the section 272 process, will be around £29m.[68]

The Treasury has not yet published the outcome of its consultation on the Overseas Funds Regime, however the published responses of the Financial Markets Law Committee (the **FMLC**, a City of London charity) had recommended, amongst other things, greater clarity on how and when the TMPR ceases and the Overseas Funds Regime starts, and on how the Treasury will make equivalence and additional requirements assessments.[69]

[68] Impact Assessment, paras 7.102 to 7.106
[69] Financial Markets Law Committee, Consultation: Overseas Funds Regime, 11 May 2020

2.7 Amendments to the Markets in Financial Instruments Regulation (clause 27)

The *EU Markets in Financial Instruments Regulation*[70] (MiFIR) was adopted in 2014 with the aims of strengthening transparency and improving the functioning of the internal market for financial instruments, following weaknesses exposed by the financial crisis.[71]

It contains provisions (under "Title 8") to grant third country firms (like deposit-taking banks, stock brokers and underwriters of certain instruments like shares) to provide investment services to or perform investment activities relating to, professional clients or certain "eligible counterparties" (such as investment firms or governments) by registration rather than by needing to gain authorisation or be subject to supervision within the EEA. For such firms to be able to do this the European Commission will need to have adopted an "equivalence" decision in respect of the country where that firm is based. To benefit from an equivalence decision a country will need not only to have regulation equivalent in outcome to the EU, but will also need to have an equivalent recognition system for third country firms to provide services in its jurisdiction. As a result the threshold for achieving EU equivalence is very high and as of the time of writing the European Commission has not listed any equivalence decisions under Title 8.[72]

After the end of the UK-EU transition MiFIR will be onshored to form part of UK law (**UK MiFIR**), and the powers to grant equivalence in respect of the UK will pass to the Treasury. Clause 27 of the Bill therefore makes amendments to UK MiFIR to "broadly reflect the changes the EU introduced to their own regime"[73] which were introduced as part of the IFR/IFD legislation described in section 3.1 above but which are intended to become applicable in 2021 after the transition period is over and so will not automatically form part of UK law. The changes include granting the FCA powers to specify reporting requirements for firms that use the Title 8 regime, changes to the equivalence assessment criteria, granting the Treasury powers to impose specific requirements on firms registered under the regime, and additional powers for the FCA (under a procedure) to restrict or withdraw the recognition of specific firms using the regime. The Treasury's powers under this clause will be subject to the negative procedure, and the FCA's powers will not be subject to a procedure.[74]

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70 OJ L 173/84, 12 June 2014
71 Ibid, Recital 1
72 European Commission, Overview table – Equivalence/adequacy decisions taken by the European Commission
73 Explanatory Notes, para 131
74 Delegated Powers Memorandum, paras 373 to 397

2.8 Changes to the FCA's cancellation of authorisation process (clause 28)

Currently, a person cannot carry out a "regulated activity" under FSMA unless they are authorised or exempt. An example of a regulated activity is accepting deposits, which covers many banks. Part 23 of FSMA requires the FCA to maintain a public record of authorised persons. This record, know as the Financial Services Register, is accessible on the FCA's website.

The Government considers that keeping the register accurate and up-to-date is important to allow consumers to make informed decisions, and to deter fraud caused by the use of identities of inactive authorised firms[75]. However, current powers require the FCA to spend significant time gathering evidence in order to establish that the conditions for cancellation (for example, that the authorised person has failed to carry out the regulated activity it is authorised for, for at least 12 months).[76] The FCA must then give that firm a warning notice and allow it at least 14 days to make representations. Given that the FCA currently regulates approximately 58,000 firms, and estimates that at any point around 300 to 400 of these firms are inactive without having sought cancellation, the current procedure is considered inappropriately onerous.[77] In May 2019 the Complaints Commissioner (an assessor of complaints against the FCA) raised concerns over "seriously inaccurate" entries on the FCA register.[78]

The Government is therefore seeking to introduce a new procedure to allow the FCA to cancel or vary an inactive firm's authorisation. The new procedure would apply where an authorised person fails to pay required fees or provide required information, and requires the FCA to issue a notice and give the respondent at least 14 days to respond before issuing a further notice with its proposed changes. For aggrieved respondents, applications for annulment of a decision can be made to the FCA.

2.9 Amendments to the Market Abuse Regulation (clause 29)

The EU *Market Abuse Regulation*[79] (**MAR**) was adopted in 2014. Article 18 of MAR requires issuers who have financial instruments admitted to trading on a regulated market (such as companies with shares listed on the London Stock Exchange) to produce and maintain "insider lists". These are lists of all individuals who work or perform tasks (such as advisers) for that issuer who have access to inside information.

[75] Explanatory Notes, para 137
[76] See Section 55(J)(1) of FSMA
[77] HM Treasury, Changes to the FCA's cancellation of authorisation process, Policy statement, July 2020, paras 1.11 to 1.13
[78] See Financial Times, FCA told to compensate over 'seriously inaccurate' register, 8 May 2019
[79] OJ L 173/1, 12 June 2014

Inside information, in summary, is defined as non-public precise information relating to an issuer or its financial instruments (such as shares) that would significantly affect the price of those issuer's instruments if the information were made public. An example might be a large and lucrative contract that has just been agreed by that issuer but has not been made public yet. Given the obvious sensitivity of inside information and the ways it can be used for illegal financial gain, insider lists help the FCA investigate unlawful disclosure of inside information as well as unlawful "insider dealing" on the basis of such information.

The Government has identified two area of confusion in the current drafting of MAR that it wishes to rectify. Given that MAR will be onshored after the UK-EU transition period, the UK will be able to amend MAR, as retained in the UK (UK MAR). The two areas of confusion which the Government seeks to clarify in clause 29 of this Bill are:

- who is required to maintain insider lists. MAR currently requires issuers "or any person acting on their behalf or on their account" to maintain an insider list. The Government says this has created uncertainty as to whether third parties acting on behalf of an issuer should be holding their own list or sending it to the issuer to hold – leading to a risk that some of the parties are not maintaining insider lists. The Bill therefore clarifies that both issuers **and** those acting on their behalf or on their account must maintain such lists; and
- MAR also requires persons discharging managerial responsibilities (**PDMRs**, essentially senior managers) and those connected with them to notify both the issuer and the FCA of their transactions in the issuer's instruments. Currently this notification must be made within three business days of the transaction and the issuer must also notify the public within three business days of the transaction. The Government considers that this can be a difficult timeline to meet and so proposes to require that issuers notify the public within two working days ("working days" will explicitly exclude England and Wales bank holidays) of receiving the notification from the PDMR. This change has been described by an international law firm as a "welcome change from the existing regime".[80]

Clause 29 makes these two changes to UK MAR. The Explanatory Notes state that these two changes are "closely aligned with changes that will shortly be made to the EU MAR".[81]

[80] Osborne Clark, Listed companies, are you ready for the changes to the Market Abuse Regulation? 29 October 2020

2.10 Extending the maximum criminal sentence for market abuse (clause 30)

MAR prohibits insider dealing and market manipulation. These two civil offences are also criminal offences in the UK under the *Criminal Justice Act 1994* and the *Financial Services Act 2012*, respectively – two Acts that pre-date MAR.

Insider dealing broadly involves someone dealing (or encouraging another to deal) in securities (like shares) in circumstances where they have price-sensitive information relating to those securities (or otherwise unlawfully disclosing that information). Market manipulation broadly involves giving out false information to influence the price of securities to make a gain or cause loss.

The maximum sentence for both these offences is currently seven years' imprisonment. However, the maximum sentence for fraud (considered a comparable economic crime) is currently ten years. The Government is concerned that this situation means "firms could perceive market abuse as a lesser crime, reducing the potential deterrent effect, and increasing the likelihood of market abuse" and therefore seeks, in clause 30, to increase the maximum penalty for these offences to ten years' imprisonment. This is consistent with the recommendations of the Fair and Effective Markets Review 2015, published by the Treasury, the Bank of England and the FCA, which recommended that the maximum sentence for market abuse be lengthened from seven to ten years' imprisonment.[82]

Merely increasing the severity of punishment by increasing the fine is considered an ineffective response as firms may begin to simply see such fines as a "cost of doing business". The Government believes these reforms will increase the "headroom" for judges to impose higher sentences for serious offences. The cost of these changes are estimated to be around £100,000 per annum to be borne by the Ministry of Justice through increased jail time for offenders.[83]

2.11 Application of money laundering regulations to overseas trustees (clause 31)

The *Sanctions and Anti-Money Laundering Act 2018* (SAMLA) contains the framework that the UK will use to implement sanctions and anti-money laundering policy after leaving the European single market. Section 49 of SAMLA (which is not yet in force) provides that a minister may make regulations concerning the enabling, detection or investigation of money laundering. Schedule 2 is then said to make

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[82] Bank of England, Fair and Effective Markets Review – Final Report, 10 June 2015
[83] Impact Assessment, para 10.8 10.18

further provision about the regulations that can be made under section 49.

Schedule 2 (paragraph 22) then states that regulations made under section 49 can impose requirements on conduct outside the UK by a "United Kingdom person, which includes British nationals and companies, and certain others who can be regarded as carrying on business in the UK. The Government has observed, however, that it is not clear under the current drafting that anti-money laundering regulations can be made in relation to non-UK trustees of trusts based outside the UK. A trustee is essentially someone that holds assets on behalf of someone else, and a trust is the mechanism by which these assets are held.

Even though a trust may be based out of the UK and the trustee may be a non-UK corporate or individual, the trust may have links to the UK – for example because it owns UK property. The Government therefore has a clear interest in obtaining information about such trusts (such as who is involved in them and who benefits from them) since they may be liable to pay UK tax. Clause 31 therefore amends Schedule 2 of SAMLA to ensure that regulations can be made in respect of trustees with links to the UK. Without it, any powers HMRC sought to exercise to access information on such trusts are at risk of being held invalid under legal challenge.[84]

The Government believes that this technical change will:

> reaffirm the UK's global leadership in the use of public registers of beneficial ownership, as identified by the Financial Action Taskforce's [*sic*] Mutual Evaluation of the UK in 2018. This will further support the public and private sectors to efficiently and effectively target their resources towards potential criminal activity using trusts, maintaining the resilience of the UK's defences against economic crime.[85]

2.12 Statutory Debt Repayment Plan (clause 32)

Clause 32 amends the *Financial Guidance and Claims Act 2018* (FGCA) to broaden the statutory debt repayment plan. The plan is the second part of the Debt Respite Scheme – the Government's strategy to help individuals struggling with problem debt.

The FGCA made provision for the creation by regulations of the Debt Respite Scheme. The Government's aim is to incentivise more people to access professional debt advice and to access it sooner, helping them reach sustainable debt solutions.[86] The Debt Respite Scheme fulfils a commitment made in the Conservative Party's manifesto for the 2017 general election:

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[84] Impact Assessment, para 11.7
[85] Ibid, para 11.11
[86] *Financial Services Bill*, Explanatory Notes, para 162

> For some people, the cost of living can become too great. Problem debt can be hard to escape and can compound family breakdown, worklessness, stress and mental health issues. We will adopt a "Breathing Space" scheme, with the right safeguards to prevent abuse, so that someone in serious problem debt may apply for legal protection from further interest, charges and enforcement action for a period of up to six weeks. Where appropriate, they will be offered a statutory repayment plan to help them pay back their debts in a manageable way. This will give eligible debtors time to seek advice and assistance to apply for a sustainable solution to their debt.[87]

The scheme offers two separate means of support to individuals in debt:

- Breathing Space
- A statutory debt repayment plan (SDRP)

The two elements should be viewed separately. A debtor would be able to enter a breathing space without then entering a SDRP. A debtor would also be able to enter a SDRP without having first entered a breathing space.

Breathing Space

Breathing Space will be implemented by the *Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020*. The Regulations will come into force on 4 May 2021. They will give eligible people who receive professional debt advice 60 days of "breathing space" during which interest, fees and charges are frozen and enforcement action is paused. For people receiving treatment for a mental health crisis, the moratorium may last for the duration of their crisis treatment.

Statutory debt repayment plan

A SDRP would offer people in problem debt and who are not suited to existing statutory debt solutions an alternative way of repaying debts, in full, over a manageable timeframe. The Government believes it can improve both debtors' finances and returns to creditors.[88] The Government has yet to set a date for the implementation of the SDRP. It stated in June 2019 that whilst Breathing Space would be introduced in early 2021, the SDRP would be developed over a longer timeframe.[89]

Clause 32 would amend the FGCA to give the Government greater powers in implementing the SDRP. The amendments are needed to allow the regulations to:

- compel creditors to accept amended repayment terms;

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[87] Conservative Party Manifesto 2017, p60
[88] HM Treasury, Breathing space scheme: response to policy proposal, 19 June 2019, para 1.8
[89] Ibid, para 1.17

- provide for a charging mechanism through which creditors will contribute to the cost of running the scheme and repayment plans; and
- include in SDRPs debts owed to central government departments.

The regulations would be subject to the draft affirmative procedure, requiring approval by a resolution of both Houses. Should the regulations provide for the scheme to apply in Wales and Northern Ireland, they would require the approval of the National Assembly for Wales and the Northern Ireland Assembly.

Clause 32 would extend to England and Wales and Northern Ireland, where there is currently no statutory debt solution focused entirely on repayment. Legislative Consent Motions will be needed for Wales and Northern Ireland. (The management of debt was devolved to the Scottish Parliament, not being reserved by the *Scotland Act 1998*). In England, Wales and Northern Ireland, any arrangement to freeze interest and charges, and to suspend debt recovery and enforcement action, is made voluntarily between debtors and their creditors. In contrast, Scotland's Debt Arrangement Scheme provides a six-week "breathing space" for debtors seeking debt advice, and a statutory repayment plan.

For an overview of the consultation process and the Treasury's proposals for SDRPs, see the Library briefing paper 'Breathing space for individuals in problem debt'.[90]

Response

The Money and Pension Service overwhelmingly supports the introduction of both Breathing Space and the SDRP, believing they have the "potential to provide new and effective ways to support more people in resolving debt problems and will add to the significant social and economic benefits that debt advice already offers".[91]

The debt charity StepChange has also welcomed the scheme.[92] However it has stressed that "sometimes people need a longer period of time to get through the debt advice process and into a long-term solution for their debts". It has called on the Government to ensure the SDRP allows for low start repayments, subject to review. It also highlighted the warning in Peter Wyman's 2018 Independent Review of Debt Advice that the debt advice sector needs to grow 50% in the next two years to help all those who need it.[93] StepChange urged the Government to ensure administration of the scheme does not increase costs or divert funding away from the debt advice frontline.

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90 CBP 7934, 18 July 2019
91 Money & Pensions Service, Debt Respite Scheme: Response to Request for Advice, 14 August 2019, p1
92 StepChange, Breathing Space and Statutory Debt Repayment Plans – Our take on the Government's proposed scheme, undated
93 Peter Wyman, Independent Review of the Funding of Debt Advice in England, Wales, Scotland and Northern Ireland, 2018, para 41

2.13 Successor accounts for Help-to-Save savers (clause 33)

Under the *Savings (Government Contributions) Act 2017* (SGCA), the Government introduced Help-to-Save accounts. These accounts were introduced to encourage working people on low incomes, and those in receipt of certain benefits, to save money.

Participants in the scheme may deposit up to £50 a month for four years. Government bonuses are paid after two and four years, being 50% of the highest amount saved.[94] Since the launch of the scheme, over 222,000 have opened Help-to-Save accounts, with over £85m deposited.[95]

However, neither the SGCA nor regulations made under it provide for what happens once the scheme is over, after four years. The legislation simply states that at the end of the maturity period, the Help-to-Save account ceases to be a Help-to-Save account.[96] For savers who do not withdraw the funds after maturity, therefore, the balance may simply remain in the account, not eligible for further bonuses but also not earning interest.

Clause 33 therefore amends SGCA to empower the Treasury to make regulations for the transfer of the balance (without charge) in a matured account to a successor account, where no practical instructions have been received from the account holder. These regulations are intended to be made in advance of the first accounts maturing just before January 2022 and will be subject to the negative procedure.[97]

2.14 Amendments to the PRIIPs Regulation (clause 34)

The EU *Packaged Retail and Insurance-based Investment Products* (**PRIIPs**) *Regulation*[98] introduced a new disclosure regime for certain investment products that are regularly provided to retail (i.e. non-professional) investors.

A PRIIP generally refers to an investment whose return can fluctuate because it is affected by assets which are not actually bought by the retail investor. A UCITS (see section 3.6 above) is an example of a PRIIP because investors are buying into the UCITS fund rather than the underlying assets which the UCITS invests in.

The PRIIPs Regulation requires those who manufacture, advise on or sell PRIIPs to provide a "key information document" (**KID**) to retail investors in good time before they invest. The KID must include information about the product and set out "performance scenarios" predicting what

[94] Gov.uk, Get help with savings if you're on a low income (Help to Save)
[95] Impact Assessment, para 13.7
[96] See Schedule 2, paragraph 3(2) of SGCA
[97] Delegated Powers Memorandum, paras 423 and 424
[98] OJ L 352/1, 9 December 2014

returns the investment might make in different scenarios. The idea is to increase transparency and allow retail investors to make more informed choices.

However, concerns about the PRIIPs Regulations have been raised since the legislation became effective on 1 January 2018. The FCA published a feedback statement[99] in February 2019 setting out feedback it had received from firms and consumers on the new PRIIPs requirements. Some of the concerns raise were:

- a lack of clarity over exactly what products were PRIIPs. Corporate bonds were identified as a particular area of concern since in some cases the amount to be repaid to the investor might not be clear at the outset[100] and evidence has suggested that some issuers of bonds have avoided retail issuances to avoid PRIIPs-related compliance risks, which in turn shrinks the market and reduces choice for consumers; and
- that the risk indicators and performance scenarios required to be included in KIDs could be misleading as they were based on flawed methodologies on the state of the market.[101]

At EU level, consultations have commenced on amendments to improve how the PRIIPs Regulation works,[102] but as any such amendments will be made following the end of the UK-EU transition period on 31 December 2020, they would not automatically apply in the UK. The Government has stated that it supports the objectives of the PRIIPs Regulation but intends to make changes to the onshored version of the PRIIPs Regulation (**UK PRIIPs**) to address some of the areas of concerns raised. Furthermore,

> In the longer term, the Government intends to undertake a more wholesale review of the disclosure regime for UK retail investors, but in the meantime, the Bill makes targeted amendments to the PRIIPs Regulation to avoid consumer harm and provide the appropriate certainty to industry.[103]

Clause 34 therefore grants the FCA the power to make rules specifying whether certain products are PRIIPs and replaces the obligation to set out "performance scenarios" with "information on performance". These amends can then be supplemented by rules made by the FCA under its existing rule-making powers.

Whilst UCITS are PRIIPs, they are currently exempted under the PRIIPs Regulation from having to produce KIDs until 31 December 2021. The Government is seeking to grant the Treasury a power to extend the UCITS exemption for up to a further five years. Since UCITS are currently

[99] FCA, PRIIPs Call for Input Feedback Statement, February 2019
[100] Also see for example the European Commission's letter on the treatment of bonds, dated 13 May 2019
[101] Ibid, pp 5 and 6
[102] European Securities and Markets Authority, Joint Consultation Concerning Amendments to the PRIIPs KID, 16 October 2019
[103] Explanatory Notes, para 179

obliged to provide their own key investor information documents under separate legislation, the Government considers that the current rules on UCITS disclosure are satisfactory.

Around 3,000 to 4,000 PRIIPs manufacturers currently operate in the UK. Since the Government's changes will mean that the UK version of PRIIPs will be different to that which is applicable in the EU, there is a potential extra cost to manufacturers of having to produce two separate KIDs for the UK and EU, as the requirements will be different. The Government has not yet estimated how many PRIIPs manufacturers sell in both the UK and the EU and so how many might be affected by this requirement. But since the regimes will still be substantially the same any additional costs should not be large. This is offset by the proposed benefits which includes greater clarity for manufacturers on whether their product constitutes a PRIIP and so whether they need to produce a KID, as well as better information going to retail investors.[104]

2.15 Over the counter derivatives: clearing and procedures for reporting (clause 35)

An over the counter (**OTC**) derivative contract is a privately negotiated contract between two parties without an intermediary whose value is based on an agreed-upon underlying financial asset or set of assets. An interest rate swap contract negotiated and agreed directly between a company and a bank, where the bank would agree to pay the company its interest liabilities under certain agreements in return for a set fee, would be an example of an OTC derivative contract.

The 2007-2008 financial crisis exposed weaknesses in the derivatives market. OTC derivatives were seen as lacking in transparency, because regulators, or parties to such contracts, would not have information on the total amount of derivatives transactions the other party has entered into. This limited regulators' ability to detect risks. It was also seen as risky because parties to these contracts are taking on the risk that, when required, the other party might not be able to pay. Given how interconnected the derivatives market is, with a large number of people potentially being affected by a few parties getting into financial difficulty, these contracts could pose risks to market stability in times of market stress.

The EU *European Markets Infrastructure Regulation*[105] (EMIR), adopted in 2012, sought to address some of the risks by requiring certain OTC derivative contracts to be "cleared". Clearing involves making a third-party heavily-regulated institution (a central counterparty, or CCP) a middle-man to the derivatives transaction, buying from the seller and selling to the buyer, so that the actual parties to the derivatives transaction do not literally transact (and so do not take credit risk on each other). Instead, they will be transacting with the CCP, who must

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[104] Impact Assessment, paras 14.13 to 14.15
[105] OJ L 210/1, 4 July 2012

meet strict prudential requirements, and so should pose a significantly lower credit risk than the end-party.

Given the strict prudential requirements on them, CCPs will generally only be willing to provide their clearing services to their members (**clearing members**), who it will have checked have sufficient financial resources and capacity to be able to use that CCP. Parties which cannot become clearing members can access CCPs as a client of a clearing member, either directly (by having a contract with a clearing member) or indirectly (by agreeing indirect clearing arrangements with a clearing member).

EMIR also requires parties to report the details of derivative contracts, whether OTC or traded on an exchange, they have entered into to an EMIR-registered "trade repository" which collects and maintains records of derivative contracts. This is intended to improve the availability of derivatives data to regulators and the public.

EMIR was amended in 2019 by the EU *EMIR Refit Regulation*.[106] However, some of its amends only come into force on 18 June 2021, after the end of the UK-EU transition period, and so do not automatically form part of UK law. Clause 35 of the Bill therefore amends EMIR (as onshored in the UK, being UK EMIR) to broadly reflect the changes made by the EU.[107]

The European Commission recognised in Recital 11 of the EMIR Refit Regulation that certain parties who do not trade in large volumes of derivatives, often have difficulty obtaining access to clearing services. As clearing is a regulatory requirement for some firms, they are often required to obtain these services on uncompetitive terms. The *EMIR Refit Regulation* therefore introduces an obligation for clearing members (and clients of clearing members who can provide access to that clearing member) to provide clearing services on fair, reasonable, non-discriminatory and transparent commercial terms. Clause 35 of the Bill broadly mirrors these requirements and empowers the FCA to make rules to specify what fair, reasonable, non-discriminatory and transparent terms means.

The EMIR Refit Regulation also requires trade repositories to establish policies and procedures to reconcile data received by different trade repositories, to verify the completeness and correctness of data reported, and to establish policies for the orderly transfer of data where requested or necessary. Clause 35 of the Bill also makes these changes and provides that the FCA may make rules relating to these requirements.

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[106] OJ L 141/42, 28 May 2019
[107] Delegated Powers Memorandum, para 438

2.16 Financial collateral arrangements (clause 36)

Collateral refers to an asset (such as shares) that a borrower will give to a lender as security from a loan. If the borrower then fails to pay the loan back, the lender can then take the collateral to offset its losses on the loan.

The EU *Financial Collateral Directive*[108] sought to simplify the process of taking financial collateral across the EU. However, whereas the Financial Collateral Directive was intended to apply to transactions involving certain financial institutions (including public authorities and many banks), the UK implementing legislation, the *Financial Collateral Arrangements (No.2) Regulations 2003* (the FCARs) applied the provisions to transactions between all institutions and businesses. So, while the FCARs are currently legally valid, subsequent litigation has raised the argument that the FCARs went beyond the scope of the EU *Financial Collateral Directive* in a way that exceeded the Government's powers. Clause 36 therefore affirms that the FCARs are valid and always have been, to avoid any doubt that might be raised by a future legal challenge.

Clause 36 also provides that the Government's power to make secondary legislation relating to financial collateral arrangements, contained in section 256 of the *Banking Act 2009*, should be subject to the draft affirmative rather than the made affirmative procedure, given that the made affirmative procedure is more appropriate for urgent legislation and was initially agreed to deal with any urgent issues that might have arisen from legal challenges to the FCARs.

2.17 Appointment of the Chief Executive of the FCA (clause 37)

The FCA is the UK's financial services conduct regulator, with a total annual budget of around £588 million,[109] funded by the firms it regulates.[110]

This clause inserts a provision requiring that appointments for the Chief Executive of the FCA be limited to a fixed, once-renewable five-year term (so for a maximum of ten years). Currently, legislation does not set out a term length for the FCA Chief Executive.

The new limits are consistent with appointments for Deputy Governor of the Bank of England, a commitment made by the Government in 2016[111] and with December 2016 guidance from the Commissioner for Public Appointments stating that "there is a strong presumption that no

[108] OJ L 168/43, 27 June 2002
[109] FCA, Business Plan 2020/21, section 7
[110] FCA, About the FCA, last updated 24 September 2020
[111] HC Deb 19 April 2016, vol 608, c805

individual should serve more than two terms or serve in any one post for more than ten years."[112]

2.18 Clauses 38 and 39

Clause 38 (Subordinate legislation made under retained direct EU legislation) makes two technical amendments to FSMA. The first ensures that regulations made by the Treasury and rules made by UK regulators under onshored directly applicable EU legislation can be included in determining various powers and functions under FSMA. The second amends the list of the FCA's legislative functions to include making rules under such onshored directly applicable EU legislation; this ensures that the FCA will exercise such powers through its governing body rather than by delegation.

Clause 39 (Power to make consequential provision) grants the Treasury the power to make regulations that are consequential on the provisions of the Bill. This is considered necessary because the manner of exercise and therefore the consequential effect of the powers granted in the Bill cannot yet be determined, and so a need for further necessary consequential legislation may emerge. Such regulations will be subject to the negative procedure unless they amend, repeal or revoke primary legislation, in which case the draft affirmative procedure must be used.[113]

[112] Cabinet Office, **Error! Hyperlink reference not valid.**, December 2016
[113] Delegated Powers Memorandum, paras 455 to 460

3. Commons Second Reading

The Bill passed Second Reading (2R) on Monday 9 November by unanimous voice vote. A total of fourteen Members contributed to the debate (including frontbenchers); by party, this comprised 8 Conservatives, 2 SNP, 1 Labour, 1 Liberal Democrat. 1 DUP and 1 independent (formerly Plaid Cymru).[114]

Members noted that the debate was not well attended, with SNP Treasury spokesperson Alison Thewliss stating:

> My colleague from the Treasury Committee, the hon. Member for West Worcestershire (Harriett Baldwin), mentioned earlier that some of the Benches in this place are a little empty this evening. I am sure that that is not because this is not a wonderfully exciting Bill—well, perhaps. But we have to look at the reality of the situation that we are in. We are here in London in lockdown and people are being advised not to travel. So I do not hold a grudge against any Member who has decided not to travel today, for their safety or the safety of their constituents and their families.

She went on to say:

> The Bill is, relatively speaking, a wee bit dull and a wee bit functional. Some bits have been taken out of the back of the drawer at the Treasury and presented in the Bill tonight.

In reference to the U.S. presidential election, the result of which had been forecast by several television broadcasters the previous Saturday, Shadow Economic Secretary to the Treasury Pat McFadden said:

> I have, of course, been riveted by the Bill in recent days, but I confess that I had to put it down for a while at 5 o'clock on Saturday to watch CNN when something more exciting than the Bill came through on the news.

Economic Secretary to the Treasury John Glen set out the Government's position, describing the Bill as a "first step in taking control of our financial services legislation" from the EU. He noted that:

> In many parts, the Bill is consistent with the approach we took while this country was still part of the EU, but there are areas where it will better suit us to choose our own path, and this Bill marks the start of a process of evolution towards our goals.

Three main areas of debate can be drawn out:

1. Scrutiny

In many areas, the Bill delegates rule-making responsibilities to regulators – namely the FCA and the PRA. Concerns were raised about the lack of Parliamentary scrutiny of such rules. Alison Thewliss stated:

> We cannot be in the situation where we take all these powers back from Brussels and hand them straight over to unaccountable, arm's length organisations. They might come before the Treasury Committee once every six months or so, when we will ask them some questions, and that is the extent of the scrutiny they get from this House.

[114] See HC Deb 9 November 2020, vol 683, col 656 to 696, from which all quotations in this section are drawn unless otherwise referenced

Conservative backbenchers Richard Fuller, Bim Afolami and Stephen Hammond also raised the issue of parliamentary scrutiny of regulators. Stephen Hammond, for example, argued:

> There also needs to be rigorous scrutiny of the regulators' rule-making powers by Parliament. As I said earlier, the Bill puts in place some major increases in powers for regulators, so it is completely appropriate that Parliament sets the scrutiny and accountability objectives. There are many ways to do that, and I know colleagues will suggest other methods later, but it is clear that one of the great successes has been the OBR, which analyses, scrutinises and gives an independent verdict on financial policy. It may well be appropriate that one of the ways that Parliament holds financial regulators to account is a similar body for financial regulation.

In his closing remarks, John Glen noted these concerns:

> Our independent expert regulators are a key strength of the UK's existing framework … it is these expert regulators who will be setting the firm-level requirements. We therefore think that they should continue to play a central role in developing and maintaining regulatory standards, in line with their statutory objectives. However, as my hon. Friend the Member for Wimbledon pointed out, that must be balanced with appropriate strategic policy input from Government and parliamentary scrutiny.

2. Environmental standards

The 2R debate took place shortly after a speech by the Chancellor entitled "The future of financial services", in which he announced plans to make the UK a "world leader in the use of green finance".[115] Members therefore questioned the absence of environmental standards in the Bill. Pat McFadden argued:

> […] clauses 1 to 7 deal with new prudential regulation requirements, the implementation of the Basel rules and the new accountability framework, which I quoted from a moment ago. As I said, the schedule on the accountability framework states that, when making these new rules, the regulator must have regard to the likely effect on the "relative standing" of the UK as a place for firms to be based or carry on activities. I want to explore that with the Minister. Does that clause about the relative standing of the UK mean that, every time a regulated entity says, "We don't want you to do that because it will affect our competitiveness in relation to other countries"—and they are liable to say that quite a lot when regulatory proposals are put forward—the regulators have to keel over and give in? How does this point to the UK being a leading player in the kind of environmental or social regulation that can help to ensure that the power of our financial services sector is a force for good?

Alison Thewliss stated:

> The Chancellor talked a lot earlier about how important those environmental outcomes are, but they are missing from this Bill. I do not know whether that is because one part of the Treasury is not speaking to the other or how else that has come about, but if the Government are now saying today that these environmental aspects are incredibly important and they should be a key part of COP26, as the former Governor of the Bank of England has also

[115] HC Deb, 9 November 2020, vol 683 col 619

> argued, they need to be in the Bill. If they are that important, the Government need to put them in the Bill.

Liberal Democrat Treasury spokesperson Christine Jardine said "the Bill requires some form of provision—more provision than we have heard—to take potential environmental impacts into account."

Mr Glen responded:

> A number of Members, including the right hon. Member for Wolverhampton South East, raised green finance. While he acknowledges that it is not directly related to the Bill—he wonders why—I hope the measures announced today show that the Government take their commitments in the green finance space very seriously. I look forward to engaging with him on the substantive points about how regulatory oversight works with the announcements made today.

3. Divergence

Following the end of the transition period on 31 December 2020, the UK will no longer be bound by EU legislation. On future divergence from EU law, John Glen noted:

> In many parts, the Bill is consistent with the approach we took while this country was still part of the EU, but there are areas where it will better suit us to choose our own path, and this Bill marks the start of a process of evolution towards our goals.

He went on to say that "However, we have no intention of needlessly, ideologically or recklessly diverging from EU legislation". Clause 35 (Amendments to EMIR) was given as an example of the Government maintaining EU standards, and clause 34 (Amendments to PRIIPs) was cited as an example of divergence.

Richard Fuller noted that "As we leave the European Union, we are keen to accelerate away from a sclerotic, introspective set of financial markets."

Alison Thewliss however argued:

> There should be no backsliding on the standards we have built up as part of being in the EU. It is an area in which we had huge and significant influence as a member state in making a lot of these rules.

Fresh issues

In addition to the three points above, some discussion also centred on matters absent from the Bill. John Glen addressed these in stating:

> I recognise that Members might be concerned that some of the Government's prior commitments are not included in the Bill. I assure the whole House that our focus on these issues has not wavered. One issue that came up in questions to the Chancellor earlier was access to cash. The Government are committed to ensuring that everyone who needs it has easy access to cash.

Concerns about access to cash were also raised by Pat McFadden. Alison Thewliss raised the issue of beneficial ownership registers, saying:

> I do not understand why there is not more to deal with the issue of trusts, or with the issue, as I have mentioned ad nauseum,

> about Scottish limited partnerships and proper reform of Companies House.

Kevin Hollinrake (Conservative, Thirsk and Malton) spoke about "the different and perhaps better things that might be done by the Bill in its later form or by another piece of legislation". Among the issues raised by him were:

- allowing small and medium-sized enterprises "rights of action" for breaches of FCA rules by regulated firms;
- the lack of inclusion in the Bill of a failure to prevent economic crime corporate offence, due to which, he argued, the UK "risks falling behind international standards";
- the "regulatory gap" caused by allowing regulated entities to sell loans and mortgages to unregulated entities abroad; and
- amendments to country-by-country reporting requirements to "make sure that multinationals pay a fair share of tax".

4. Commons Committee Stage

The Financial Services Public Bill Committee (the Committee) sat on 12 occasions between 17 November and 3 December 2020.

Committee Members

Chairs: Philip Davies, Dr Rupa Huq

Conservative (10): John Glen, Harriett Baldwin, Miriam Cates, Gareth Davies, Andrew Jones, Julie Marson, Robin Millar, Angela Richardson, David Rutley, Craig Williams

Labour (including Co-op) (5)**:** Pat McFadden, Abena Oppong-Asare, Stella Creasy, Angela Eagle, Jeff Smith

Scottish National Party (2): Alison Thewliss, Stephen Flynn[116]

Expert evidence was taken from the following groups on Tuesday 17 and Thursday 19 November:

Governmental bodies and regulators:

- The Financial Conduct Authority and the Prudential Regulation Authority;
- City of London Corporation;
- The Minister for Digital, Financial Services and Public Utilities, Her Majesty's Government of Gibraltar;

Trade bodies:

- UK Finance;
- International Capital Markets Association;
- The Investment Association;
- TheCityUK;
- The Association for Financial Markets in Europe;
- The British Private Equity and Venture Capital Association;
- The Association of British Insurers;

Charities and campaigning organisations:

- Spotlight on Corruption;
- StepChange;
- Transparency International;
- The Finance Innovation Lab; and
- Positive Money.[117]

[116] Financial Services Bill (First sitting), 17 November 2020, col 1
[117] Ibid

In total 83 amendments (comprising 41 new clauses and 42 amendments to existing provisions) were put forward. Of these:

- 19 were agreed to without a vote (all moved by John Glen);
- 18 amendments were not agreed following a vote (7 moved by the Labour frontbench, 5 by Stella Creasy (Labour/Co-op, Walthamstow), and 6 by the SNP. These amendments were consistently voted down along party lines;
- 28 were debated but not put to a decision;
- 17 were withdrawn after debate; and
- 1 was not chosen for debate by the Chair.[118]

4.1 Amendments agreed to without a vote

The 19 amendments agreed without a vote were all put forward by John Glen, Economic Secretary to the Treasury. They comprised corrections, clarifications and minor amendments – many simply corrected cross-references.

An example of a substantive (but nonetheless technical) amendment tabled and agreed to is amendment 32. The EU CRR II comes into force on 28 June 2021. Amongst the new prudential rules it brings in, as part of the Basel standards, is a revised method of calculating leverage ratios for financial services firms. Mr Glen explained that the revised calculation:

> […] will reflect the leverage of a transaction more appropriately, and at the same time increase the capacity of an institution to lend and to absorb losses […]

Due to the Covid-19 pandemic:

> The EU brought this provision forward through a derogation to the first capital requirements regulation that is currently in effect. The UK supported that approach. This derogation is time-limited in the EU to 28 June 2021, as that is when the relevant EU CRR II comes into force, which will put in place the new permanent provisions on leverage ratio. [119]

After leaving the European single market, this time-limited derogation will continue to apply in the UK (as EU law will be onshored) but the relevant CRR II provisions will not automatically apply in the UK because they come into force after the transition period is over. The Government is "targeting 1 January 2022" for implementing its own regime – six months after the derogation ceases to apply. Allowing the derogation to expire on 28 June 2021, before the UK's regime is effective, means firms would need to revert to the pre-derogation method of calculating leverage ratios under the CRR in the six-month gap between the derogation ending on 28 June 2021 and the UK's regime coming into force in January 2022. Mr Glen explained that:

> This amendment therefore removes the time limit on the derogation, so it will remain in place until the new permanent provisions are in place in the UK, giving clarity and certainty, and not seeking to cause disruption.[120]

[118] Public Bill Committee Proceedings, Financial Services Bill, Thursday 3 December 2020
[119] Official Report, Public Bill Committee, Financial Services Bill, p200
[120] Ibid, p201

4.2 Amendments not agreed following a vote

The 18 amendments that failed after a division were all tabled by opposition Members.

Labour frontbench amendments

Seven Labour frontbench amendments - moved by Pat McFadden, Abena Oppong-Asare and Jeff Smith - were voted down upon division. These were:

– **Amendment 19**. This amendment to Clause 1 would require the Government to publish a report before Parliament within three years of the passing of the Bill, detailing the impact of the amendments being made to the CRR on financial stability, competitiveness and consumer risk;

– **Amendments 20 and 21**. These sought to introduce to the accountability framework two additional factors the FCA must have regard to when exercising its prudential rule-making powers, being:

a. the target for net UK emissions of greenhouse gases in 2050 (a similar amendment was tabled by the SNP but not called); and

b. high standards in social practice and corporate governance including pay, adherence to equalities legislation, transparency and corporate responsibility.

The SNP also moved an amendment (**Amendment 38**) that would include having regard to "the likely effect of the rules on trade frictions between the UK and EU".[121]

– **Amendment 27**. This sought to require the PRA to review its own accountability framework at least every five years, and the Treasury to lay before Parliament the outcomes of such a review together with any changes it proposed to make as a result of this review;

– **Amendment 30**, which "would require that consumers are given information about the environmental, social and governance standards of PRIIPs" rather than simply information on investment performance;[122]

– **NC2**. This new clause would require the Treasury to publish a report on progress towards obtaining equivalence recognition for UK-based financial services firms operating within the European Union; and

– **NC6**. This would include in the FCA's general duties the principle of ensuring firms should not profit from exploiting consumers, and gives it to the power to introduce rules creating a duty of care owed by firms to consumers.

[121] Public Bill Committee Proceedings, Financial Services Bill, Thursday 3 December 2020, p4
[122] Official Report, Public Bill Committee, Financial Services Bill, p332

The Labour frontbench team had also tabled, but did not push to a vote, a new clause (NC24) which would create a corporate criminal offence of facilitating or failing to prevent economic crime, as suggested by Spotlight on Corruption in evidence and Kevin Hollinrake at Second Reading.[123] For the background to this matter see our briefing on Corporate Criminal Liability.

Amendments by Stella Creasy

Five amendments were pressed to a vote by Stella Creasy, who has a particular interest in debt and savings matters.[124] These were:

- **Amendment 34**, that "would require the breathing space to provide debtors with a minimum of 120 days protection from the accrual of further interest and charges and enforcement action";[125]
- **Amendment 35**, that "would remove the requirement in the current draft regulations for debt advice providers to conduct a 'mid-way review' of eligibility for breathing space";[126]
- **NC17**. This would require the Treasury to make regulations about buy-now-pay-later and other similar credit firms;
- **NC21**. This new clause would "ensure that the FCA considers the likelihood of consumer detriment arising from the firm's business model prior to, and following, authorisation, and that firm's [sic] hold sufficient financial resources to meet potential compensation claims from customers in full"[127]; and
- **NC37**. This would "revoke restrictions in the Co-operative and Community Benefit Societies Act 2014 on registered societies with withdrawable share capital from undertaking banking activities".[128]

SNP amendments

The six amendments, in the names of Alison Thewliss and Stephen Flynn, pressed to a vote were:

- **Amendment 38** described above;
- **Amendment 37** to clause 33 (Successor accounts to Help-to-Save savers) that would "ensure customers are contacted and informed before their funds are transferred" from their matured Help-to-save account;[129]
- **NC29**, that would "require a review of the impact of providing the Scottish Government with powers to allow the Scottish National Investment Bank to carry over reserves

[123] Ibid, p403
[124] Ibid, p329
[125] Ibid, p296
[126] Ibid, p306
[127] Notices of amendments given up to and including Tuesday 24 November 2020, p17
[128] Notices of amendments given up to and including Tuesday 1 December, p20
[129] Notices of amendments given up to and including Thursday 26 November, p3

between financial years beyond its current £100 million limit";[130]

- **NC31**, that would require FCA provisions (rules) made under the Bill to be laid and approved by the House of Commons;[131]
- **NC35**, that would require the Treasury within six months of the Act being passed to lay before Parliament a report on the effects on money laundering of clause 31 (Application of money laundering regulations to overseas trustees);[132] and
- **NC38**, which along the lines of Labour's NC6, requires the FCA to ensure the firms it regulates are acting with a duty of care to consumers.[133]

4.3 Key themes

Scrutiny

A common concern raised at Committee Stage was whether the new measures brought in by the Bill justified additional parliamentary scrutiny. Catherine McGuinness, from the City of London Corporation, said:

> I think it is important that we look at the right degree of scrutiny. Yes, when we speak to practitioners with the International Regulatory Strategy Group, it is their view that a joint Select Committee on financial regulation, which could look in detail at pieces of financial services regulation, would be a useful way of enhancing and embodying that scrutiny.[134]

Fran Boait from Positive Money said:

> The substantial transfer of power to the financial regulators—the Treasury, the FCA and the PRA—is concerning if there are not increases in parliamentary scrutiny and more detail about the accountability framework. I noted this morning that a number of amendments have been put forward, and I think a lot of them enhance accountability and require parliamentary scrutiny and reporting. I would really welcome that.[135]

Enhancing scrutiny was the aim of a number of the amendments tabled, including Amendments 19, 27, NC2 and NC29 described above. Over twenty other amendments, which were either not selected for debate or withdrawn before a vote, focused on enhancing scrutiny, for example by requiring further Parliamentary approval of secondary legislation or reports to be laid before the House of Commons.[136]

Two amendments (NC20, tabled by Dr Creasy; and NC32, tabled by the SNP) focused on enhancing the role of select committees, by giving

[130] Official Report, Public Bill Committee, Financial Services Bill, p410
[131] Ibid, p412
[132] Ibid, p415
[133] Ibid, p419
[134] Ibid, p43
[135] Ibid, p109
[136] For examples, see amendments 22, 23, 26, NC1, NC3, NC4, NC7, NC9, NC10, NC12, NC14, NC20, NC25, NC28, NC30, NC31, NC32, NC33, NC34, NC35, NC36, NC39, NC40 and NC42

them the power to require regulators to undertake investigations, or by creating entirely new committees in the Houses of Commons and Lords to focus on financial regulation.[137]

In making the argument for further scrutiny, Ms Thewliss said:

> I agree that it is vital that there is scrutiny of these institutions and these powers. It is surely unacceptable that the Government have made so much play of taking back control from the EU only to hive it off to regulators because it is far too terribly complicated for us parliamentarians to worry our sweet heads about. That is not acceptable. That is not the way that it works in the European Union, and it certainly should not be the way Westminster operates. We should trust ourselves and our colleagues slightly more to do that scrutiny. If European parliamentarians, some of whom are now in this place, can do it, we can certainly look at a way that this can be done and that accountability can be taken for these powers.[138]

Mr Glen however felt that introducing additional scrutiny mechanisms in the Bill was unnecessary. Commenting on one amendment, he said:

> I contend that the Bill contains sufficient mechanisms to ensure public and parliamentary scrutiny of both the FCA and the Treasury through the draft affirmative procedure and the FCA reporting requirements. […][139]

He later commented:

> I would like to reassure the Committee that I am committed to ensuring appropriate accountability and scrutiny around new rules for our financial sector. That is why I recently published a consultation document on the review of the future regulatory framework for financial services. This review seeks to achieve the right split of responsibilities between Parliament, Government, and the regulators now that we have left the EU. It seeks views, including those of all parliamentarians, on how we can best scrutinise and hold the regulators to account, while respecting and safeguarding their independence.[140]

Consumer protection

Several amendments tabled sought to enhance consumer protection. Many focused on clauses 32 (Debt respite scheme) and 33 (Successor accounts for Help-to-save savers), or on the FCA's general duties. These included amendments 30, 34, 35, 37, NC6, NC21 and NC38 discussed above.

On the topic of imposing on financial services firms a duty of care towards their consumers, for example, Mr McFadden argued:

> Those who argue for a duty of care—I refer again to the charity StepChange—suggest that the current regulatory framework, even with the duty to treat customers fairly, which is part of the FCA's current advice and regulations to providers, does not provide adequate protection for consumers. They seek to prompt the question from a financial service provider, "Is this right?"

[137] Official Report, Public Bill Committee, Financial Services Bill, pp 400 and 412
[138] Ibid, p181
[139] Ibid, p141
[140] Ibid, p413

> rather than just, "Is this legal?" That is a helpful way of considering what difference a duty of care might make.[141]

Stella Creasy added:

> If we want the FCA to be able to protect our consumers in the future, we need to add a request that one of the things it has to consider is a failure of its own to intervene, which is what happened in the payday lending industry, what I believe is happening in the credit card industry, and what is happening in the guarantor loan industry. Members may have seen the adverts for Amigo Loans; many may have already had somebody come into a constituency surgery who is in difficulties with those loans.[142]

Alison Thewliss was also supportive:

> Banks and other financial institutions have a duty to look at things more carefully, and to take their duty of care seriously. Organisations that support the introduction of this duty of care include the Money Charity, Fair By Design, StepChange, Age UK, the Alzheimer's Society and the Money and Pensions Service, as well as Macmillan Cancer Support.[143]

However, John Glen responded:

> The Government believe that, as the FCA is already taking steps to ensure that consumers are treated fairly and financial services firms are obliged to exercise due care and regard when offering products, services and advice, a statutory duty of care requirement is not necessary. I have already set out a number of actions that the FCA is taking to ensure that customers are properly protected.
>
> […]
>
> The Government believe that there are sufficient protections in place without expanding the FCA's statutory consumer protection objective or introducing a statutory duty of care, but I reassure members of the Committee that we will continue to work closely with the FCA to keep this issue under review—I am not saying "No, never."[144]

4.4 Result

The Bill emerged from Committee Stage in substantially the same it entered it - amended only by the largely technical amendments moved by Mr Glen.

All amendments moved by the Labour frontbench, Dr Creasy, and the SNP, and pressed to a division, were voted down. Dr Creasy referred to Mr Glen's "Scrooge-like refusal to amend the Bill"[145] and Pat McFadden remarked that:

> The Minister has been consistent in resisting every amendment and new clause over the past couple of weeks, and I appreciate that he has probably come armed with advice not to accept any

[141] Ibid, p360
[142] Ibid, p366
[143] Ibid, p371
[144] Ibid, pp 372 and 373
[145] Ibid, p416

> amendments, even if they look okay, because there may be a drafting issue or something.[146]

Alison Thewliss concluded:

> I said on Second Reading that we would bring forward constructive amendments and the Government would ignore them, and that turned out to be what happened, but we hope that on Report perhaps some of the good Opposition suggestions, made with the best intentions to make things better for all our constituents, will be taken on board.[147]

One amendment Mr Glen agreed to consider in detail is NC8. This new clause:

> would update definitions in the Proceeds of Crime Act 2002 to reflect the growth of financial technology companies in the UK by equalising the treatment of fin tech companies with banks on money laundering and Account Freezing Orders.[148]

The clause appears to have been suggested in written evidence submitted to the Committee by fintech and electronic money company Revolut.

Mr Glen said that:

> The Government are aligned with the intent [of the amendment], so I have asked my officials to work—and, indeed, I have been working myself—with colleagues across Whitehall, particularly in the Home Office, to identify a way of addressing this issue that is consistent with the broader regulatory framework for these firms. I intend to provide the House with an update on Report.[149]

The new clause was subsequently withdrawn by Shadow Exchequer Secretary to the Treasury Abena Oppong-Asare in light of this commitment.

[146] Ibid, p356
[147] Ibid, p420
[148] Ibid, p379
[149] Ibid, p383

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