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Financial Services and Markets Bill 2022-23

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Summary

The Financial Services and Markets Bill 2022-23 (Bill 146) is a Government Bill introduced in the House of Commons on 20 July 2022. Second reading was on 7 September 2022 and the Bill completed its Commons committee stage, in nine sittings, on 3 November 2022.

According to the Treasury, the Bill would:

- Implement the outcomes of the Future Regulatory Framework (FRF) Review
- Maintain the UK's position as an open and global financial hub
- Harness the opportunities of innovative technologies in financial services
- Bolster the competitiveness of UK markets and promote the effective use of capital
- Support the levelling up agenda, promote financial inclusion and consumer protection

Bill documents are available on Parliament's online bill page. As introduced, the Bill contained 73 clauses and 14 Schedules, covering over 20 separate measures and stretching to 335 pages. All its measures (with two exceptions relating to Northern Ireland) would apply across the UK.

Leaving the EU Single Market

In 2021, the financial services sector contributed 8.3% of total UK economic output and (according to PwC research) in 2019/20 provided about a tenth of total Government tax receipts.

The UK is currently undergoing changes in the regulation of financial services. In October 2020, the Treasury consulted on the Future Regulatory Framework for financial services to consider how to adapt regulation to reflect the UK's new position outside of the EU. A further consultation (PDF) was issued in November 2021. The Treasury responded to that consultation (PDF) alongside the Bill's publication in July 2022. Many of the Bill's measures seek to implement measures consulted on as part of this review.

As an EU Member State, the UK applied hundreds of pieces of EU financial services legislation. When the UK left the EU Single Market on 31 December 2020, much of this legislation was "onshored" (preserved in domestic law) as "retained EU law". The Government believes that, for the most part, issues

dealt with by retained EU law would best be dealt with by UK regulators – mainly the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) – exercising their own rule-making powers.

The Bill's measures (as introduced)

The Bill is made up of seven Parts.

Part 1 contains three Chapters:

- Chapter 1 (clauses 1 to 7) would allow for the Treasury to revoke (or amend) hundreds of pieces of retained EU financial services law.
- Chapter 2 (clauses 8 to 23) would then grant additional powers to regulators to, in part, fill gaps in regulation left by the revocation of retained EU law. It would also allow for greater regulation of financial promotions (advertising of certain financial services) and stablecoins (a type of cryptoasset).
- Chapter 3 (clauses 24 to 46 – with an additional clause 47 (Chair of the Payment Systems Regulator as member of FCA Board) added at Commons Committee Stage) would implement measures intended to ensure appropriate democratic accountability for regulators, considering the significant transfer of powers to them that the Bill facilitates. This would include giving the FCA and PRA new secondary objectives to advance the international competitiveness and medium to long-term growth of the UK economy, and to have regard to the Government's commitment to reach net zero emissions by 2050. It would also allow greater involvement (but, the Government argues, not direction) by the Treasury in the regulators' rule-making process, as well as greater involvement by the Treasury Select Committee in FCA and PRA consultations.

Part 2 (originally, clauses 47 and 48) seeks to ensure continued access to cash.

Parts 3 to 5 (originally, clauses 49 to 51) would allow for greater regulation of individuals working in firms that set processes for financial transactions. It would also establish special procedures in the event of insolvency of one such type of firm (central counterparties) and insurers.

Part 6 (originally, clauses 52 to 65 – with a new clause 61 (Cryptoassets) added at Committee Stage) contains several miscellaneous measures. These include a replacement for the Cash Ratio Deposit scheme (the Bank Levy) and enhanced compensation arrangements for victims of advance push payment fraud.

Part 7 (originally, clauses 66 to 73) contains provisions relating to, for example, interpretation, extent and commencement of the Bill.

Initial responses to the Bill

The banking and finance trade body UK Finance supports the Bill, arguing it "gives the UK the opportunity to create a more competitive financial services sector post-Brexit, while preserving high regulatory standards tailored to our needs". TheCityUK, which advocates for the financial sector, said it would "study the Bill in detail". It said it supported many of its key measures, including on new competitiveness and growth objectives for the regulators (clause 24), transfers of powers to the regulators, and on giving the Government a power to require regulators to review their rules (clause 27). The consumer group Which? also expressed support for the Government's measures on access to cash and authorised push payment fraud (clauses 47-48 and 62).

However, Finance for our Future, a coalition of public interest groups, argued the Bill would "miss a golden opportunity to strengthen the UK's global leadership position by failing to focus regulation on what matters."

Financial charity the Finance Innovation Lab was concerned that the Bill's "proposals don't go far enough to address [the] UK's biggest challenges." It also opposed proposals to grant the financial regulators new growth and competitiveness objectives (clause 24). Social justice campaign group Global Justice Now said the Bill would "give even more power" to the financial sector. It feared this would "unleash a wave of dangerous financial trading, fuelling volatility in the economy and further driving up the prices of basic commodities."

Second reading and Committee Stages

Commons Second Reading

The Bill was given its second reading on Wednesday 7 September without a division. 39 MPs participated in the "very well subscribed" debate, which was opened by then-Economic Secretary Richard Fuller.

Labour (Shadow Minister Tulip Siddiq) and the Liberal Demorats (Sarah Olney) expressed broad support for the Bill. The SNP had tabled a reasoned amendment to deny the Bill a second reading (which was not selected for a vote), but opted not to oppose second reading itself. Shadow Minister Tulip Siddiq called for the Bill to go further to counter fraud, ensure access to essential banking services, and support the mutuals sector.

Several Members (including Labour MPs Dame Angela Eagle and Emma Hardy, and Peter Grant (SNP)) raised concerns over whether the Bill would grant too much power to the Goverment to by-pass parliamentary scrutiny.

A number of Conservatives (including then-backbenchers Rishi Sunak and John Glen, and Bim Afolami) expressed support for a Government proposal (which was ultimately dropped) to amend the Bill to introduce a "call-in" power allowing the Government to intervene more directly in financial services regulation. Lastly, former Shadow Chancellor John McDonnell, Sarah Olney and Caroline Lucas (Green) expressed concern over proposals (in clause 24) to grant regulators (the FCA and PRA) new secondary objectives relating to growth and international competitiveness, at the possible expense of other objectives.

Commons Committee Stage

The Public Bill Committee met nine times between 19 October and 3 November 2022. It comprised 17 MPs: 10 Conservative (Treasury Minister Andrew Griffith), 5 Labour (including Shadow Minister Tulip Siddiq) and 2 SNP (including spokesperson Peter Grant).

Two Government New Clauses were inserted – both without division. New Clause 13 (Chair of the Payment Systems Regulator as member of FCA Board) would add the chair of the Payment Systems Regulator to the board of the FCA. It now forms clause 47 of the Bill. New Clause 14 would (according to Andrew Griffith) bring cryptoassets "within the scope of regulation for the first time…It will ensure that the Treasury is equipped to respond to developments in the crypto sector more quickly and deliver regulation in an agile, risk-based way". It now forms clause 61 of the Bill.

Several largely technical Government amendments were made to clauses 5, 8, 36, 67 (currently clause 69), 70 (currently clause 72), 72 (currently clause 74), and Schedules 11 and 12. No non-Government amendments were made to the Bill.

1 Overview

This section was written before the Bill's Commons second reading debate on 7 September 2022. Clause references are therefore to the Bill as introduced to Parliament.

The Financial Services and Markets Bill 2022-23 (Bill 146 – the "Bill") is a Government Bill introduced in the House of Commons on 20 July 2022. Second reading is scheduled for Wednesday 7 September 2022. The Bill's accompanying Explanatory Notes, Delegated Powers Memorandum and Human Rights Memorandum are available on the Bill page.

Financial services are reserved for the Westminster Parliament, so the Bill's measures (with two exceptions) would apply across the UK. The exceptions are two provisions (on Credit unions and Reinsurance for acts of terrorism (clauses 63 and 64, and Schedule 14) which would extend to Great Britain but not Northern Ireland.[1] No legislative consent motions are being sought.

Financial services in the UK

In 2020, the financial services sector contributed 8.6% of total UK economic output. In Q1 2021 there were 1.1 million financial services jobs in the UK – around two thirds of which are outside London.[2]

The Commons Library briefing Financial services: contribution to the UK economy contains statistics on the contribution of the financial services sector.

Brexit

On 31 December 2020, the UK left the EU single market. The terms of the trade deal the UK Government signed with the EU provided for a substantial loss of market access to the EU for UK financial services firms. Prime Minister Boris Johnson said that the UK-EU trade deal signed with the EU "does not go as far as we would like"[3] on financial services.

1 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), p234-235
2 See the Commons Library briefing CBP-6193 Financial services: contribution to the UK economy
3 Financial Times, Inside the Brexit deal: the agreement and the aftermath, 22 January 2021

It will take time to know the full impact on Brexit on the UK's financial services sector. Early indications suggest there has been an economic impact, but that it may not be as bad as initially feared by some.[4]

A twice-yearly ranking of the competitiveness of financial markets compiled by a City of London and a China-based think tank ranked London second in the world (behind New York) in March 2022.[5] Whilst retaining its second place position, London received its lowest individual points score (726) since the ranking was first published 16 years ago.[6] Edinburgh was ranked 21st.[7]

For information on the financial services terms of the UK-EU trade deal and its early impact, see the Library briefing on The UK-EU trade deal: financial services.

The future of UK financial services

The UK is currently in the midst of far-reaching changes in the regulation of financial services, as the Government implements its vision for the sector and seeks to take advantage of the additional regulatory freedom that accompanies being out of the EU single market.

In January 2021, then-Chancellor Rishi Sunak told City A.M. that financial services firms should await a "Big Bang 2.0".[8] "Big Bang" is a reference to the deregulation agenda pursued under Margaret Thatcher's government which supporters credit with making UK financial services more attractive to overseas markets, but which critics say sowed the seeds for the 2008 financial crisis.[9]

The Future Regulatory Framework

As part of this reform agenda, the Treasury launched in October 2020 a consultation on the "Future Regulatory Framework", to ask how financial services regulation needs to adapt to be "fit for the future", in particular given the UK's new position outside of the EU.[10]

This was followed by a further consultation (which closed in February 2022) on its proposals for reform,[11] which included giving regulators a greater focus on growth and competitiveness by introducing them as new secondary objectives for the regulators (the Prudential Regulation Authority and Financial Conduct

4 See section 6 of the Commons Library briefing CBP-6193, Financial services: contribution to the UK economy
5 Long Finance, The Global Financial Centres Index 31, March 2022
6 Long Finance, GFCI Over Time, London [accessed 30 August 2022]
7 Long Finance, The Global Financial Centres Index 31, March 2022
8 City A.M., Chancellor Rishi Sunak: The City could be set for a post-Brexit Big Bang 2.0, 11 January 2021
9 See BBC News, How the Big Bang changed the City of London for ever, 29 October 2016
10 HM Treasury, Future Regulatory Framework (FRF) Review: Consultation, October 2020, Executive Summary
11 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021

Authority), and introducing a new requirement in legislation for regulators to respond in writing to formal responses to statutory consultations from Parliamentary committees. These proposals set out eleven questions for respondents to consider.[12]

In July 2022 – the same month as the Bill was published - the Government set out its response to the consultation, and its final plans for reform. Many of the Bill's measures implement proposals that the Government consulted on as part of the Future Regulatory Framework review.[13]

The Bill

Mansion House speech

On 19 July 2022 Nadhim Zahawi gave the Chancellor's annual Mansion House speech. He confirmed that the Financial Services and Markets Bill would be introduced to Parliament the following day, referring to it as a "landmark piece of legislation" that gives the Government the tools it needs "to seize the opportunities of Brexit and create a safer, better system for consumers".[14] He explained some of the Bill's key measures:

- The repeal of hundreds of pieces of retained EU law (thereby allowing for reform of the various regimes they establish)
- Giving the UK's financial services regulators (the Financial Conduct Authority and the Prudential Regulation Authority) greater rule-making powers
- Giving the regulators new secondary objectives of facilitating growth and international competitiveness
- Safeguarding access to cash
- Enabling regulators to require that victims of certain banking scams (authorised push payment fraud) receive their money back.[15]

Separately, Mr Zahawi noted in the speech that there had been speculation that the Government would grant itself powers to "intervene in financial regulation, in the public interest". The Financial Times had noted on 17 July – two days before the speech – that the Bill would provide for Ministers to be able to "call in" regulatory decisions made by the Bank of England that they do not like.

12 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021

13 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, Response to the Consultation, July 2022

14 HM Treasury, Mansion House Speech by the Chancellor of the Exchequer, published 20 July 2022

15 As above

The proposals had reportedly cause concern at the Bank of England, resulting in tense negotiations between the regulator and the Government over fears that "regulators would constantly have politicians looking over their shoulders".[16] However, Mr Zahawi confirmed in the Mansion House speech that the proposal would not be in the Bill, "because I want time to consider all the arguments before making such an important decision."[17]

The Bill's structure

The Bill is the second piece of financial services legislation the Government is seeking to pass following the UK's exit from the EU single market. The first – the Financial Services Act 2021 – was largely technical and passed Commons second reading, report stage and third reading without a division.

The Bill's 73 clauses and 14 Schedules stretch to 335 pages, containing over 22 separate measures. These measures, together with the reaction to them, are explained in the remaining sections of this Bill paper. Many of the measures are technical and so have not attracted significant public comment or commentary.

General commentary

Support

Banking and finance trade body UK Finance is supportive of the Bill, describing it is an "important piece of legislation [that] gives the UK the opportunity to create a more competitive financial services sector post-Brexit, while preserving high regulatory standards tailored to our needs".[18] TheCityUK, which advocates for the financial sector, said it would "study the Bill in detail"[19] but supported many of its key measures, including on new competitiveness and growth objectives for the regulators (clause 24), a transfer of powers to the regulators (mainly Chapter 2 of the Bill) and on giving the Government a power to require regulators to review their rules (clause 27).[20]

Consultancy firm EY praised the Bill as providing "greater clarity on the treatment of new and emerging areas of financial services", saying that the "the UK needs to ensure it does not fall behind other global financial centres".[21] Law firm Shearman & Sterling described it as an "important step forward for the U.K." in reforming regulation of financial services.[22]

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16 Financial Times, Bank of England battle looms over plans for second 'Big Bang', 17 July 2022
17 HM Treasury, Mansion House Speech by the Chancellor of the Exchequer, published 20 July 2022
18 UK Finance, Financial Services and Markets Bill [accessed 31 August 2022]
19 TheCityUK, TheCityUK comments on the Financial Services and Markets Bill, 20 July 2022
20 TheCityUK, Summary of the Financial Services and Markets Bill 2022 and the Chancellor's Mansion House speech [accessed 31 August 2022]
21 EY press release, EY comment on the 2022 UK Financial Services and Markets Bill, 21 July 2022
22 Shearman & Sterling, UK Financial Services and Markets Bill 2022, 1 August 2022

Consumer group Which? expressed support for the Government's measures on access to cash and authorised push payment fraud (clauses 47-48 and 62) but noted it would conduct further scrutiny of the legislation to ensure "adequate protections are in place".[23]

Opposition

However, Finance for our Future, a coalition of public interest groups, said the Bill will "miss a golden opportunity to strengthen the UK's global leadership position by failing to focus regulation on what matters". In particular, they think the Bill should do more on the climate, financial inclusion, economic stability, and public accountability.[24]

Financial charity the Finance Innovation Lab said it was concerned that the Bill's "proposals don't go far enough to address [sic] UK's biggest challenges".[25] Its Head of Policy and Advocacy, Marloes Nicholls, expressed the Lab's particular opposition to proposals to grant the financial regulators new growth and competitiveness objectives (clause 24), saying that "asking regulators to boost 'competitiveness' is more likely to drive them down, putting the UK once again at the forefront of a race to the bottom that can only end badly".[26] The Lab notes that in May 2022, what it described as "over 50 leading economists" wrote a letter to the Treasury raising concerns over plans to make competitiveness a greater focus in financial regulation.[27]

Nick Dearden, director of social justice campaign group Global Justice Now, said the Bill would "give even more power" to the financial sector, which would "unleash a wave of dangerous financial trading, fuelling volatility in the economy and further driving up the prices of basic commodities".[28]

[23] Which? Which? responds as government publishes Financial Services & Markets Bill, 20 July 2022
[24] Finance for our future, "Our demands" [accessed 31 August 2022]
[25] Twitter, Finance Innovation Lab, posted 8 August 2022 at 11:00
[26] Long Finance, You Don't Get Growth By Picking Winners: Against A 'Competitiveness' Objective For Financial Regulators, 22 August 2022
[27] The Finance Innovation Lab, Economist Letter: Dangers of a competitiveness objective for financial regulators [accessed 31 August 2022]
[28] Global Justice Now, EXPOSED: New PM to give bankers more power to gamble on food, 26 July 2022

2 Part 1: Regulatory framework (Clauses 1 to 46)

This section was written before the Bill's Commons second reading debate on 7 September 2022. Clause references are therefore to the Bill as introduced to Parliament.

2.1 Chapter 1: Revocation of retained EU law (Clauses 1 to 7)

Background: Retained EU law and "onshoring" financial regulation (2018-2022)

Financial services regulation in the EU

When the UK was a member state of the EU, and during the 11-month post-Brexit transition period (ending 31 December 2020), it was obliged to follow EU law. One of the major policy areas regulated by EU law was financial services.

This meant that UK law on financial services was closely aligned to, and often in dynamic alignment with, those of other member states, with many common rules and frameworks. [29] The UK, for example, had to follow EU regulations, ensure domestic law gave effect to EU directives, and implement the EU treaties, so far as they had a bearing on financial services.

Consequences of leaving the EU

The end of the post-Brexit transition period marked the point at which EU law no longer had direct application to the UK. Unless something was done to replicate that law, it would simply fall away.

The UK Government proposed, in its EU (Withdrawal) Bill introduced in 2017, to legislate for the repeal of the European Communities Act 1972 (ECA).[30] The

[29] UK In A Changing Europe, What is dynamic alignment?, [last accessed 16 August 2022]
[30] European Communities Act 1972 (repealed)

ECA had given direct effect in domestic law to EU law (including on financial services). Unless something was done to preserve those effects, that legal framework would similarly have fallen away.

The ECA had also given UK Ministers very broad powers to make secondary legislation to give effect to EU obligations. This was especially important for the implementation of EU directives. Unless something was done to preserve that delegated (i.e. secondary) legislation, it too would mostly fall away at the same time as the repeal of the ECA.

Retained EU law and onshoring financial services rules

The solution adopted is known as "retained EU law". The EU (Withdrawal) Act 2018 (EUWA) provided for these various sources of EU and EU-related law to be preserved in UK domestic law, as they stood on 31 December 2020. [31] EUWA also gave Ministers temporary powers (which expire after 2022) to modify "retained EU law" for the purposes of preventing and correcting "deficiencies" that would otherwise arise by virtue of the UK's departure from the EU. The Act additionally provides interpretive rules to ensure the consistent interaction between retained EU law and other forms of domestic law.

Although the intention was that there would no longer be dynamic alignment of UK and EU law, their substance would remain, initially at least, broadly similar. This process, in the context of financial services, was referred to by the Treasury as the "onshoring" of the EU's regulatory regime. In the Financial Services Future Regulatory Framework Review Phase II Consultation of October 2020, it said:

> the bulk of EU financial services legislation will form part of UK law and will continue to apply in the UK after exit, with necessary changes to make sure that it operates effectively. This approach was adopted so that Parliament would play a full role in approving changes needed to ensure onshored legislation works as intended after the transition period ends. It was also designed to ensure that Parliament would take any future decisions on what should happen to the body of onshored legislation as the UK adapts its regulatory approach. [32]

However, the Government also indicated that this was a temporary solution, and that more fundamental changes to the structure, content and sources of financial services law would be undertaken further down the line:

While the onshoring approach is right for the immediate period after EU exit, it was not designed to provide the optimal, long-term approach for UK regulation of financial services. In fact, there would be significant disadvantages to retaining the onshored regime over the long term. [33]

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[31] European Union (Withdrawal) Act 2018

[32] HM Treasury, Future Regulatory Framework (FRF) Review: Consultation, 30 November 2020

[33] HM Treasury, Future Regulatory Framework (FRF) Review: Consultation, Section 2.19, 30 November 2020

Moving away from "retained EU law"

This Bill represents a significant move away from relying on retained EU law as a means of regulating the UK's financial services sector. The Treasury has set out its intention to revert to what it calls the "FSMA model". This a reference to the consolidation of financial services regulation, along the lines of the Financial Services and Markets Act 2000 (FSMA).[34]

The Government has argued that EU membership, especially post 2008, had created more complicated lines of regulatory accountability, undermining the main advantages of the FSMA model. The growth of EU-wide financial services legislation since the Global Financial Crisis, in particular, was identified as a cause of fragmentation and a "patchwork" of legislation.[35]

The Government maintains that the issues addressed in retained EU law at the moment would and should be, for the most part, better dealt with by domestic regulators exercising rule-making powers, rather than by frequent reversion to Parliament (whether through the passing of primary legislation or the approval of statutory instruments).

This has culminated in Part 1 of the Bill.

Clause 1 and Schedule 1: Revocation of retained EU law

Clause 1 and Schedule 1 of the Bill provide for the revocation of (essentially) all of the retained EU law concerned with the regulation of financial services in the UK. In particular, the Bill would revoke:

- 32 EU regulations (Schedule 1 Part 1);
- Almost 200 UK statutory instruments that implemented EU law (Schedule 1 Part 2);
- Retained tertiary legislation made under any of 25 EU directives, or under any of the aforementioned EU regulations or UK statutory instruments (Schedule 1 Part 3);
- related parts of the Financial Services and Markets Act 2000 (Schedule 1 Part 4); and
- any other related EU-derived legislation to the extent it is concerned with financial services or markets regulation (Schedule 1 Part 5).

Clause 1 would also sweep away any financial services-related retained EU "rights, powers, liabilities, obligations, restrictions, remedies and procedures" that would otherwise have continued to be recognised by domestic law under section 4 of EUWA.

[34] Financial Services and Markets Act 2000

[35] HM Treasury, Future Regulatory Framework (FRF) Review: Consultation, Section 2, 30 November 2020

Exceptions

Clause 1 includes two important caveats to the revocation of the above mentioned retained EU law.

Firstly, if Ministers have already modified retained EU law under other powers (for example the "deficiencies" power in EUWA) then those modifications are preserved during the transitional period (on which see below).

Secondly, the Treasury can make regulations, under the negative procedure, narrowing the range of EU-derived legislation that would be covered by Schedule 1 Part 5.

When will this retained EU law be revoked?

The Bill does not specify when section 1 and Schedule 1 would come into force, and different parts of them could come into force at different times. This would be done using commencement regulations made by the Treasury.

There would therefore be a "transitional period" of undefined length, after Royal Assent, for each provision that is to be revoked. During that period, the relevant retained EU law would remain in force, unless and until revoked by the Treasury. As the Explanatory Notes set out:

Each piece of legislation captured by Schedule 1 has its own transitional period, which lasts from the commencement of this clause to the point at which the revocation of that instrument is commenced.[36]

Clause 2 and Schedule 2: Transitional amendments

During the "transitional period" clause 2 and Schedule 2 would make changes to some of the instruments slated for eventual revocation under Schedule 1:

- Part 1 of Schedule 2 modifies Regulation (EU) No 600/2014 on markets in financial instruments;
- Part 2 of Schedule 2 modifies Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories;
- Part 3 of Schedule 2 modifies Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation;
- Part 4 of Schedule 2 modifies a UK statutory instrument made in 2017 under the Financial Services and Markets Act 2000; and
- Part 5 of Schedule 2 modifies two UK statutory instruments:

[36] Explanatory Notes to Financial Services and Markets Bill (pdf), para 677

- The Electronic Money Regulations 2011; and
- The Payment Services Regulations 2017.[37]

Clause 3: Further Treasury powers during transition

Over and above the modifications made directly by clause 2 and Schedule 2, the Bill would empower the Treasury to modify any legislation referred to in Schedule 1 for any of 11 different purposes, set out in subsection 3(2). The purposes in question are very broadly drawn; for example, regulations can be made "in connection with protecting and enhancing the integrity or stability of the financial system operating in the United Kingdom". The Government argues that these listed purposes "closely relate to the regulators' statutory objectives".

These regulations are potentially very powerful in terms of further delegation from the Treasury to regulators. Subsection 3(4) would allow such regulations:

- to confer new powers on the Treasury or a regulator;
- to grant new rule-making powers on a regulator;
- to enable a regulator to charge fees in relation to its functions; and/or
- to create, among other things, new criminal offences, or modify existing ones.

Regulations can also be made under clause 3 for the purposes of "restat[ing] legislation in a clearer or more accessible way" and can make supplementary, incidental, consequential, transitional, transitory or saving provision.

There would be a requirement for the Treasury to consult the regulators before making regulations under clause 3, though this does not always apply to either the Bank of England or the Payment Systems Regulator.

The Government's argument for delegating this power is essentially to do with speed and efficiency. As the Delegated Powers Memorandum puts it:

> Without such a power, amendments to retained EU law during the transitional period, where a piece of law has been repealed but that repeal has not yet been commenced, would generally require primary legislation. The government does not consider that it is appropriate to continue to ask Parliament to pass primary legislation in order to update legislation which Parliament has agree [sic] to repeal by passing this Bill.
>
> Furthermore, this is very likely to materialise in practice. The Financial Services Act 2021 made several amendments to retained EU law, often very minor one-

37 The Electronic Money Regulations 2011 (SI 2011/99) and The Payment Services Regulations 2017 (SI 2017/752)

clause amendments; and a number of other amendments to retained EU law are made through this Bill itself. Due to the vast amount of retained EU law, and the speed at which financial markets evolve, without this clause Parliament will regularly be required to pass primary legislation to continue to maintain retained EU law before it can be repealed.[38]

Clause 4: Restating and modifying saved legislation

Although commencement regulations will revoke the retained EU law identified in Schedule 1 of the Bill, in practice the Treasury would have substantial powers to:

- make transitional or saving provision;
- restate legislation that is currently retained EU law; and/or
- modify legislation that is saved/restated.

Legislation can be "restated" either by amending existing primary legislation (ie Acts of Parliament) or by amending existing or making new delegated legislation (statutory instruments). Therefore, the substance of many of the currently retained EU laws might stay the same, even if they are contained in a different type of legislative instrument. What will change is who will exercise the power to change those laws or rules in future (typically it will be the Treasury or regulators rather than Parliament).

Scrutiny of regulations made under clauses 3 and 4

The level of scrutiny of regulations made under the powers in clauses 3 and 4 would vary, depending on the source of the legislation that is being (a) transitionally amended, (b) saved or restated, or (c) modified.

The negative resolution procedure would apply (ie no prior Parliamentary approval will be required) if the affected legislation is:

- retained EU legislation that is tertiary (ie something made under powers conferred by, an EU regulation or directive);
- subordinate UK legislation that did not require the affirmative resolution procedure when it was originally made; or
- simply restating the law without modification under subsection 3(2).

By contrast, if regulations are concerned with the modification of primary legislation, or would restate (say) retained EU regulations but with modifications, the affirmative procedure must be used. This would mean that both Houses of Parliament would have to approve the changes in draft before they could be made.

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[38] HM Treasury, Delegated Powers Memorandum for the Financial Services and Markets Bill, 20 July 2022

Clause 5: Replacing references to EU directives

EU directives do not, in themselves, form part of retained EU law. However, the direct effects of them are preserved under section 4 EUWA and their content may be relevant to the interpretation and application of retained EU law where they are referred to in retained EU regulations or in EU-derived domestic legislation (such as UK Acts or statutory instruments).

Part 3 of Schedule 1 would, on commencement, deprive certain EU directives of their continuing legal effects in UK law. Clause 5 is intended to deal with the knock-on effects when interpreting domestic legislation, should those links be severed.

The power in subsection 5(1) allows the Treasury to replace any reference to an EU directive in the context of financial services and markets. It may do so only if it is "necessary or desirable" for the purposes of:

- making the law clearer or more accessible; or
- in pursuit of the broad list of policy objectives in subsection 3(2).

If the clause 5 power is used to amend primary legislation, the draft affirmative procedure must be used in Parliament. Otherwise, this power can be used with the negative procedure (subject to annulment).

Clause 6: Exemption from consultation requirements

At the moment, various parts of the Financial Services and Markets Act 2000 impose consultation requirements on regulators. For example, under section 138I, the Financial Conduct Authority (FCA) must consult the Prudential Regulatory Authority (PRA) and carry out a statutory cost-benefit analysis (and the PRA must reciprocate under Section 138J). These duties apply whenever the relevant regulator is making rules.

Clause 6 would grant the Treasury the power to exempt the regulators from these consultation requirements in certain situations. Under such Treasury regulations, a regulator could only avoid consultation requirements if it is proposing merely to "restate" legislation that would otherwise be lost by revocation under Schedule 1.

Where a regulator makes "restating" rules it must publish a list of the relevant provisions it has restated. The regulator would also be required to make its best endeavours to ensure that the restated rules are brought to the attention of the public.

If other enactments than FSMA impose consultation requirements, those would be unaffected.

Clause 7: Interpretation

Clause 7 of the Bill provides some key definitions for terms in Part 1 Chapter 1. It clarifies, for example, which bodies count as "regulators" for the purposes of Chapter 1.

Those are:

- the Financial Conduct Authority
- the Prudential Regulatory Authority
- the Bank of England
- the Payment Systems Regulator

Depending on the measures, other parts of the Bill confer powers or set requirements on all or some of these regulators.

Most of the other definitions concern terminology used to identify types of legislation. For example, the clause also explains that references to "legislation" do not include rules made by regulators, but they do include various types of EU legal instrument.

Normally, if the intention is to remove all or part of a piece of primary legislation from the statute book, this would be described as "repealing" rather than "revoking". However, clause 7 clarifies that references in Chapter 1 to "revoking" mean "repealing" when the target legislation in question is the Financial Services and Markets Act 2000.

2.2 Chapter 2: New regulatory powers (Clauses 8 to 23)

Designated activities (Clause 8)

Most countries have a system for regulating financial services, although the exact process for obtaining authorisation and the exact activities that are regulated will differ. In the UK, performing many financial services requires authorisation from the regulators – the Financial Conduct Authority (FCA) and sometimes the Prudential Regulation Authority too.

The Financial Services and Markets Act 2000 (FSMA 2000) is the main piece of financial services legislation in the UK. It allows the Treasury to determine exactly which financial services need to be regulated.[39] It then says that

[39] Financial Services and Markets Act 2000, section 21(5)

performing regulated financial services is a criminal offence unless someone is authorised by the regulators or benefits from an exemption.[40]

There are around 50,000 authorised firms in the UK.[41] They perform a range of regulated financial services such as day-to-day banking, payment transfers and investment management. FSMA 2000 then gives the regulators wide rule-making powers over authorised firms.[42] This lets them regulate those firms' conduct.

This model allows Government to set the overall policy approach while delegating the setting of regulatory standards to the operationally independent regulators. The Government is supportive of maintaining this approach, calling it an "internationally respected" model.[43]

Regulating financial markets

The FSMA model is therefore firm-centric: it operates by requiring firms to be authorised and then imposing requirements on those authorised firms. The financial crisis exposed a possible gap in this model. Sometimes, there is a need to regulate certain financial activities, even if the people engaging in those activities are not financial services firms that need to be authorised.

For example, the Explanatory Notes note that a car manufacturer may want to enter into a metal derivatives contract to try and hedge the risks of a rise in the price of metal.[44] In this case, it might be disproportionate to require the car manufacturer to be authorised by the FCA in order to enter the derivatives contract. But there was a recognised need to regulate these kinds of contracts because of the potential risks they pose to financial stability.

Following the financial crisis, many laws were passed at EU level which regulated certain activities like derivatives contracts. When the UK left the European Single Market on 31 December 2020, these were copied across into UK law, forming retained EU law (on which, see section 2.1 of this briefing). Currently, primary legislation is needed to add to, or update, retained EU law. This would require an Act of Parliament each time the Government wanted to regulate new activities, update the requirements for existing ones, or impose requirements on firms conducting those activities.

The Designated Activities Regime

The Government believes, similar to the FSMA authorisation model, that it is more efficient and appropriate for the regulators to determine and update specific rules. They therefore propose to create a new Designated Activities Regime (DAR). Under the DAR (and similar to the FSMA authorisation model) the Government (by secondary legislation) would set out which activities need

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40 Financial Services and Markets Act 2000, section 21(5)

41 FCA, About the FCA, last updated 19 July 2022 [accessed 27 July 2022]

42 Financial Services and Markets Act 2000, part 9A

43 HM Treasury, Financial Services Future Regulatory Framework Review, Phase II Consultation, October 2020, Executive Summary

44 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 121

to be regulated, and the regulator (in this case, the FCA) would be empowered to determine the final rules applicable to firms conducting those activities.[45]

Similar to the firm-centric FSMA model, regulators would also be given rule-making powers under the DAR, but unlike the FSMA model these rules would only need to be followed by firms when performing the regulated activity, not in relation to their other (unregulated) activities. The regulators' rule-making powers under the DAR would therefore be more limited, but the regulators' powers around information gathering, enforcement (civil and criminal), supervision and consultation would be closely based on existing powers under the FSMA model.[46]

For now, the Government plans for the DAR to mirror the existing scope of regulation. In the short term, therefore, it is largely intended to be simply a transfer of power from legislation (retained EU law) to UK secondary legislation and regulator rules. In future, however, the greater flexibility enabled by the DAR would enable the Treasury and regulators to choose whether to mirror or diverge from EU regulation (for example, by designating new activities to be regulated or updating rules around already-regulated activities).[47]

The Government says that the majority of the 109 responses to its November 2021 consultation supported its proposal to create the DAR, viewing its activity-centric approach as a "flexible and proportionate" way of regulating financial markets following the repeal of retained EU law. Some respondents however did caution that there should be clarity on exactly what activities are regulated, what constraints would be placed on the powers of the Treasury and regulators, and what the consequences of failing to comply with regulators' rules would be.[48]

Clause 8: the DAR

Clause 8 would implement the Government's proposals on the DAR by introducing a new Part 5A (clauses 71K to 71S) into FSMA 2000. The key parts are that:

- clause 71K empowers the Treasury to designate activities for regulation under the DAR. They can only specify activities related to financial markets or exchanges of the UK, or financial instruments, products or investments issued or sold to or by people in the UK. A separate Schedule 6B contains a non-exhaustive list of examples of activities which might be designated (such as entering into derivatives contracts). Such

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45 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p60

46 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p60

47 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p61

48 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, Response to the Consultation, July 2022, p16

regulations would need parliamentary approval under the affirmative procedure, except in urgent cases where retrospective parliamentary approval must be granted within 28 days (Clause 71S);

- clause 71L prohibits someone from performing a designated activity that is prohibited by regulations, or from doing so in breach of Treasury or FCA rules relating to that activity;
- clauses 71M – 71Q allows for the Treasury to make rules (by making regulations) related to designated activities, or to provide for exemptions to these rules. This could include regulations about enforcement and compensation to be paid for breaches of those rules (but would not include criminal offences). The FCA could then make rules (or impose requirements on certain people through directions) where authorised by Treasury rules to do so; and
- clause 71R contains a Henry VIII power allowing the Treasury to amend legislation, including primary legislation, as considered appropriate relating to designated activities. The Treasury consider this power to be necessary to adapt the way existing parts of FSMA 2000 operate for particular designated activities, for example to adapt the scope of existing criminal offences to match the designated activity. The draft affirmative procedure would be used to approve such amendments where they amend primary legislation[49].

Financial market infrastructure: general rules and requirements (Clauses 9 to 12)

Financial markets infrastructure

Firms involved in setting the processes for financial transactions are called financial markets infrastructure (FMI). Four examples of these are central counterparties (CCPs), central securities depositories (CSDs), Data Reporting Service Providers (DRSPs) and Recognised Investment Exchanges (RIEs). Each are explained in Box 1 below.

Box 1 Jargon buster: CCPs, CSDs, DRSPs and RIEs

A **CCP** is a "middle man" in a derivatives transaction who buys from the seller and sells to the buyer, so that the actual parties to the derivatives transaction do not literally transact with (and so do not take credit risk on) each other. Instead, they will be transacting with the CCP, who must meet strict requirements, and so should pose a significantly lower credit risk than the end-party. This process is known as "clearing".

[49] Delegated Powers Memorandum, pp40-41

A **CSD** is an institution that allows for securities (like shares) to be traded electronically. They provide accounts within which people can hold cash or securities, and they provide for transfers of cash or securities between accounts. In the UK there is one CSD: Euroclear UK & Ireland Limited (Euroclear). Euroclear operates the CREST electronic settlement system, through which people can trade UK shares, UK government bonds, and other securities.

DRSPs allow firms to meet reporting obligations for trades. There are three types of DRSPs: (1) approved reporting mechanisms (ARMs) which report to regulators on behalf of firms; (2) approved publication arrangements (APAs) which publish reports of trades in line with transparency obligations, on behalf of firms; and (3) consolidated tape providers (CTPs) which consolidate information published on lots of different trades into a live data stream providing price and volume information for a particular financial product.[50]

RIEs are platforms that bring together buyer and selling of financial instruments, managed by a market operator. An example is the London Stock Exchange.[51]

The failure or malfunction of FMI can have a big impact on the transactions they are intended to facilitate. As a result they are heavily regulated by retained EU law, such as the European Market Infrastructure Regulation (EMIR) and the Central Securities Depositories Regulation (CSDR). This means that regulators have limited powers to directly set requirements on firms comprising FMI.

The Government's approach

The Government's approach is that regulators should have primary responsibility for setting regulatory requirements for FMI, rather than them being setting out in retained EU law. This is consistent with its view that delegation of regulatory responsibilities to independent, expert regulators can provide more effective and predictable approaches over time.[52]

This means that the Bank of England would be given powers to set requirements for CCPs and CSDs, and the FCA would set requirements for DSPRs and RIEs. Clauses 9 to 12 of the Bill seek to implement this policy.

The Bill: Clauses 9 to 12

Clauses 9 and 10 would insert new provisions (300F and 300G, and paragraph 9B to Schedule 17A) into FSMA 2000 that enable the Bank of England to make rules regulating CCPs and CSDs. This includes applying rules to "third country" (non-UK) institutions. In general, rules can only be applied

50 See the FCA, Data reporting services providers, last updated 20 June 2022 [accessed 29 July 2022]

51 London Stock Exchange Group, Listing Process [accessed 29 July 2022]

52 HM Treasury, Financial Services Future Regulatory Framework Review, Phase II Consultation, October 2020, para 2.8 - 2.9 [accessed 22 August 2022]

to third-country institutions where permitted by Treasury regulations, except for rules relating to CCPs deemed systemic to the UK's financial stability. Under clause 10, the Bank of England would be able to impose specific requirements on CCPs and CSDs to further the objective of protecting and enhancing UK financial stability, or if that body has failed or is likely to fail to meet its obligations.

Clause 11 would insert a new section (300H) into FSMA 2000 granting the FCA rule-making powers relating to RIEs and DRSPs. The FCA would be able to make rules necessary and expedient for the purposes of advancing its operational objectives.

Clause 12 concerns the power under the Bank of England Act 1946 for the Treasury to give directions to the Bank of England where it is in the public interest for it to do so. The clause would disapply that requirement insofar as it relates to CCPs and CSDs, on the basis that there are separate transparency and accountability requirements for these as set out in this Bill.[53]

Financial market infrastructure piloting powers (Clauses 13 to 17)

The term 'sandbox' is used in a number of different ways in financial services. Broadly speaking, sandboxes allow firms to test new approaches – whether practices or technologies.

The FCA, for instance, established its regulatory sandbox in 2016 and accepts applications from firms throughout the year. It offers participants:

- the ability to test products and services in a controlled environment
- the opportunity to find out whether a business model is attractive to consumers, or how a particular technology works in the market
- a reduced time to market at potentially lower cost
- support in identifying consumer protection safeguards that can be built into new products and services.[54]

An area of particular innovation in financial services has been distributed ledger technology (DLT), most widely known from the blockchain technology that underlies cryptocurrencies. At its most essential, DLT allows transactions to be simultaneously verified and recorded across many ledgers instead of in a limited number of systems managed by the parties to the transaction (or their intermediaries).[55]

[53] Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 785
[54] Financial Conduct Authority, Regulatory sandbox,11 August 2022
[55] See the POST research briefing, Distributed ledger technology (6 September 2018), for further background.

The Government consulted on regulating cryptoassets and distributed ledger technology in financial markets in 2021, alongside a call for evidence on investment and wholesale uses.[56] Its response said that many respondents had highlighted that the UK current legislative framework did not allow for such innovations as DLT in financial markets infrastructure (FMI). It was not clear what would need to change to permit the "effective and safe adoption" of such innovations.[57]

An independent report on the UK Fintech sector for the Government – the Kalifa Review – highlighted the success of the FCA's sandbox and recommended expanding the approach.[58] The Government announced its plan "to make the UK a global cryptoasset technology hub" in April 2022.[59]

In the Explanatory notes to the Bill, the Treasury notes the systemic importance of various FMI and thus the need for close regulatory attention. At the same time, it highlights that technological and practice innovation offers the potential for improved efficiency, lower costs, and indeed potentially improved resilience of FMI, "to the benefit of financial stability."[60]

Commenting on the Government's April 2022 announcement, the law firm Linklaters highlighted the "careful balancing act" between "the (sometimes) competing objectives of risk mitigation and supporting innovation". It noted that UK regulation had often been seen as focusing on the former at the expense of the latter.[61]

The Bill: clauses 13 to 17

The Bill would enable the Treasury to develop financial market infrastructure sandboxes. The Explanatory Notes to the Bill say that the sandboxes would support innovation by enabling "participating firms to be subject to temporary modifications to legislation, where that legislation does not currently accommodate such activities or is ambiguous as to whether or not it can be accommodated." On the basis of learning from successful pilots, the Treasury would be able to report to Parliament and thereafter to "make permanent changes to legislation, via statutory instrument subject to the affirmative procedure".[62]

Clause 13 would give the Treasury the power to create one or more FMI sandboxes (or iterations of the same sandbox) by way of regulations. Any such regulations would need to specify or provide for the specific FMI activities, the eligible entities or other persons eligible to participate and the limited period for which the FMI sandbox arrangements would apply (Clause

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56 HM Treasury, UK regulatory approach to cryptoassets and stablecoins: consultation and call for evidence, 5 July 2022

57 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 162

58 HM Treasury, The Kalifa Review of UK FinTech, 16 April 2021

59 HM Treasury, Government sets out plan to make UK a global cryptoasset technology hub, 4 April 2022

60 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), paras 157-159

61 Linklaters, UK "open for crypto businesses" as it points to flexible future regulation, 15 April 2022

62 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 156

13(4)). Subsection (6) would also allow the Treasury to temporarily disapply or modify legislation for the purposes of the sandbox arrangements. Schedule 4 includes examples of the types of provision that an FMI sandbox could make.

Clause 14 would require the Treasury to publish reports on any Clause 13 FMI sandbox arrangements, in consultation with the appropriate regulator and lay a copy of the report before Parliament.

Clause 15 would allow the Treasury to permanently implement arrangements tested under an FMI sandbox. Any such regulations may amend, repeal or revoke relevant legislation and, if so, would be subject to the affirmative procedure. If not, the regulations would be subject to the negative procedure.

Clause 16 would allow the Treasury to confer powers on an appropriate regulator or other specified person to do anything under or for the purposes of any regulations made under clauses 13-15. The Explanatory Notes provide the example of where the Treasury has made changes to primary legislation, it may be necessary for regulators to make consequential changes to related technical standards and rules.

Clause 17 would incorporate existing and provide new definitions for the purposes of this Bill.

The full list of legislation in scope, and that might be amended, is set out in **clause 17(3)**.

Powers in relation to critical third parties (Clauses 18 and 19)

Regulated financial services firms often outsource important functions to third parties, such as cloud (digital infrastructure) or IT providers. Even though these third-party providers are not financial services firms, some of them are used widely enough that their failure could significantly impact the financial services sector – for example, by restricting firms' ability to make payments or access important data.

But financial services regulators currently do not have the power to impose requirements on these third-party providers, because they are not regulated financial services firms. With the exception of third parties involved in payment systems,[63] existing powers only allow for regulators to impose requirements on how financial services firms interact with these third-party providers, which are less effective than if they could impose requirements directly.

The Bill therefore introduces a power for the Treasury, following consultation with the regulators, to designate certain third-party providers as "critical" by secondary legislation, enabling the FCA, PRA and the Bank of England to

63 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 174

make and enforce rules and directions on them, request information and conduct investigations. The FCA has said it "welcomes" these proposals and, if passed, intends to consult on them in 2023 before their full introduction.[64] Trade body UK Finance also welcomed the proposals and said its members were "highly engaged" in its development.[65] The Government says that "Feedback from industry has been positive" to its proposals.[66]

The Bill: Clauses 18 and 19

Clause 18 would amend FSMA 2000 to insert new sections 312L to 312W. It would allow the Treasury to designate a firm as a "critical third party" (CTP) if the failure of or disruption to that CTP would risk UK financial stability or confidence. In making designations the Treasury must have regards to the materiality (size/importance) of the services provided to the delivery of essential services, and the number of regulated firms using those services. Various procedural requirements are included on the process for designation and the notices that need to be sent. Where rules are broken by a CTP, enforcement mechanisms available to the regulators include a power of public censure, and prohibiting the CTP from providing its services to financial services firms.

Clause 19 would make largely technical amendments to several parts of FSMA 2000, applying existing requirements to the new CTP framework. For example, under FSMA (see section 177) it is already a criminal offence to knowingly or recklessly give the FCA or PRA information which is false or misleading in connection with a requirement it has imposed. As the Bank of England would also be implementing the CTF regime, subsection 14 would extend this offence to information given to the Bank of England relating to CTPs too.[67]

Regulatory gateway for financial promotions (Clause 20)

"Financial promotions" are essentially any form of advertising or marketing of investment opportunities or certain other types of financial services to consumers. The FCA reports that in the year to the end of July 2022, it intervened to amend or withdraw 4,226 such promotions.[68]

As set out in the Explanatory Notes to the Bill, while the FCA and PRA currently require most financial promotions to be undertaken by firms that they authorise, those firms are able to approve financial promotions by

64 FCA, DP22/3: Operational resilience: critical third parties to the UK financial sector, 21 July 2022 [accessed 22 August 2022]

65 UK Finance, Critical Third Parties – Being Brought Within the Regulatory Perimeter [undated – accessed 22 August 2022]

66 HM Treasury, Policy paper: Critical third parties to the finance sector: policy statement, 8 June 2022 [accessed 22 August 2022]

67 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 875

68 Financial Conduct Authority, "FCA clamps down on marketing of high-risk investments to consumers", 1 August 2022 (accessed 30 August 2022)

unauthorised third parties. While the authorised firm is expected to ensure that the third party complies with FCA rules, the Treasury notes that the current approach presents three specific risks to consumers and to wider confidence in the financial system:

1. Authorised firms are free to approve promotions in areas in which they are not expert.

2. Authorised firms may not always apply sufficient due diligence to firms and promotions that they approve.

3. Authorised firms are not required to report on promotions that they approve, so the FCA may only find out about problems after they've occurred.[69]

The Bill: Clause 20

Clause 20 would establish a "regulatory gateway" for firms wishing to approve financial promotions by unauthorised firms. It would insert a new subsection 2A into section 21 of FSMA 2000 and insert new sections 55NA and 55NB into FSMA 2000. It would require any authorised person to either (i) have permission from the FCA or (ii) fall within an exemption conferred by regulations before it approves the content of a financial promotion. New sections 55NA and 55NB set out the detail of how the regulatory gateway would work. **Schedule 5** contains further amendments related to this Clause.

Digital settlement assets (Clauses 21 and 22)

In the Explanatory Notes, the Treasury describes "cryptoassets" as "a digital representation of value or contractual rights that can be transferred, stored or traded electronically, which may (though do not necessarily) utilise cryptography or distributed ledger technology."[70] The most familiar type of cryptoasset is the "cryptocurrency", such as Bitcoin.

The Commons Library briefing paper Cryptocurrencies: Bitcoin and other exchange tokens provides further background up to February 2020.

The Treasury, the Bank of England and the FCA established the Cryptoassets Taskforce in 2018 to assess the potential impact of cryptoassets and distributed ledger technology in the UK and to consider appropriate policy responses. Its report in October 2018 set out a series of tasks for the authorities involved.[71]

The FCA has since set out its approach to regulating and describing various types of cryptoassets. These include "unregulated exchange tokens" such as

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[69] Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 182-184

[70] Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 188

[71] HM Treasury, Cryptoassets Taskforce: final report, 29 October 2018

Bitcoin and regulated security tokens and e-money tokens, which may meet the definition of e-money under the Electronic Money Regulations (EMRs)."[72]

In January 2021, the Treasury launched a consultation and call for evidence on the UK's regulatory approach to cryptoassets and the use of distributed ledger technology in financial markets. It sought to explore how the UK's regulatory framework might best support innovative new technologies while mitigating risks.[73] See also the discussion of clauses 13 to 17 above.

The Government noted that most types of cryptoassets fell outside the regulatory perimeter and would continue to do so. But it highlighted the emergence of some types – notably 'stablecoins' (see Box 2) – that might become attractive as a widespread means of payment, notably in cross-border payments. Such cryptoassets could present risks to consumers and wider financial stability if not adequately regulated.[74]

Box 2 Stablecoins

Most 'cryptocurrencies' such as Bitcoin are characterised by extreme volatility and so are not considered practical for use as a means of exchange. Stablecoins, on the other hand, seek to overcome this problem – either by being backed with reserves of fiat currencies (such as US dollars or pounds sterling) or by using algorithms to control supply.[75]

In April 2022, the Government announced in its response to the consultation that it intended to bring stablecoins into the regulatory perimeter when they were used as a means of payment.[76]

An article by law firm Pennington Manches Cooper discusses this topic further and concludes that the market is likely to welcome some regulation provided it doesn't stifle innovation:

> The market is therefore likely to welcome some regulation of the riskier parts of the digital asset landscape to offer consumers protection, providing that it does not stifle innovation or seek to control the way in which blockchain and distributed ledgers work (*ie* by consensus, without one controlling party). How the regulation transpires and whether it ends up stifling innovation or undermining the very reasons why the DeFi ['decentralised finance', that is,

72 Financial Conduct Authority, Cryptoassets: our work , 12 August 2022

73 HM Treasury, UK regulatory approach to cryptoassets and stablecoins: Consultation and call for evidence, January 2021

74 HM Treasury, UK regulatory approach to cryptoassets and stablecoins: Consultation and call for evidence, January 2021, p3

75 See, for instance, Investopedia, Stablecoin, 11 May 2022 (accessed 12 August 2022)

76 HM Treasury, UK regulatory approach to cryptoassets, stablecoins, and distributed ledger technology in financial markets: Response to the consultation and call for evidence, April 2022

> financial systems based on using blockchain] community came together in the first place remains to be seen.[77]

The Bill: Clauses 21 and 22

Clause 21 and Schedule 6 would amend Part 5 of the Banking Act 2009 and Part 5 of the Financial Services (Banking Reform) Act 2013. This would provide for the regulation of payment systems using digital settlement assets and DSA service providers.

Clause 22 would give the Treasury the power to make regulations to regulate payments that include digital settlement assets. Clause 22(3) sets out the range of regulations that the Treasury would be able to make. Any regulations would be subject to the affirmative procedure and the Treasury would be required to consult with the FCA, the Bank of England and (in relation to regulations that refer to them) the PRA or the Payment Systems Regulator.

Clause 22(2) of the Bill would define "digital settlement asset" as:

> a digital representation of value or rights, whether or not cryptographically secured, that—
>
> a. can be used for the settlement of payment obligations,
>
> b. can be transferred, stored or traded electronically, and
>
> c. uses technology supporting the recording or storage of data (which may include distributed ledger technology).

This introduces the concept of the "digital settlement asset" into legislation for the first time.[78] The Treasury would have the power to modify this definition (Clause 22(6)). The Explanatory Notes explain that this is due to the nascent nature of the cryptoasset market.[79]

Mutual recognition agreements (Clause 23)

Clause 23 of the Bill would enable the Treasury to give domestic effect to the recognition provisions of the Mutual Recognition Agreements (MRAs) signed by the UK Government allowing UK firms to seek benefits from these agreements.

MRAs are international agreements that recognise the law and practice of the agreement partners as equivalent, in other words – achieving comparable outcomes. Financial services MRAs aim to support more openness, mutual market access between jurisdictions, as well as information sharing and cooperation between regulators. Agreement partners accept each other's

77 Penningtons Manches Cooper, The pending regulations of stablecoins, 26 July 2022
78 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 199
79 As above

regulation and supervision of firms engaging in financial services, allowing them to operate in the host market with less barriers to trade.

Outside of the EU, the UK is able to negotiate its own international agreements in areas previously within the competence of the EU, including MRAs. The Government sees MRAs on financial services as part of its "ambitious" international financial services agenda.[80]

UK MRAs on financial services

In 2020, the UK and Switzerland announced their intention to negotiate a comprehensive Mutual Recognition Agreement on financial services. The agreement would cover banking, insurance, asset management and capital markets, including market infrastructure.[81] These talks are progressing. The Government anticipates the UK-Swiss MRA would set a blueprint for future MRAs on financial services it intends to negotiate with other jurisdictions.[82]

In contrast to MRAs, the UK-EU relationship in financial services for a significant part depends on unilateral equivalence decisions in specific areas. The process of adoption of equivalence is based on one side's technical assessment of another side's rules and practice in specific sectors of financial services. The EU or the UK can suspend or withdraw their equivalence decisions one-sidedly.[83]

Parliament's role in implementing agreements

The UK Government is responsible for negotiating, signing, ratifying, amending and withdrawing from all international agreements or treaties involving the UK, under its prerogative powers. However, the UK is a 'dualist' state, in which treaties create formal rights and duties only for the Government under international law and cannot automatically change UK domestic law. Legislation may therefore be needed to give domestic effect to new treaty-based rights and duties that the Government has agreed to.[84] It is a convention in the UK not to ratify a treaty unless and until the Government can implement that treaty in domestic law.

Furthermore, the Government cannot ratify a treaty unless it has first laid the signed treaty before Parliament, for 21 sitting days, as set out under Part 2 of the Constitutional Reform and Governance Act 2010 (CRAG). The House of Commons may pass a resolution that a treaty should not be ratified, triggering another 21-sitting-day delay to ratification – and this process may be repeated.

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80 Delegated powers memorandum (pdf), para 291

81 HM Treasury, UK and Switzerland to deepen cooperation on financial services, 27 January 2021

82 Financial Services and Markets Bill, Explanatory Notes, Bill 146, para 203; Delegated powers memorandum (PDF), para 300

83 See The UK-EU trade deal: financial services, Commons Library Briefing CBP-9263; Equivalence' with the EU on financial services, Commons Library Insight, 19 November 2020

84 See 'International law and parliamentary sovereignty in the UK', part 3.1 of Commons Library Briefing CBP-9010, Principles of International Law: a brief guide, 21 September 2020

The Government has confirmed in the Delegated powers memorandum that any MRA to which clause 23 of this Bill relates will also be subjected to the CRAG Act process.[85]

Further information on Parliament's role is in the Library briefing on How Parliament treats treaties.[86]

The Bill: Clause 23

Clause 23(1) would give the Treasury power to make regulations it considers appropriate to implement existing or future Mutual Recognition Agreements with other jurisdictions in relation to financial services or markets.

Subsections (2) and (3) of Clause 23 clarify the meaning of "mutual recognition agreement" in this Bill. Relevant MRAs would include comprehensive agreements covering all financial services sectors, MRAs focusing on a limited number of sectors or activities, and mutual recognition clauses in relation to financial services included in other international agreements, such as free trade agreements. The power of subsection (1) would also allow the Government to implement changes in these agreements over time.[87]

Subsection (4) gives examples of provisions to be made by regulation under subsection (1). Explanatory notes set out that this includes conferring powers on the Treasury or the financial services regulators - the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA), or the Bank of England. The Treasury would be able to impose duties on those regulators, where it considers appropriate, including a duty to make rules. This would enable the Treasury to delegate aspects of implementation of MRAs to regulators. Subsections (8) and (9) would ensure that the Treasury may not specify the precise form or content of the rules regulators would draw up.[88]

Subsection (6) specifies that the power of subsection (1) would enable the Government to modify legislation by regulation. As per subsection (11), this includes amending, repealing or revoking primary and subordinate legislation, as well as retained EU law. Explanatory notes give an example of how this power may be used:

> [...] if an MRA provides for recognition of an MRA partner country's framework in relation to a sector or activity not covered by an existing equivalence regime, the power could be used to create a new domestic recognition regime or to amend the scope of existing regimes to allow for such recognition.[89]

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85 Delegated powers memorandum (PDF), para 296

86 Commons Library Briefing CBP-9247, How Parliament treats treaties, 01 June 2021, sections 3.2, 3.3, and p38

87 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 903

88 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 905

89 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 904

Regulations made under Subsection (1) of Clause 23 would be made by the affirmative procedure.[90] The Treasury writes the MRAs would relate to a wide range of financial services sub-sectors governed by different and complex regulatory regimes. They could be amended over time, possibly expanding or amending their scope. To reflect the flexibility needed to implement the MRAs, the power in Clause 23 is broadly drawn. Considering it may be used to amend primary legislation and direct principal EU legislation, the Treasury argues that the affirmative procedure would be appropriate and would ensure adequate parliamentary debate and scrutiny.[91]

2.3 Chapter 3: Accountability of regulators (Clauses 24 to 46)

FCA and PRA objectives and regulatory principles (Clauses 24 to 26)

FSMA 2000 sets out objectives for the FCA and PRA. The FCA has one strategic objective (to ensure that financial markets function well), supported by three (secondary) operational objectives (to protect (i) consumers and (ii) market integrity, and (iii) to promote effective competition).[92] The PRA has two general objectives (to promote the safety and soundness of the firms it authorises, and to secure appropriate protection for insurance policyholders) and one secondary objective (facilitating effective competition).[93]

In addition to these, both regulators must have regard to eight "regulatory principles" (such as the need to use resources efficiently, and to impose burdens on persons which are proportionate to the benefits) when performing their functions.[94]

Growth and competitiveness objective

The Government notes that there has been an ongoing debate on whether these objectives should be added to, focusing on whether there should be an objective to support the international competitiveness of the UK financial services sector. Supporters say that promoting the economic viability of the UK financial services sector should be an objective for the regulators (among the others) when drafting their rules, whereas critics say that a focus on international competitiveness could distract from the other duties, promote light-touch regulation and precipitate another financial crash.[95]

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90 Clause 23, subsection 10

91 Delegated powers memorandum (PDF), para 300

92 FSMA 2000, section 1B

93 FSMA 2000, sections 2B, 2C and 2H

94 FSMA 2000, section 3B

95 HM Treasury, Future Regulatory Framework (FRF) Review: Consultation, October 2020, p24

In its 2020 Future Regulatory Framework consultation, the Government invited views on whether any of the regulators' objectives should be amended or added to. In its November 2021 Proposals for Reform, it affirmed the importance of all existing objectives and regulatory principles for the FCA and PRA,[96] but noted recent debate (including in Lord Hill's March 2021 report on the UK Listings Regime) on whether the regulators' objectives should include a competitiveness or growth requirement, as in other jurisdictions like Australia, Singapore, Hong Kong and Japan.[97] It said it had "carefully considered" all representations received and the ongoing public debate, and concluded that it wishes to introduce a greater focus on growth and international competitiveness through new secondary objectives for the PRA and the FCA that would sit alongside existing secondary objectives for each.[98] It would not authorise or permit any action that would be inconsistent with the main (strategic or general) objectives for each.

The Government considered and rejected various other proposals such as introducing new regulatory principles (rejected for being too weak) or new principles or objectives around innovation or financial inclusion (rejected for being unnecessary).[99]

In July 2022 the Government noted that the majority of the respondents to its Proposals for Reform supported its proposals, and it therefore intended to implement them. Of those who disagreed, some thought the new objectives should be stronger (by being primary objectives) and some opposed their inclusion altogether by expressing concern about their impact on regulatory standards.[100]

Clause 24 would insert into FSMA 2000 new secondary objectives for the FCA and PRA which requires them, when performing their functions, to seek to act in a way which advances the international competitiveness of the economy of the United Kingdom and its growth in the medium to long term. **Clause 26** would make consequential amendments and require both regulators to report annually on how they have advanced their growth and international competitiveness objectives through their annual report.[101]

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96 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p31

97 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p32

98 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p33

99 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p35

100 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, Response to the Consultation, July 2022, pp4-5

101 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), paras 916-917

Net zero target

The UK has written into law its commitment to reach net zero greenhouse gas emissions by 2050, and the Government considers that the financial services sector must play its part in achieving this.[102]

The FCA and PRA must already have regard to an existing regulatory principle (the desirability of sustainable economic growth in the medium or long term) when performing their functions. Alongside the new regulatory objectives being introduced by the Bill relating to growth and international competitiveness (clause 24) the Government therefore proposes to amend this existing regulatory principle to be clear that this growth should be consistent with the Government's commitment to reach net zero by 2050.

The majority of respondents to the Government's consultation supported this proposal. Some of those who disagreed argued that "social policy" should be excluded from financial regulation, whilst others argued that a more "holistic" approach is required (such as investment in the economy).[103] In July 2022 the Government confirmed its commitment to implement this proposal.[104] But the Bill opts to replace rather than amend the existing sustainable growth regulatory principle, to avoid "unnecessary duplication".[105]

Clause 25 would therefore amend FSMA 2000 to introduce a new regulatory principle for the FCA and PRA to have regard to the need to contribute towards achieving compliance with section 1 of the Climate Change Act 2008 (the target of reaching net zero by 2050), replacing the existing principle relating to sustainable economic growth. **Clause 26** would make minor and consequential amendments.

The Payment Systems Regulator (PSR) has a similar set of regulatory principles, but the Government is proposing, for the PSR, to merely amend its existing "sustainable growth" principle to note the net zero target rather than replace it, to be clear that achievement of net zero is understood as being only one element of its sustainable growth principle.[106] For the PSR, the change is made by **Schedule 7, para 3** to the Bill (inserted by **clause 46**).

FCA and PRA powers to make rules etc (Clauses 27 to 32)

The Bill facilitates a significant transfer of responsibilities from retained EU law to the regulators, which are operationally independent from Government.

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102 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p35

103 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, Response to the Consultation, July 2022, pp6

104 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, Response to the Consultation, July 2022, pp6

105 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 221

106 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 222

The Government therefore believes there is a need to balance the need for policy input and democratic accountability with the need for the regulators to remain independent.[107]

Legislation already provides for the regulators to have some accountability mechanisms in place to the Government. For example, the Treasury currently appoints the Chair and Chief Executive of the FCA, and members of the governing boards of the FCA and PRA. The Treasury also advises the Prime Minister (and ultimately the Crown) on appointments for Governor and Deputy Governors of the Bank of England.[108]

One area where the Government feels it needs greater input is in scrutiny of the FCA and PRA's rules.[109] Both regulators have the right to make rules which are binding on the firms they regulate. For the FCA, these rules are set out in its Handbook.[110] These rules are made independently from the Government, so the Treasury isn't involved in setting or enforcing them. But in its November 2021 Proposals for Reform consultation the Treasury announced its intention to create a new power (to be used in exceptional circumstances) for it to require regulators to review their rules when they consider that it would be in the public interest.[111] According to the Government this proposal was "generally welcomed" by respondents to its consultation.[112]

Deference and trade

Having left the EU, the Government has assumed responsibility for two policy areas that historically were dealt with by the EU. The **first** of these is on recognition of other jurisdictions' regulatory systems. Historically, market access to foreign firms was largely determined by the "equivalence" mechanism (on which, see the Library Insight, 'Equivalence' with the EU on financial services). The Government refers to these as "deference arrangements", as it entails recognising (or deferring to) the high standards of another jurisdiction's regulatory framework. The **second** of these is on trade policy, with the Government now able to pursue an independent trade policy from the EU, including on financial services.

The Government is keen to ensure that conflicts do not emerge between regulator rules and its policy in these two new areas. It therefore proposes to create a new "accountability mechanism" that would require regulators to consider the impact on deference arrangements and assess compliance with trade agreements when making rules and when setting its general approach

107 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, pp37-38

108 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 234

109 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p40

110 See the FCA Handbook of rules and guidance

111 As above

112 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, Response to the Consultation, July 2022, p7

to supervision.[113] The Government says that the majority of the respondents to the consultation on these proposals were in favour of them, but recognised concerns raised by some respondents that the requirement on regulators to have regard to these matters could lead to a lowering of regulatory standards, because regulators might water down or avoid implementing rules where they feel the Government had made a conflicting commitment in a trade agreement or deference arrangement.[114]

Clauses 27 to 32 would amend FSMA 2000 to implement the Government's proposals on greater accountability of regulator rule-making.

The Bill: Clauses 27 to 32

Clause 27 would introduce a requirement for the FCA and PRA to keep their rules under review. The Treasury would also have the power to direct the regulators to review specific rules if it believes that doing so would be in the public interest. The regulator would then produce a report on that rule which the Treasury must lay before Parliament, unless it believes publication is not in the public interest.

Clause 28 would allow the Treasury to require the FCA or PRA to make rules on a certain matter. The power would not be permitted to be used to require the regulators to achieve a particular outcome or include certain content.

The Treasury would be empowered to specify matters in secondary legislation (using the affirmative parliamentary procedure) that the regulators must have regard to when making rules in a particular area, under clause 29. When consulting on rules, the FCA or PRA would generally then need to explain how the Treasury requirement for them to have regard to those matters had impacted their draft rules.

Clause 30 would require the FCA and PRA, when making rules or changing policies relating to their supervisory functions over which they have a duty to consult publicly, to consider their effect on deference (equivalence) decisions and consult the Treasury in advance if there is a risk of incompatibility between its rules and the decision. **Clause 31** would create a similar requirement on the regulators relating to the UK's obligations relating to financial services or markets under free trade agreements signed or the World Trade Organisation Marrakesh Agreement.

Clause 32 would provide for the Treasury (in consultation with the regulators) to specify (under the affirmative parliamentary procedure) certain of the FCA and PRA's rules which they would be allowed to disapply or modify in individual cases on the application (or with the consent) of the person subject to them.

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113 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p42

114 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, Response to the Consultation, July 2022, p8

FCA and PRA engagement (Clauses 33 to 36)

Clauses 33 to 36 of the Bill contain further measures intended to strengthen the accountability of the FCA and PRA.

Recommendations letters: Clause 33

FSMA 2000 and the Bank of England Act 1998 (the BoE Act) require the Treasury to send "recommendations letters" on matter of economic policy at least once in every Parliament to the FCA and PRA, who must then consider the recommendations when performing their functions. The most recent such letter was sent in March 2021 (and supplemented in April 2022).[115] These letters must be published and laid before Parliament. They are intended to allow the Government to provide policy input on topical or important matters.

The Government's view is that the greater responsibility being given to the regulators under the Bill (and more generally following the UK's exit from the EU) must be "balanced with effective policy input and appropriate accountability to Government". It therefore is bringing forward "targeted proposals" that seek to build on existing accountability mechanism, whilst safeguarding regulators' independence.[116]

Initially, the Government consulted on increasing the frequency of such recommendations letters, to seek to strengthen accountability, but some respondents to its consultation raised concerns that this could create uncertainty for regulators, industry and customers, if policy regularly changes. The Government therefore decided not to amend the requirement that letters be sent at least once a Parliament. Instead, the Government proposes to require the regulators to respond annually to such letters (as no such requirement currently exists), as was suggested by some consultation respondents.

Clause 33 would amend FSMA 2000 and the BoE Act to introduce the requirement on the FCA and PRA to respond annually to such recommendations letters. **Paragraph 4 of Schedule 7** to the Bill would also introduce a corresponding requirement for the Payment Systems Regulator.[117]

Statutory Panels: Clauses 34 and 35

FSMA 2000 created a system of independent "panels" intended to contribute to the regulators' policymaking functions. Panel members are typically senior executives or experienced practitioners appointed by the regulators, with the panel Chairs approved by the Treasury. Members are intended to contribute

[115] See (in relation to the FCA) HM Treasury, Recommendations for the Financial Conduct Authority: March 2021, and Recommendations for the Financial Conduct Authority: April 2022 [accessed 24 August 2022]

[116] HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p37

[117] Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 983

expertise and insight to assist policy development, and are consulted on all major policy and regulatory interventions.[118]

The FCA works with five panels. Four are statutory (set out in FSMA 2000) – the Financial Services Consumer, Practitioner, Small Business Practitioner and Markets Practitioner Panels, and one (the Listing Authority Advisory Panel) is not. The PRA and PSR also work with one statutory panel each (in the PRA's case, this is a Practitioner Panel with a non-statutory insurance-subcommittee).[119]

The panels publish annual reports giving information on how they have engaged with the regulators. Sometimes, public consultations of the regulators may note how panels have been engaged, although this is not a requirement. To increase transparency, the Government proposes to introduce a new requirement to ensure consistent communication by regulators on their engagement with panels. It therefore proposes to introduce requirements on the FCA and PRA to: (i) mention in their public consultations information on any pre-engagement with statutory panels; and (ii) provide information in their annual reports on how they have engaged with statutory panels. **Clauses 34 and 35** would implement these requirements.

Engagement with the Treasury Select Committee: Clause 36

The Treasury says that Parliament "should play an important strategic role in interrogating, debating, and testing the overall direction of policy for financial services".[120] In particular, the Treasury Select Committee (TSC) plays an important scrutiny role through its inquiries, regular hearings and appointment hearings for key positions in the regulators.[121]

The Government therefore believes that select committees, and the TSC in particular, should continue to be the main vehicle to conduct future scrutiny of financial services regulation. Respondents to its consultation noted that the TSC was well-regarded but some suggested that it might find it difficult to properly scrutinise the volume of regulator proposals in light of its broad remit. Other suggestions made included a new Commons Financial Services Select Committee or a Joint Committee of both Houses.[122]

In its July 2022 Proposals for Reform Response, the Government said that it would not be making recommendations to Parliament on the best structure for ongoing scrutiny, as this was a matter for Parliament, but said it wishes to formalise and strengthen existing mechanisms for regulators engaging with the TSC, for which there was "broad support" among respondents to its

118 HM Treasury, Future Regulatory Framework (FRF) Review: Consultation, October 2020, p35

119 As above

120 HM Treasury, Financial Services Future Regulatory Framework Review, Phase II Consultation, October 2020, p30

121 HM Treasury, Financial Services Future Regulatory Framework Review, Phase II Consultation, October 2020, p29

122 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p26

consultation.[123] Separately, in June 2022 the TSC announced the establishment of a new Sub-Committee on Financial Services Regulations to "take the lead on scrutiny of financial regulatory proposals".[124]

Clause 36 would amend FSMA 2000 to implement the Government's proposals by setting out that the FCA and the PRA must notify the TSC when they publish a consultation, and that they must respond to any Select Committee that has responded to a consultation published by it.

Cooperation of FCA, PRA and others (Clause 37)

The FCA is the UK conduct regulator for around 51,000 financial services firms. The Financial Ombudsman Service (FOS) was established by FSMA 2000 as a free alternative dispute resolution service for financial services consumers and smaller businesses. The Financial Services Compensation Scheme (FSCS) provides compensation for customers of financial services owed money by firms authorised by the FCA.[125]

The FCA, FOS and FSCS have distinct but interlinking roles. They are also required to cooperate as they consider appropriate (such as by sharing information), and the FCA and FOS must maintain a Memorandum of Understanding describing how they do this. In January 2022 these organisations (together with the Money and Pensions Services and Pensions Regulator) voluntarily launched a Wider Implications Framework to provide transparency on how they cooperate (such as through publication of minutes of meetings). [126]

The Government proposes to formalise this practice by requiring these organisations to cooperate on issues with wider implications.[127] **Clause 37** would implement this by amending FSMA to introduce a duty for the FCA, the FOS and the FSCS to cooperate on issues affecting each other or the wider financial services market. They would have to publish a statement and annual report on compliance with the duty.

FCA and PRA panels and policy statements (Clauses 38 to 42)

For background on statutory panels, see the commentary on clauses 34 and 35 above.

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123 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, Response to the Consultation, July 2022, p9

124 UK Parliament, Treasury Committee establishes Sub-Committee for scrutiny of financial services regulations, 23 June 2022

125 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), p50

126 FOS, Wider Implications Framework [accessed 24 August 2022]

127 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), p50

Non-statutory panels

Unlike other panels, the FCA's Listing Authority Advisory Panel (LAAP) and the PRA's insurance sub-committee panel are non-statutory. The Government believes they make an "important contribution…as a channel for stakeholder engagement"[128] and wants to give stakeholders confidence of their permanence, and formalise their right to be consulted (alongside the other statutory panels). **Clauses 38 and 39** would implement this policy by placing the LAAP and the PRA's insurance sub-committee panel on an equal footing with other statutory panels.

Cost benefit analyses

FSMA 2000 generally requires the FCA and PRA to publish a draft of any proposed rules they intend to make, which must include a cost-benefit analysis (CBA). The CBA must include an estimate of the costs and benefits of bringing those rules into force, unless they think they cannot be reasonably estimated, or it is not reasonably practicable to produce an estimate.[129] In October 2020 the Treasury asked for views on how regulators' CBA obligations could be improved to contribute to higher-quality and evidence-based policy.[130]

CBA Panels

The Government noted that several respondents to its consultation supported "enhanced external challenge" to CBA. They therefore proposed the creation of a new statutory panel for each of the FCA and PRA to give expert advice and support in developing their CBAs. In their view this could both improve the quality of CBAs conducted and increase stakeholder confidence in them.[131]

In its July 2022 Proposals for Reform Response, the Treasury confirmed its intention to create new CBA statutory panels, which it said was "overwhelmingly supported" by respondents. Having sought views on whether such panels should provide pre-publication or post-publication (and post-implementation) input on rules, it concluded that regulators should provide both, subject to a materiality threshold and the ability for regulators to set criteria for when CBAs would not need to go to the panel before publication because it would be disproportionate.[132]

Clause 40 would amend FSMA (by inserting new sections 1381A and 138JA) to implement this policy, by requiring the FCA and PRA to create new statutory

128 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p49

129 See sections 138I and 138J of FSMA 2000

130 HM Treasury, Financial Services Future Regulatory Framework Review, Phase II Consultation, October 2020, p36

131 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p54

132 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, Response to the Consultation, July 2022, p13

Cost Benefit Analysis Panels, on an equal footing with other existing statutory panels.[133]

Statements of policy on CBA

Some respondents to the Government's consultation on CBA raised concerns about the rigour and consistency of the FCA and PRA's CBAs. They said it wasn't clear when CBAs were conducted, how they were put together, and whether they focused on the correct things.[134]

In response, the Government proposed to introduce a requirement for the FCA and PRA to introduce and publicly publish a framework for how they conduct CBAs (which the FCA already largely does).[135] It believes this would increase transparency and give stakeholders confidence in knowing how and when CBAs are conducted. This proposal was "strongly welcomed" by respondents, according to the Government. **Clause 41** would implement this policy by amending FSMA to create a new requirement for the FCA and PRA to each publish a statement of policy on their approach to CBA.

Statements of policy on panel appointments

In addition, the Government believes that statutory panels comprised of members with diverse backgrounds, fields of expertise and opinions are better placed to advise regulators. It recognises concerns raised by some respondents that panel members tend to be selected from larger firms and established sectors, with a lack of representation from some important stakeholder groups (like vulnerable customers).[136] In its July 2022 Proposals for Reform Response the Government therefore confirmed its intention to introduce a requirement for regulators to maintain statements of policy on their processes for appointing members to panels, which respondents "strongly agreed with".[137]

Clause 42 would implement this policy by amending FSMA 2000 to introduce a requirement for the FCA and PRA to publish statements of policy on their processes for appointing members to their statutory panels. Prior to publishing their statements they would be required to consult the Treasury.

Bank of England regulatory powers (Clauses 43 to 45)

Clauses 43 to 45 would set new requirements on how the Bank of England exercises its regulatory powers.

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133 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 998

134 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p52

135 See the FCA, How we analyse the costs and benefits of our policies, July 2018

136 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, November 2021, p50-51

137 HM Treasury, Financial Services Future Regulatory Framework Review: Proposals for Reform, Response to the Consultation, July 2022, p10

Clause 43 would insert new sections 30D to 30I into Part 3A of the Bank of England Act 1998. [138] It would set new objectives for the Bank when exercising powers relating to financial market infrastructure (on which, see commentary on clause 9 to 12). It would reassert the Bank's Financial Stability Objective as its primary objective, but introduce new secondary objectives, requiring it to:

- have regard to the effect of its regulatory activity on CCPs and CSDs not established in the UK, as well as the location of their customers
- facilitate innovation in the services that CCPs and CSDs offer
- have regard to the desirability of sustainable growth, including in a way which is consistent with the UK's net zero emissions target
- have regard to the desirability of facilitating fair and reasonable access to services provided by CCPs and CSDs[139]

It would also establish a new Financial Market Infrastructure Committee, to be chaired by either the Governor or a Deputy Governor of the Bank, and would set out arrangements for how that committee would operate and report.[140]

Clause 44 would amend Part 18 of FSMA 2000 to introduce requirements relating to the review of rules made by the Bank in relation to CCPs and CSDs. [141] It would require the Bank to maintain a review of any relevant rules it makes, unless complying with recommendations from the Financial Policy Committee. It would also give the Treasury powers to direct the Bank to review rules if this would be in the public interest, and more generally how the Bank and the Treasury would work together to instigate and report on such reviews.[142] Many of these requirements resemble though imposed on the FCA and PRA under clauses 27 to 32.

Clause 45 would amend Part 18 and Schedule 17A to FSMA 2000 to reflect the new arrangements that would be made under clauses 43 and 44, and ensure that they function in a way which is appropriate for the Bank's new regulatory framework and its new general rule-making power. [143] For example, subsection (8) applies section 166A of FSMA 2000 to the Bank, which allows for the appointment of a skilled person to investigate a potential breach of a requirement to collect and keep up to date information.

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[138] Bank of England Act 1998, part 3A

[139] Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), paras 1002-1004

[140] As above, paras 1005-1008

[141] Financial Services and Markets Act 2000, part 18

[142] Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), paras 1009-1021

[143] As above, paras 1022-1023 and Financial Services and Markets Act 2000, part 18

Payment Systems Regulator's powers (Clause 46)

Clause 46 would introduce Schedule 7, which relates to the powers of the Payment Systems Regulator.

Schedule 7 would make amendments to the Financial Services (Banking Reform) Act 2013 (FSBRA 2013) to align it with other provisions that Part 1 of the Bill would make,[144] notably:

- confirming that the sustainable growth principle to which the PSR must have regard is consistent with contributing towards achieving compliance with the UK net zero emissions target (clause 25)
- requiring the PSR to respond to Treasury recommendations about aspects of government economic policy (clause 33)
- arrangements to consider when making rules (clause 29)
- reflecting that the PSR is not a rule-making authority, but rather imposes "generally applicable requirements" (clauses 27, 28 and 34)
- requiring the PSR to notify the Treasury of any relevant actions that it considers might materially risk being incompatible with the UK's international trade obligations (clause 31)[145]

[144] Financial Services (Banking Reform) Act 2013

[145] Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), paras 1281-1287

3 Part 2: Access to cash (Clauses 47 and 48)

This section was written before the Bill's Commons second reading debate on 7 September 2022. Clause references are therefore to the Bill as introduced to Parliament.

The use of cash in the UK has fallen quickly over recent years. While cash accounted for 45% of all payments in 2015, five years later it was used in only 17% of transactions in the UK.[146]

In October – December 2021:

- 4.3% of the UK population lived further than 2km from a bank, building society, Post Office branch or automated teller machine (ATM) where they could get cash. This rose to 4.5% for access to cash **without a charge**.
- Just 1.0% of the UK population lived further than 2km from a location where they can get cash (free or paid), including cashback. Northern Ireland had the greatest proportion of people – 16 % - who lived more than 2km from a source of cash.[147]

For further policy background, see the Library briefing paper The future of local banking services and access to cash.[148] More detailed data and trends are available in Statistics on access to cash, bank branches and ATMs.[149]

In 2019, an independent Access to Cash Review highlighted the risks to millions of people of "sleepwalking" into a cashless society by default. It called on Government, regulators, financial services and others to work together to "keep cash viable for the foreseeable future".[150]

As well as promoting the continued availability of ready access to cash for consumers and businesses, the Review noted that the reduced demand for

146 UK Finance, UK Payment Markets Summary, 2016 to 2021 editions

147 FCA, Access to cash coverage in the UK 2021 Q4, June 2022. Note that cashback locations are based on locations where cashback had been provided in 2020.

148 Commons Library Briefing Paper CBP 9543, The future of local banking services and access to cash

149 Commons Library Briefing Paper CBP 8570, Statistics on access to cash, bank branches and ATMs

150 Access to Cash Review, Access to Cash Review: final report (pdf), March 2019, p4

notes and coins risked undermining the economic sustainability of wholesale supply of physical cash. It highlighted two threats:

- Reduced payments to providers of automated teller machines (ATMs) might lead those providers to move to more pay-to-use ATMs or to abandon the market altogether.[151]
- The wholesale cash network in the UK is run by a few companies. Two firms dominate the market for transporting cash. The withdrawal of any of these could severely affect overall the capacity of the market.[152]

Subsequent action by government, regulators and the financial services industry has tended to build on the Access to Cash Review's recommendations.[153]

The Government announced a commitment to legislating to protect access to cash and the related infrastructure in the 2020 Budget.[154]

As part of its response, the Financial Services Act 2021 enabled traders to offer cashback without a purchase.[155]

The Treasury launched a call for evidence on the future of access to cash in October 2020.[156] It outlined the Treasury's thinking on various aspects of the issue:

- It suggested that the ATM network should ensure "reasonable access to cash" across the UK, and that decisions about where ATMs are located should "[balance] commercial customer need alongside commercial factors."[157]
- It welcomed existing industry and regulatory initiatives.[158]
- It wanted to explore options to promote cash acceptance rather than mandating it.[159]
- It suggested that the FCA was "well positioned" to take on regulatory oversight of retail distribution of cash, supported in this goal by the Payment Services Regulator and the Bank of England.[160]

151 As above, p67

152 Access to Cash Review, Access to Cash Review: final report (PDF), March 2019, p69

153 See Commons Library briefing paper, CBP-9453 The future of local banking services and access to cash (8 August 2022) for further detail.

154 HM Treasury, Budget 2020, 12 March 2020

155 Commons Briefing Paper CBP 8705, Financial Services Act 2021, 7 May 2021

156 HM Treasury, Access to Cash: Call for Evidence, October 2020

157 As above, p10

158 As above, p7-12

159 As above, p19

160 As above, p22

The Treasury published a summary of responses to the call for evidence[161] and a consultation document on access to cash on 1 July 2021, setting out its proposals. These included ensuring "reasonable access" for withdrawal and deposit facilities for personal customers, and deposit facilities for SME customers. It would set and amend geographic access requirements to achieve this.[162]

In April 2022, the Government published a policy statement recognising the potential risks to the sustainability of the wholesale cash infrastructure – although it emphasised that no such risk currently existed. It announced its intention to give the Bank of England:

- regulatory oversight of the market activities of cash infrastructure industries
- powers "to prudentially regulate a systemic entity in the market, should one form in the future" (and so potentially influence wider financial stability) [163]

The Government confirmed in May 2022 that the Bill would both guarantee customers "reasonable access" to deposit and withdrawal facilities, and give the Bank of England powers to oversee the wholesale cash infrastructure.[164]

Cash access services (Clause 47 and Schedule 8)

The Bill aims to ensure "continued provision of cash withdrawal and deposit facilities" in order to maintain access to cash.[165]

Clause 47 of the Bill would insert Schedule 8, which in turn would insert new Part 8B into FSMA 200. This would create legislation to protect access to cash.

Part 1 of Schedule 8 would insert a new Part 8B entitled "Cash Access Services" into FSMA 2000 consisting of new sections 131M to 131Z2. New section 131P would require the Treasury to produce a cash access policy statement. New sections 131R and 131S would give the Treasury powers to designate legal persons involved in providing cash deposit and withdrawal services, and give the FCA regulatory powers over designated persons.[166] The Explanatory Notes to the Bill state that in order to identify relevant firms, the Treasury would consider firms' geographic coverage, distribution of customers and market share. It considers it likely that designated firms would be "larger banks and building societies." As part of the process, the Treasury could also designate "industry cash coordination bodies". The FCA's powers would enable it to require designated bodies to ensure continued "reasonable

161 HM Treasury, Access to Cash: Call for Evidence – summary of responses, 1 July 2021
162 As above
163 HM Treasury, Protecting UK wholesale cash infrastructure: Policy statement, April 2022, p9
164 HM Treasury, "New powers to protect access to cash" (news story), 19 May 2022
165 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 316
166 As above, para 1316-1324

access" to cash services. It stipulates that the FCA would take account of the effect of proposed changes on people in particular areas, regardless of whether they are customers of the firm(s) concerned. The FCA might require a firm not to close a cash access service if there is no suitable alternative.[167]

New sections 131U to 131Z1 would give the FCA powers to supervise designated persons.[168] These would also give it monitoring and enforcement powers over designated firms and coordination bodies. The FCA would be able to obtain information from non-designated bodies involved in providing cash facilities.

Part 2 of Schedule 8 would make consequential amendments to FSMA 2000 as a result of the introduction of new Part 8B.[169]

Wholesale cash distribution (Clause 48 and Schedule 9)

The Bill would also support access to cash by ensuring that "a sustainable and resilient wholesale cash system" is in place.

While the Government does not consider any of the current operators in the industry to be "systemic" (that is, they can be replaced without risk to the stability of the wider system) it considers that future consolidation of the industry could change this. The Bill would therefore provide the Bank of England powers to oversee the wholesale cash industry.

It would give the Treasury powers to designate entities that provide or support wholesale cash services to regulation by the Bank of England under either or both of two regimes:

1. Under a **market oversight regime**, the Bank would be given powers to seek information in order to monitor the state and evolution of the industry in order to identify any emerging systemic risks.

   The Bank would have powers to direct designated firms to take specific actions or indeed not to do so, and to set standards for firms to meet. The Bank would be given powers of inspection and enforcement, as well as to levy fees to cover the operation of the scheme and penalties for non-compliance. The scale of fees would have to be approved by the Treasury and Parliament, and industry would be consulted.

2. A **prudential regime** would give the Bank powers of prudential regulation of any systemic entity that might emerge in the market in future. The Bill would only allow the Treasury to designate an entity as being subject to the regime "if they are satisfied that a deficiency or disruption to their wholesale cash distribution activities would threaten the stability of or confidence in the UK financial system."

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167 As above, para 317-319

168 As above, para 1326-1357

169 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 1361

> The Bill would give the Bank similar powers as those under the market oversight regime, but with a focus on managing risks to financial stability and confidence in the UK financial system. It would give the Bank the power to apply an appropriate Special Administrative Regime (SAR) to prevent or mitigate the failure of a relevant designated entity.
>
> The Bill would allow the Bank not to apply or vary such provisions for companies wholly owned by the Crown. The regime would not cover wholly state-owned entities.[170]

Clause 48 of the Bill would insert **Schedule 9**, which in turn would insert new Part 5A into the Banking Act 2009 and make amendments to Part 6 of the Financial Services (Banking Reform) Act 2013.[171]

Part 1 of Schedule 9 would insert new Part 5A of the Banking Act 2009 consisting of new sections 206C to 206Z6. Section 206E would define "wholesale cash distribution". Section 206H would explain "market significance" and "systemic significance" Sections 206K to 206N would set out provisions for regulation. Sections 206O to 206Y would set out provisions for enforcement.

Commentary

Among the responses to the call for evidence, the Access to Cash Review panel had broadly welcomed the Treasury's proposals. It also proposed that banking providers should be allowed to collaborate to provide access to cash without breaching competition law, and that the Post Office's banking services should be brought under the FCA's regulatory remit.[172]

On 11 July 2022, shortly before publication of the Bill, Pete Wishart, SNP Chair of the Scottish Affairs Committee, expressed concerns about "the risk that banks may close their doors before legislation on this matter comes into force. We are aware of the commercial considerations affecting banks, which has played a role in the recent increase of branch closures." While welcoming the intentions of the forthcoming legislation, the Committee also urged the FCA to investigate the refusal of some retailers to accept cash, and for the new approach not to rely so heavily on voluntary agreements.[173]

170 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), paras 321-331
171 Banking Act 2009 and Financial Services (Banking Reform) Act 2013
172 Access to Cash Review, Response to HMT call for evidence – access to cash (PDF), November 2020
173 UK Parliament, Scottish Affairs Committee, "Half a million Scots could struggle to access their cash as banks speed up closures to dodge UK Government laws to protect services", 11 July 2022

4 Part 3: Performance of functions relating to financial market infrastructure (Clause 49)

This section was written before the Bill's Commons second reading debate on 7 September 2022. Clause references are therefore to the Bill as introduced to Parliament.

The Senior Managers and Certification Regime (SM&CR) was introduced as part of post-financial crisis reforms to drive up standards in people working in financial services. It comprises three main limbs:

- **the Senior Managers Regime**: people performing significant managerial functions who must be pre-approved by the regulator and then certified annually;
- **the Certification Regime**: a larger group of persons in high-risk roles who need not be pre-approved but must be certified annually as fit and proper for their roles; and
- **the Conduct Rules**: a set of minimum standards such as a duty to act with integrity, with which most staff in financial services firms need to comply.

The regime was introduced to the banking industry from March 2016. It was extended to insurers in December 2018, and to the bulk of the remainder of the roughly 50-60,000 FCA-regulated financial services firms in December 2019. For more information on the regime see the Library briefing Executive accountability in financial services: the Senior Managers and Certification Regime.

The measure

Existing regulation of Central Counterparties (CCPs), Central Securities Depositories (CSDs) and Recognised Investment Exchanges (RIEs), currently largely set out in retained EU law (see the commentary on clauses 9 to 12), has limited oversight of the individuals within those firms. The Government seeks to address this by introducing a similar (but separate) SM&CR for those firms. The Treasury would be given the power in future to apply the regime to Credit Rating Agencies (CRAs) in future, to deliver greater consistency of

regulation across the sector.[174] CRAs (such as Moody's or S&P) give opinions on the creditworthiness of an issuer (like a company) or a product (like bonds).[175]

The Treasury would decide when to apply the regime to each of these categories of new entities, and be able to tailor the regime to each category to account for the differences between these types of firms. CCPs and CSDs are regulated by the Bank of England, and RIEs and CRAs are regulated by the FCA, who would each be given enforcement powers (such as the power to issue fines or orders prohibiting individuals from performing certain functions) as part of the SM&CR. To implement the regime, each regulator would use its rule-making powers.[176]

Clause 49 inserts Schedule 10 into the Bill, which would introduce a new Chapter 2A into Part 18 of FSMA 2000 to allow for the implementation of the new SM&CR for these bodies.

174 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), paras 332 to 347
175 See FCA, Credit rating agencies, last updated 30 June 2022 [accessed 24 August 2022]
176 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 626

5 Part 4: Central counterparties in financial difficulties (Clause 50)

This section was written before the Bill's Commons second reading debate on 7 September 2022. Clause references are therefore to the Bill as introduced to Parliament.

For background on central counterparties (CCPs), see the commentary on clauses 9 to 12 above.

Because of the volume of trades cleared through them, the failure of a CCP could pose risks to the stability of the financial system. CCPs are highly regulated so it is rare that they fail – but it cannot be ruled out.[177] If it does happen, the normal insolvency procedures used for companies are therefore not generally considered appropriate for CCPs.[178]

The UK was one of the first countries to establish a tailored regime for failed CCPs, through the Financial Services Act 2012 (which came into force in 2014). This regime gave the Bank of England powers to (for example) transfer ownership of the CCP or some of its business.[179]

The Financial Stability Board (FSB) – an international body (which the UK is a member of) that monitors and makes recommendations about the global financial system[180] - has since issued guidance on how to implement an effective regime (known as a resolution regime) for CCPs in financial difficulty.

An updated regime

The Government therefore is seeking to legislate to update the resolution regime for CCPs in line with FSB guidance. It says the updated regime would allow it to take:

> faster and more extensive action to stabilise the CCP than it can now. These powers would also limit risks to public funds by seeking to ensure CCPs and clearing members bear the losses arising from a CCP failure, rather than taxpayers, whilst still stabilising the CCP, preventing the CCP's failure from

177 Oxford University Faculty of Law, How Do Central Clearing Counterparties Fail? 23 November 2016
178 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 357
179 HM Treasury, Expanded Resolution Regime: Central Counterparties. March 2022, Chapter 1
180 FSB, About the FSB [accessed 26 August 2022]

> having a wider negative impact on the stability of other firms, and providing reassurance to the market.[181]

These new tools would include, for example, requirements for members using CCPs to provide cash contributions from clearing, the ability to write down (reduce) certain of the CCP's liabilities, and a requirement for the CCP to provide more of its own assets ("skin-in-the-game") to absorb losses.[182]

The Government consulted on these measures in 2021, and noted in response that respondents broadly "welcomed the proposed expansion of the UK resolution regime for CCPs and were broadly in agreement with the proposed framework, noting that it was in line with international guidance".[183] It therefore expressed an intention to legislate for the expanded regime and bring the powers into force as soon as practicable after the legislation is passed.

Clause 50 would insert Schedule 11 into the Bill, which would introduce a special resolution regime for CCPs where all or part of their business has encountered, or is likely to encounter, financial difficulties. Schedule 11 sets out the technical detail of this regime in 165 paragraphs.

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181 HM Treasury, Expanded Resolution Regime: Central Counterparties. March 2022, p5

182 HM Treasury, Expanded Resolution Regime: Central Counterparties. March 2022, p5

183 HM Treasury, Expanded Resolution Regime: Central Counterparties. March 2022, p18

6 Part 5: Insurers in financial difficulties (Clause 51)

This section was written before the Bill's Commons second reading debate on 7 September 2022. Clause references are therefore to the Bill as introduced to Parliament.

Only 11 UK insurers have become insolvent since 2000.[184] But when an insurer does become insolvent, it can cause huge damage to individual policyholders (who may for example rely on life insurance policies for a primary source of income), and for many businesses that can't operate without insurance cover.

The current UK insolvency regime for insurers, set out in FSMA 2000, is a modified version of that which is in place for companies. The Government says the regime has generally been effective, but some elements of it have become outdated as international standards have developed.[185]

Clause 51 (and Schedules 12 and 13) would therefore make a number of amendments to the existing regime, covering three broad areas. The **first** relates to the "write-down" of liabilities under section 377 of FSMA. This gives courts a power to reduce the value of an insolvent insurer's contracts, as an alternative to making an order to close the insurer down. The power has never been used and there is uncertainty about its scope. The Bill therefore sets out when and how the power can be used, who can apply to the court for it to be used, and what test the court must apply in deciding whether to use it.[186]

The **second** concerns contractual termination rights. Contracts an insurer has (for example, with its bank or with suppliers) often include 'ipso facto' clauses, allowing the other party to terminate the contract if the insurer enters into certain proceedings showing it is in financial distress, even if the insurer is still meeting its obligations under the contract (such as making payments on time). This can make the insurer's financial situation even worse. The Bill would therefore introduce a new 'moratorium' preventing suppliers and some financial counterparties from enforcing this type of termination clause for an initial six-month period (extendable by a court), while an insurer is going through certain insolvency procedures (like administration).[187]

184 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 367
185 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 366-7
186 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), paras 369 to 375
187 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), paras 376 to 378

The **third** concerns policyholder surrender rights. Some life insurance policies include 'surrender' clauses allowing policyholders to terminate their contract early in return for a proportion of its cash value. When a life insurer is known to be in financial distress, large numbers of concerned policyholders might choose to surrender their contracts to get what cash they can, creating a situation analogous to a 'run' on a bank. This can force an insurer already in financial difficulty to lose even more money. The Bill would therefore introduce a moratorium on life insurance policyholder surrender, applying in the same circumstance as the moratorium on contractual termination rights described above. The moratorium would also last for six months and be extendable by a court. Small withdrawals of up to 5% of the value of the policy in any 12-month period would still be allowed – but the Treasury would be able to amend this percentage limit through secondary legislation under the draft affirmative procedure.[188]

The Government consulted on its proposed amendments to the insurer insolvency regime in 2021, received 9 responses and agreed to make changes from its initial proposals, such as introducing (in relation to the proposals on policyholder surrender rights) the 5% "small withdrawals" exemption and reducing the initial moratorium from 12 months to 6 months.[189]

188 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), paras 379 to 381

189 HM Treasury, Amendments to the Insolvency Arrangements for Insurers: Responses to Consultation, April 2022, pp16 and 30-31

7 Part 6: Miscellaneous (Clauses 52 to 65)

This section was written before the Bill's Commons second reading debate on 7 September 2022. Clause references are therefore to the Bill as introduced to Parliament.

7.1 Amendments to FSMA 2000 (Clauses 52 to 59)

Application of provisions to regulatory functions under this Act (Clause 52)

Clause 52 of the Bill would amend sections 1A and 2AB of FSMA 2000 so that responsibilities, functions or regulations made under them through this Bill would become functions of the relevant regulator – the FCA or the PRA.[190]

Formerly authorised persons (Clause 53)

Most firms undertaking regulated financial services in the UK must be authorised to do so by the FCA or the PRA and must thereafter follow the relevant regulator's rules. They are also subject to regulatory supervision, investigation and disciplinary action.[191]

But currently the regulators are in most cases unable to take disciplinary action against firms that are no longer authorised – even if such measures were to relate to actions taken while the firm was still authorised.[192]

Clause 53 of the Bill would enable the regulators to take action against firms that are no longer authorised (as long as they lose their authorisation after the introduction of the Bill, that is, 20 July 2022. It would amend relevant sections of FSMA 2000 both to extend the regulators' disciplinary powers to formerly authorised persons and specify that references in the Act to "authorised persons" to include those who ceased to be authorised on or after the day that the present Bill was introduced.[193]

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190 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), paras 1031-1033 and Financial Services and Markets Act 2000, part 1A

191 As above, paras 382-383

192 As above, para 384

193 As above, paras 1034-1037

Control over authorised persons (Clause 54)

Currently, Section 178 of FSMA 2000 requires persons (firms or individuals) who wish to take an ownership stake of 10% or more of an authorised UK financial services firm to give notice and seek the approval of the relevant regulator before completing that acquisition. Such applicants are referred to as "controllers".[194]

The regulator then assesses the proposal, taking account of – among other matters – the reputation and financial soundness of the notice-giver, the reputation and experience of the director of the business, the subsequent ability of the firm to meet regulatory requirements, and any reasonable suspicions that the notice-giver has connections with or might enable money laundering or terrorist financing.[195]

While the regulators may currently apply conditions to their approval of an application, they may only do so in cases where the application would otherwise fail. The Explanatory Notes to the Bill highlight that the regulator may sometimes have significant concerns about the notice-giver, but not enough to reasonably reject the applicant. Attempting to apply such a condition while there is an existing investigation of the applicant might also affect their reputation.[196]

Clause 54 of the Bill would amend section 187(2) of Part 12 of FSMA 2000 to allow regulators to impose conditions if doing so would advance their objectives (although they would have to disregard the economic needs of the market).[197]

Financial Services Compensation Scheme (Clause 55)

The Financial Services Compensation Scheme (FSCS) is administered by the "FSCS manager", a body corporate established under FSMA 2000.[198]

The Office for National Statistics (ONS) compiles the UK's National Accounts. As explained in the Explanatory Notes to the Bill, in 2020 the ONS classified the FSCS manager as a "supervisory authority", which meant that it was considered neither part of central government nor an arm's length body (ALB) of the Treasury. This meant that its accounts would no longer be consolidated into those of the Treasury. [199]

Clause 55 would amend section 212(3)(aa) and repeal section 218B of FSMA 2000 so that the FSCS manager would no longer require an accounting

194 Financial Services and Markets Act 2000, section 178
195 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), para 393
196 As above, paras 395-396
197 As above, paras 1038
198 See Financial Services Compensation Scheme website for further information.
199 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (pdf), paras 387-389

manager and would no longer be required to provide certain information relating to its accounts to the Treasury.[200]

Technical measures (Clauses 56-59)

These clauses are essentially technical changes so are not discussed here.

7.2 Bank of England levy (Clauses 60 and 61)

The Cash Ratio Deposit (CRD) Scheme

The Bank of England's policy functions – monetary policy and financial stability – are financed by the Cash Ratio Deposit (CRD) Scheme. Under the Scheme banks and building societies are required to place an interest-free deposit at the Bank which is a ratio of their eligible liabilities. The Bank invests those deposits in interest-yielding assets, generating income to fund these aspects of its work.[201]

In 2021/22 the Scheme raised £136 million.[202]

Statutory provision for the Scheme is made by section 6 and Schedule 2 of the Bank of England Act 1998.[203]

As the Treasury has noted, the rationale for the Scheme is that "deposit-taking institutions benefit from the Bank's provision of liquidity, since their balance sheets are characterised by assets (loans) with long-term maturity, and liabilities (deposits) many of which can be called in at short notice." In addition, "CRD payers are all eligible to act as participants in the Bank's Sterling Monetary Framework, which gives them access to a range of facilities including reserves accounts and various borrowing facilities."[204]

Eligible institutions within the CRD scheme are, broadly, UK deposit-taking institutions (banks and building societies) authorised under the Financial Services and Markets Act 2000. The size of an eligible institution's cash ratio deposit is calculated by applying two factors:

200 As above, paras 1039-1040 and Financial Services and Markets Act 2000

201 Bank of England Annual Report and Accounts 2021/22 p38. For details of the ways the Bank raises funds for its other activities see, HM Treasury, Review of the cash ratio deposit scheme: consultation on proposed changes, September 2021 para 3.1; Bill 146-EN, 20 July 2022 para 407-8.

202 Bank of England Annual Report and Accounts 2021/22 p41 (see, Financial statement highlights)

203 This legislation (Bank of England Act 1998) provided for the transfer of monetary policy from HM Treasury to the Bank of England in 1997. Commons Library briefing CBP97/115, Bank of England Bill 1997/98, 10 November 1997 discusses the background to this reform (see p16 on the CRD Scheme).

204 HM Treasury, Review of the cash ratio deposit scheme: consultation on proposed changes, September 2021 para 1.5. For details see, Bank of England, SMF operating procedures, January 2022

- the size of its eligible liabilities above a minimum threshold; [205]
- a cash ratio, applied above this threshold.[206]

The Bank of England Act 1998 provides for the value bands and ratios for the Scheme to be set by secondary legislation.[207]

The operation of the Scheme means the Bank's income is subject to changes in two variables: changes in the gilt rate, and the size of deposits eligible for the Scheme, which is largely driven by the performance of the banking sector.[208] Since it was established the Scheme has been reviewed regularly to ensure it raises sufficient funds for the Bank's policy functions, with modifications being made to its parameters in 2004[209], 2008[210] and 2013.[211]

Following a review of the Scheme in 2018, the Government introduced an indexation-based approach to adjust the cash ratio every six months, using a formula that takes into account past gilt yields.[212] In effect, this means that when gilt yields decrease, participants are required to increase their deposits at the Bank, so that the Bank can invest in more gilts, in an attempt to meet the income target. As of June 2021, the overall size of the cash ratio deposits were £12.1 billion. The largest 20 institutions accounted for 83% of the total deposits, eight of which each contributed more than £200 million in deposits under the scheme.[213]

The Government's consultation to replace the CRD Scheme with a new levy (Sept-Nov 2021)

In July 2021 the then Economic Secretary John Glen announced that the Treasury, working closely with the Bank, would begin the next review of the CRD scheme. This would "include an assessment of the detailed arrangements of the scheme as well as the continuing suitability of the scheme itself compared to alternative sources of funding." It would "also

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[205] Paragraph 2 of Schedule 2 to the Act provides that the liability base of an eligible institution at any time is the aggregate of those sterling and foreign currency liabilities of the institution which are eligible liabilities.

[206] HM Treasury, Review of the cash ratio deposit scheme: consultation on proposed changes, September 2021,paras 1.6-1.7. Eligible institutions with eligible liabilities below this threshold are not required to place any cash on deposit at the Bank under the current scheme. The scope of 'equitable liabilities' is set out in secondary legislation (SI 1998/1130, amended by SI 2005/3203).

[207] Specifically paras 2 and 5 of Schedule 2 to the Act (Bill 146-EN, 20 July 2022 para 651). Initially the value bands and ratios were set by SI 1998/1269. See, Sixth Standing Committee on Delegated Legislation, 13 May 1998.

[208] As noted by Government spokesman Lord Newby in May 2018 when the Government modified the cash ratio and deposit threshold (HL Deb 20 May 2013 GC19).

[209] SI 2004/1270. See also, HC Deb 19 April 2004 c80WS; HL Deb 26 March 2004 c1011-1014

[210] SI 2008/1344. see also, Fourth Delegated Legislation Committee, 14 May 2008; HL Deb 20 May 2008 GC11-15

[211] SI 2013/1189. see also, HC Deb 25 April 2013 cc1062-65; HL Deb 20 May 2013 GC19-24.

[212] HM Treasury, Review of the cash ratio deposit scheme: consultation on proposed changes, September 2021 para 1.8. This change was made by SI 2018/633. see also, Fourth Delegated Legislation Committee, 15 May 2018; HL Deb 16 May 2018 c160GC-164GC.

[213] Bill 146-EN, 20 July 2022 para 409

address the impact of the scheme on eligible institutions and involve a public consultation."[214] The Treasury's public consultation was launched in September 2021 and closed in November 2021.[215]

The Treasury's review found that the Scheme created "a lack of predictability for CRD payers" and had "failed to generate the stable income required to fund the Bank's policy functions":

> As part of the current review, the government looked at the past and projected performance of the scheme in the 2018-23 period.
>
> The volatility and the lack of predictability in the current scheme was noted, which results in significant uncertainty for CRD payers and the Bank. The total cash deposits are projected to rise in size from £7.6 billion following implementation of the 2018 review changes, to approximately £14 billion by 2023.
>
> The Bank is also exposed to volatility since the income generated from the investment of CRD is directly linked to market yields. The projected shortfall of funding for the Bank's policy functions over the 2018-23 period is expected to reach £261 million.[216] The main reason for the shortfall has been lower than anticipated gilt yields, which have resulted in below target income from the investment of deposits. The cost of the Bank's activities funded by the scheme have also increased over the period, beyond the income target set in 2018.[217]

The review concluded that there would need to be a substantial increase in the CRD deposit to meet the future costs of the Bank's policy functions:

> For the illustrative purpose of assessing the options reviewed, it has been assumed that the Bank's policy costs will remain flat in real terms beyond those expected for 2021/22. This would imply a target income of £220 million a year averaged over the period.
>
> The CRD portfolio would need to increase substantially in order to generate this target income. This is primarily due to gilt yields, where market expectations are that these will remain low across the period, as well as an increase in the Bank's responsibilities, resulting in increased policy costs. If the CRD scheme were recalibrated at the end of the current period in June 2023 in order to fully cover the Bank's policy costs, the total balance would need to grow from the current £12.1 billion to £19.8 billion, taking account of expected maturities and investments to that point.[218]

The consultation paper proposed that a new levy could "deliver a simpler, more transparent funding scheme for CRD payers" and offer "a more reliable way of providing stable funding for the Bank's policy functions":

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[214] Written Statement HCWS211, 20 July 2021

[215] HM Treasury, Review of the Cash Ratio Deposit scheme: consultation on proposed changes, 7 June 2022

[216] These projections are based on the relevant financial years for the Bank of England, which do not align exactly with when the changes of the 2018 review took effect.

[217] HM Treasury, Review of the cash ratio deposit scheme: consultation on proposed changes, September 2021 para 4.2, para 2.2-3

[218] As above para 4.3-4

> Under an alternative funding arrangement, such as an annual levy, the Bank would consult with industry annually on the basis of actual policy costs […] rather than the Treasury assuming an income level requirement at the beginning of every five-year period using estimates, as for the current CRD scheme […] The Bank's policy costs to be recovered through the levy would be approved by Court as part of annual budget setting processes and discussed with The Treasury.[219]
>
> The Bank would then allocate the expenditure total to eligible firms according to a defined metric, for example using the long-established allocation process currently used in the CRD scheme. Firms would then be required to make a payment according to this determination. As happens with other cost recovery schemes, a mechanism would exist for adjusting subsequent years' levies to take account of under or overspends, following the finalisation of accounts.[220]

In February 2022 the Treasury published a summary of the responses it had received to the consultation exercise. There had been six responses: two from trade associations (who together represented many of the deposit-takers within the scope of the CRD scheme), two from individual banks and two from members of the public. Overall respondents supported the proposal, and had mentioned "many of the same themes": specifically, "the cohort of taxpayers, the implementation and operation of the proposed levy and alternatives to the levy."[221]

Among the comments made, one respondent "noted that a levy would create less of a constraint on firms' balance sheets and would allow the option to invest in a broader range of assets to generate an income to cover the levy payment, although they were of the view that in doing so firms would not make a greater return than the Bank might be able to." A second respondent noted "that they had previously argued the case for a levy" and that "a new levy would allow for a much greater degree of transparency and accountability, and would allow firms to reflect the direct cost of contribution rather than having to estimate its opportunity cost."[222]

The Government's proposal for a new levy does not appear to have been raised by MPs.

The Treasury's Policy Statement on replacing the CRD Scheme (June 2022)

In June 2022 the Treasury published details of its policy to replace the CRD Scheme with the Bank of England Levy. The Department noted that the new levy would "ensure that the income received by the Bank is in line with its forecast expenditure for its policy related activities." This would provide "increased certainty to the Bank over its funding" as well as "increased

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219 Under the terms of the Memorandum of Understanding on the financial relationship between HM Treasury and the Bank of England.

220 HM Treasury, Review of the cash ratio deposit scheme: consultation on proposed changes, September 2021 para 5.5 , para 3.6, para 5.8-9

221 HM Treasury, Review of the Cash Ratio Deposit Scheme: Summary of consultation responses, February 2022 para 1.4

222 HM Treasury, Review of the cash ratio deposit scheme: consultation on proposed changes, September 2021 para 5.5 , para 3.6, para 5.8-9

certainty to payers over the size of their annual contribution, which they will be notified of annually." [223]

The Treasury's policy statement gave more details of the scope of the levy:

> The CRD scheme will be replaced with a new levy of the same cohort that currently pay into the CRD scheme. In line with the CRD scheme, eligible institutions will broadly be UK deposit-taking institutions (banks and building societies) authorised under the Financial Services and Markets Act 2000. The policy rationale for maintaining this cohort as payers of the levy is that they are all eligible to act as participants in the Bank's Sterling Monetary Framework, which gives them access to a range of facilities including reserves accounts and various borrowing facilities. They are also the primary beneficiaries of the Bank's role as resolution authority.[224]

The Treasury's policy statement also set out how the levy would work in practice:

> The Bank will determine the total policy levy annually to match budgeted expenditure on policy functions [...] Each year, the Bank will be required to notify industry of the aggregate costs that it has set for that year. Through this annual notification process, the Bank will explain any changes to costs or operation of the levy [...]
>
> Each year the Bank will notify eligible institutions of the amount of the levy that they are liable to pay and the time and method by which the levy must be paid [...] In the event of an eligible institution's failure to pay the levy, the outstanding amount will be recoverable as a debt due to the Bank. The interest payable on the debt will be 4% over the benchmark, which will be defined as the official Bank rate. This is a continuation of what is currently done in the CRD scheme. [...]
>
> When the new levy scheme is introduced, the Bank will publish a standalone framework document outlining the Bank's approach to levying policy costs [...] Each year the Bank will publish the costs and reconciliation of the levy in the Bank's Annual Report and Accounts [...]
>
> The government will continue to monitor the effectiveness of the funding model used to meet the Bank's policy costs and will conduct a further formal review within at least five years of legislation being introduced and publish a report in respect of that review.[225]

Finally, the policy statement explained that the Government would introduce legislation to establish the new levy "when Parliamentary time allows", and that following the Royal Assent of primary legislation, the Treasury would "take forward steps for secondary legislation."[226]

It is intended that this secondary legislation "will allocate the Bank's policy costs to payers in proportion to their eligible liability base, setting out the formula and ratio for how this will be applied." This represents a continuation

[223] HM Treasury, Review of the Cash Ratio Deposit Scheme: Policy Statement, June 2022 para 1.19

[224] As above para 1.8

[225] As above para 1.19

[226] As above para 1.10-11, para 1.13-18

of how the CRD scheme operates. The policy rationale for this is "the link between the size of a financial institution's liabilities and its potential impact on the Bank's financial stability functions."[227]

The Bill (Clauses 60-61)

Clause 60 would repeal the CRD Scheme, and introduce provisions to enable the Bank of England to impose a new levy on financial institutions.

Clause 60(2) would remove the provisions in the Bank of England Act 1998 covering the CRD Scheme. **Clause 60(3),(4)** would insert a new section (section 6A) and a new Schedule (Schedule 2ZA) into the 1998 Act to establish the levy.

Paragraph 1 of new Schedule 2ZA would give the Bank the power to impose the new levy on 'eligible institutions'. These are defined in paragraph 2. Broadly speaking they are UK bank and building societies authorised under the Financial Services and Markets Act 2000.[228] The Bank would be required each year to determine which of its functions the levy will be funded by, and how much the levy will need to raise (under paragraph 4). These 'determinations' would have to be published.

Under paragraph 5 of the new Schedule 2ZA the Treasury would be able to introduce regulations to set out how the levy would be calculated. The Bank would determine each institution's liability in accordance with these regulations. It is intended that these regulations would be reviewed at least every five years.[229] Paragraph 6 sets out the procedure the Bank would follow to notify institutions of their liability. Paragraphs 7 and 8 set out what would happen if the levy was not paid, and how the Bank could seek to recover unpaid amounts. Paragraph 9 sets out the powers the Bank would have to obtain the information it needed to operate the levy.

As noted the Treasury would be able to introduce regulations to set out how the Bank is to determine the amount of the levy individual institutions would pay, under paragraph 5(1). The Treasury would also have the power to introduce regulations to amend the cohort of institutions liable to pay, under paragraph 2(4)). In both cases these regulations would be subject to the affirmative procedure, under paragraph 10(5).[230] Finally late payments of the levy would be subject to interest. This would be set at 4% above the 'benchmark rate' (the official Bank rate), under paragraph 8. The Treasury would have the power to introduce regulations to amend this rate, under

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227 HM Treasury, Review of the Cash Ratio Deposit Scheme: Policy Statement, June 2022 para 1.12. The Explanatory Notes to the Bill state that "it is proposed that the levy would apply to all eligible firms with eligible liabilities of at least £600 million (Bill 146-EN, 20 July 2022 para 416).

228 Explanatory Notes to the Financial Services and Markets Bill, 20 July 2022 para 1057

229 As above, para 1059

230 See, HM Treasury, Financial Services and Markets Bill: Memorandum to the Delegated Powers and Regulatory Reform Committee, July 2022 para 643-654

paragraph 8(5). These regulations would be subject to the negative procedure, under paragraph 10(6).[231]

Clause 61 would provide for a number of consequential amendments to the Bank of England Act 1998.

7.3 Other miscellaneous provisions (Clauses 62 to 65)

Liability of payment service providers for fraudulent transactions (Clause 62)

'Authorised push payment' (APP) scams are those in which someone authorises a bank transfer to a scammer's account. The victim of the scam believes that they are making a genuine payment. It is 'authorised' because the victim has approved the details of the payment.[232]

The Lending Standards Board (LSB, the "the primary self-regulatory body for the banking and lending industry"[233]) oversees a voluntary Contingent Reimbursement Model Code for APP scams (the CRM Code), which sets out principles and policies for signatories to follow in preventing APP scams and considering claims from victims.[234]

There are limitations to the scheme, which the Payment Services Regulator noted can lead to inconsistent outcomes for people affected:[235]

- Its membership is voluntary. In April 2022, the LSB said that it covered 21 banking brands within 10 wider banking groups.[236]
- It sets out general principles for reimbursement. These include such considerations as whether the victim was "vulnerable" to fraud and whether they are "not to blame for the success of a scam."[237]

UK Finance says that in the first half of 2021, it received over 106,000 reports of APP scams, worth a total of over £355 million. Both of these figures had more than doubled from the previous year. Of the £355 million reported in the

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231 HM Treasury, Financial Services and Markets Bill: Memorandum to the Delegated Powers and Regulatory Reform Committee, July 2022 , para 656 - 658

232 Payments System Regulator, Authorised Push Payment scams, November 2021

233 Lending Standards Board, Who we are (accessed 30 August 2022)

234 Lending Standards Board, Contingent Reimbursement Model Code for Authorised Push Payment Scams, 28 April 2022 (accessed 11 August 2022)

235 Payments System Regulator, Authorised push payment (APP) scams consultation paper, 18 November 2021, p10-11

236 Fraud Act 2006 and Digital Fraud Committee, Lending Standards Board – Written evidence (FDF0050), 22 April 2022

237 Lending Standard Board, Contingent Reimbursment Model Code, [last accessed 17 August 2022]

first half of 2021, almost £151 million (42%) had been reimbursed to the customers concerned.[238]

In 2021 the Payment Services Regulator (PSR) published a call for views to help to address the wider issue. It sought to require more open publication and better sharing of data, as well as "[e]xtending customer protection across all banks and building societies at a minimum standard by changing payment system rules."[239]

It followed up the call for views with a consultation paper in November 2021. That called for "mandatory reimbursement for victims of scams who have done nothing wrong."[240] The rationale for making reimbursement compulsory included:

- the fact that fewer than 50% of claims were upheld – the PSR considered it "unlikely that victims have not acted appropriately in 50% of cases"
- the inconsistencies in practice between signatories in approaching reimbursement
- the different prevention policies in place between signatories and non-signatories, which also might encourage scammers to focus their efforts on particular institutions.[241]

The PSR proposed covering all payments made under the Faster Payments system. As the name suggests, this enables transfers to be completed before a victim has a chance to change their mind and cancel it. The PSR said that the "vast majority" of APP scams related to such payments.[242]

The Treasury published a policy paper in May 2022 that set out the broad direction of the Government's legislative intentions. These built on the recommendations presented in the PSR's consultation. The Government also noted that as part of its response it would alter the Payment Services Regulations so that reimbursement could be required even where the payment had been "correctly executed" (that is, with the correct sort code and account number). It said that the changes would "enable the PSR to establish a liability framework for APP scams using its existing powers, and ultimately improve reimbursement outcomes for victims of APP scams." It expected that the PSR would consult further on reimbursement arrangements in autumn 2022.[243]

Clause 62 of the Bill would require the PSR to prepare and publish a draft relevant requirement for reimbursement in "qualifying cases" that the PSR

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[238] UK Finance, 2021 Half Year Fraud Report, [last accessed 17 August 2022]. These figures are for **reported** frauds – there are likely to have been many more.

[239] Payments System Regulator, Authorised push payment scams – call for views, 11 February 2021

[240] Payments System Regulator, Authorised push payment (APP) scams consultation paper, 18 November 2011

[241] As above, p10-11

[242] As above, p27

[243] HM Treasury, Government approach to authorised push payment scam reimbursement, 10 May 2022

considers should be eligible. The clause would define a "qualifying case" as one which relates to a payment order executed over the Faster Payment Scheme subsequent to fraud or dishonesty. The PSR would be required to consult on the draft relevant requirement and carry out its duty within two months of the commencement of this Clause. Subsections (5) to (7) would require the PSR to then impose such a relevant requirement within 6 months of the commencement of this Clause.

Credit unions (Clause 63)

Section 3 of the Credit Unions Act 1979 sets out the four objects (or purposes) for which credit unions may be established:

a) the promotion of thrift among the members of the society by the accumulation of their savings;

b) the creation of sources of credit for the benefit of the members of the society at a fair and reasonable rate of interest;

c) the use and control of the members' savings for their mutual benefit; and

d) the training and education of the members in the wise use of money and in the management of their financial affairs.[244]

ABCUL, the Association of British Credit Unions Limited, undertook a consultation exercise of its members in 2019. The results, reported in Vision 2025,[245] highlighted that many wanted to expand their services, not least to offer a wider range of financial products than legislation allowed.

The Government announced a commitment in Budget 2020 to updating the law to do that noting credit unions' "vital role in financial inclusion".[246]

The then Economic Secretary, John Glen, told ABCUL's annual conference in May 2022 that the Bill would introduce an optional supplementary object that would allow credit unions to offer hire purchase, conditional sale agreements and insurance distribution services to their members, subject to compliance with relevant regulatory requirements. The legislation would also make "minor" changes, including a requirement for credit unions to submit annual accounts to the FCA, and permission for credit unions to make temporary loans to each other, even when there is no membership link.[247]

ABCUL has welcomed the proposals in the Bill.[248]

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244 Credit Unions Act 1979, section 3

245 Association of British Credit Unions Limited, Vision 2025,[last accessed 17 August 2022]

246 HM Treasury, Budget 2020, 12 March 2020

247 HM Treasury, Keynote Speech by John Glen, Economic Secretary to the Treasury, at the Innovate Finance Global Summit, 4 April 2022

248 ABCUL, "Financial Services Bill to Unlock Growth in Credit Unions Presented to Parliament", 22 July 2022 (accessed 11 August 2022)

Clause 63 would insert Schedule 14, which would in turn amend the Credit Unions Act 1979 to add to the financial activities that credit unions may carry out. It would introduce a new optional object for credit unions which would allow them to offer new services set out in a new section 1ZA. The new services are: hire purchase agreements, conditional sale agreements and insurance distribution services.

Section 1ZB would give The Treasury powers to add new activities to the optional object in future and further amendments to the Credit Unions Act 1979 to support the new products or services. Before adding any new products or services under the new object, it would have to consult “people it deems appropriate” before introducing secondary legislation via the affirmative procedure.

In line with the coverage of the Credit Unions Act 1979, the clause would not extend to Northern Ireland.

Reinsurance for acts of terrorism (Clause 64)

The Reinsurance (Acts of Terrorism) Act 1993 (“the 1993 Act”) responded to the withdrawal of (re)insurers from the market after a series of terrorist incidents in Great Britain. (The 1993 Act does not extend to Northern Ireland and so neither would this clause.)[249]

The Government chooses to intervene in the (re)insurance market for some systemic risks because commercial operators consider potential financial losses to be too great. The 1993 Act allows the Treasury to offer an unlimited guarantee (in the form of loans) to support reinsurers if payouts exhaust their funds after a terrorist attack.

The Office for National Statistics (ONS) is “likely” to classify a company that enjoys” such a guarantee as a public sector body, and such a classification may be retrospective. However, such a classification brings a requirement for company accounts to be consolidated into those of its sponsor department.[250] The company also becomes subject to its sponsor department’s departmental accounts, and subject to “necessary and appropriate controls, standards and processes expected of a public sector body”.

Clause 64 of the Bill would amend the 1993 Act to give the Treasury power to “issue directions to any public sector body which benefits from an arrangement under the 1993 Act” (or to group undertakings of such bodies) if it deems it necessary to do so to ensure compliance, notably in relation to “auditing, accounting, budgeting, arm’s length bodies or public sector bodies.” The Treasury would also be given a specific power to direct such bodies to appoint an Accounting Officer to ensure “sufficient oversight of its requirements as a public sector body.”[251]

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[249] Reinsurance (Acts of Terrorism) Act 1993

[250] Government Resources and Accounts Act 2000

[251] See Explanatory Notes to the Financial Services and Markets Bill 2022-23, paras 433-439

8 Part 7: General provisions (Clauses 66 to 73)

This section was written before the Bill's Commons second reading debate on 7 September 2022. Clause references are therefore to the Bill as introduced to Parliament.

Part 7 (Clauses 66-73) would cover general provisions for the Bill including interpretation, extent and commencement.

Clause 68 is a standard financial provision which would authorise expenditure provisions throughout the Bill.[252]

Clause 69 would allow the Treasury to make any consequential amendments or modifications to legislation that are consequential on the Bill's provisions. Any such amendments that amend, repeal or revoke primary legislation would be made by regulations subject to the affirmative procedure.

Clause 71 sets out the territorial extent of the Bill. It would extend to England, Wales, Scotland and Northern Ireland other than Clauses 63 (Credit Unions) and 64 (reinsurance for acts of terrorism) which would extend to England, Wales and Scotland only.

Clause 72 would provide for commencement of provisions. Other than as listed in subsections (1) and (2), the provisions of the Bill would come into force on such day as the Treasury may appoint by regulations. The clauses on: financial promotion so far as it confers a power to make regulations (Clause 20(3)), mutual recognition agreements (Clause 23) and recognised bodies (Clause 49 and Schedule 10) would come into force on the day on which the Bill receives Royal Assent. A number of other clauses (including on DSAs (Clause 21), access to cash (Clauses 47-48) and insurers in financial difficulties (Clause 51)) would come into force two months after Royal Assent.

252 See: Erskine May, Chapter 28, para 14 for more information on financial provisions in Bills.

9 Commons Second reading and Committee Stage

9.1 Second reading

The second reading debate took place on Wednesday 7 September, following which the Bill passed without a division.[253]

39 MPs participated in the "very well subscribed"[254] debate, from seven parties:

- 19 Conservative: Economic Secretary Richard Fuller, Chris Grayling, Mark Garnier, David Mundell, Paul Maynard, Rishi Sunak, Mel Stride (then-Chair of the Treasury Committee), Kevin Hollinrake, Damian Hinds, John Glen, Stephen Hammond, Bim Afolami, Martin Vickers, Dame Andrea Leadsom, Pauline Latham, James Davies, Harriett Baldwin, David Simmonds and Gareth Davies
- 10 Labour: Shadow Treasury Ministers Tulip Siddiq and Abena Oppong-Asare, Dame Angela Eagle, Emma Hardy, Stella Creasy, Siobhain McDonagh, Nick Smith, Seema Malhotra, Kate Osamor and John McDonnell
- 3 SNP: Peter Grant, Alison Thewliss and Ronnie Cowan
- 3 DUP: Jim Shannon, Ian Paisley and Paul Girvan
- 2 Liberal Democrats: Wera Hobhouse and Sarah Olney
- 1 Green Party: Caroline Lucas
- 1 Plaid Cymru: Ben Lake

In opening the debate, Economic Secretary Richard Fuller said the Bill contained an "ambitious set of reforms" to "enable the United Kingdom to assert its leadership, and to drive forward change to capture a greater share of the global market for financial services".[255] Shadow Minister Tulip Siddiq said Labour "broadly support the Bill", in recognition of the financial sector's

253 HC Deb 7 September 2022, vol 719 col 278-344
254 As above, col 285
255 As above, col 278

"consensus view" that "regulatory divergence with the EU has the potential to produce many opportunities". [256]

Peter Grant noted that the SNP had "decided to table a reasoned amendment" asking the House to deny the Bill a second reading (which was not selected for a vote), as he said the Government's main intention with the Bill is to "force through a damaging, totally unnecessary divergence from our European Union neighbours, for no other reason than that they can" - but he confirmed that the SNP "will not oppose Second Reading".[257] Sarah Olney said the "Liberal Democrats very much welcome the Bill, although we would like to see stronger powers to tackle fraud and more on access to cash".[258]

The debate centred on five key themes:

Access to cash

Clauses 47 and Schedule 8 of the Bill (as introduced) would, according to the then Economic Secretary, "give the FCA the responsibility to ensure reasonable access to cash across the UK".[259] Shadow Minister Tulip Siddiq said that Labour welcomes the measures to protect access to cash, but expressed concern that the Bill "does nothing to protect essential face-to-face banking services".[260] Conservative MPs Martin Vickers and Paul Maynard agreed that it was important to focus on a wider range of banking services rather than just cash.[261]

For the SNP, Peter Grant also welcomed these measures, but was worried they "do not yet go far enough" and "probably will not lead to action quickly enough".[262] Shadow Business Minister Seema Malhotra said "we can all be very pleased" about the Bill's "aims to protect people's access to cash" but noted with surprise that the Bill "makes no commitment to free access to cash" and that the Minister would not make that commitment in the debate.[263] MPs from a number of parties (including Paul Maynard, Martin Vickers, Dame Andrea Leadsom, Nick Smith, Sarah Olney and Ronnie Cowan) also argued that access to cash should be free.[264]

Kate Osamor (Labour) said the access to cash measures "could be an important step in determining safeguards on access to cash in the long term, but sadly what we see is a narrow set of proposals with a lot of detail still unconfirmed".[265]

[256] As above, col 286
[257] As above, col 293-296
[258] As above, col 321
[259] As above, col 284
[260] As above, col 288
[261] As above, col 311 and 321
[262] As above, col 293 and col 296
[263] As above, col 299
[264] See the contributions of individual members during the debate at cols 278-344
[265] As above, col 304-5

In her concluding speech, Shadow Minister Abena Oppong-Asare said free access to cash was a "vital topic".[266] The then Economic Secretary replied that "[w]here appropriate, the FCA could exercise the powers in the Bill to prevent a branch closure where in doing so it is seeking to ensure reasonable provision of cash access services". He said that "access to cash must and will be protected", but that he "cannot give an assurance on free-to-use ATMs".[267]

Scrutiny and call-in

A number of Members raised concerns about whether the Bill's measures would allow the Government too much power to by-pass the parliamentary process. Dame Angela Eagle (Labour) noted that "a great deal of extra power will be given to the regulators and the Treasury. I worry about a lack of appropriate accountability to the House".[268] Emma Hardy (Labour) asked about measures in the Bill "going directly to the Treasury and bypassing Parliament entirely".[269] SNP spokesperson Peter Grant said the Bill "gives the Treasury the power to decide when and if each of those 200-plus laws is revoked and the Treasury gets the power to decide when, if ever, it will bring forward replacement legislation for them".[270] Economic Secretary Richard Fuller said there would be "ample time for questions to be asked in the House" as consultations on many of the measures in the Bill take their course.[271]

The then chair of the Treasury Committee, Mel Stride, said the Treasury Committee "is and should remain right at the centre" of financial services scrutiny by Parliament.[272] But Alison Thewliss (SNP) questioned whether the Committee's resources are "adequate" to properly scrutinise financial services regulation.[273] Stephen Hammond (Con) asked the Government to "consider yet again a Joint Committee of both Houses on financial services, which is what happens in other jurisdictions".[274] Richard Fuller said it was "ultimately for Parliament to determine the best structure for its ongoing scrutiny of the financial services regulators".[275]

Several Members also raised the Government's proposals to introduce a "call-in" power allowing the Treasury to intervene more directly in financial services regulation. Richard Fuller noted that the Government intended "to

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[266] As above, col 341
[267] As above, col 342-5
[268] As above, col 279
[269] As above, col 280
[270] As above, col 293
[271] As above, col 281
[272] As above, col 297
[273] As above, col 308
[274] As above
[275] As above, col 282

bring forward an intervention power that will enable Her Majesty's Treasury to direct a regulator to make, amend or revoke rules where there are matters of significant public interest", noting that the Government would "table an amendment in Committee".[276] Then-backbencher Rishi Sunak said he was "pleased to hear the Minister comment on the call-in power, and I urge him and the Government to quickly bring forward the means for that power",[277] and then-backbencher John Glen also said he "welcome[d] the call-in power".[278] Bim Afolami also spoke in favour, saying it was "almost unconscionable that such a power does not already exist".[279] But Shadow Minister Tulip Siddiq said she was "disappointed that the Government have decided to cause greater uncertainty in the City by introducing a significant change at this stage".[280]

Update: call-in power dropped

On 31 October 2022 Economic Secretary Andrew Griffith wrote to the Treasury Committee to reiterate the Government's intention to bring forward a call-in power enabling the Treasury to direct a regulator "to make, amend or revoke rules where there are matters of significant public interest" but said that "in light of the appointment of the new Prime Minister last week and the need for government to consider the detail carefully we will will [sic] now be unable to take [table] the amendment in time for the deadline for Committee Stage".[281]

The proposed amendment was therefore not tabled at Commons Committee Stage. On 23 November 2022 Mr Griffith wrote again to the Treasury Committee informing them that "Having consulted further, the government is of the view that the existing provisions in the Bill are currently sufficient, and we will therefore not be bringing forward an amendment to the Bill to introduce an Intervention Power".[282] The Financial Times reported that Prime Minister Sunak had "backed down in his longstanding power struggle with the Bank of England".[283]

New secondary competitiveness and growth objective

Economic Secretary Richard Fuller noted that "for the first time, the Prudential Regulatory Authority and the Financial Conduct Authority will be

[276] As above, col 283
[277] As above
[278] As above, col 306
[279] As above, col 326
[280] As above, col 287
[281] HM Treasury, Letter from Andrew Griffith MP to Angela Eagle MP, 31 October 2022
[282] HM Treasury, Letter from Andrew Griffith MP to Harriett Baldwin MP, 23 November 2022
[283] Financial Times, Sunak backs down in battle with Bank of England over financial regulation (paywall), 23 November 2022

given new secondary objectives, as set out in clause 24, to facilitate growth and international competitiveness".[284]

But Caroline Lucas (Green) asked the Minister to "look at this again and consider introducing a climate-and-nature-specific statutory objective as well".[285] Tulip Siddiq said Labour would "support the principle that there is a role for the FCA and PRA to advance international competitiveness and growth".[286] Stephen Hammond said the new objectives "will neither undermine the regulators' independence nor cause any prospect of a financial crash".[287]

Sarah Olney (LD) said she was "particularly concerned about the focus on competitiveness…at the expense of other statutory objectives"[288] and former Shadow Chancellor John McDonnell said he worries "that we are re-inserting into legislation an emphasis on competitiveness that could override so many other issues of concern."[289]

Fraud

Mr Fuller noted in his opening speech that "Clause 62 enables the Payment Systems Regulator to mandate the reimbursement of victims of authorised push payment scams by payment providers".[290] But Tulip Siddiq said it was "disappointing" that the "Bill does nothing to strengthen fraud prevention".[291] Peter Grant agreed, describing "the lack of effective anti-fraud measures in the Bill" as "a major concern" and "wholly inadequate".[292] For the Liberal Democrats, Sarah Olney said she "welcome[s] the measures to tackle push payments, but I would like to see a great deal more about fraud".[293]

Damian Hinds (Con) supported the Bill's anti-fraud measures, which he said would bring "consistency and fairness and will enhance confidence for people using online financial services".[294] In his concluding speech, Richard Fuller said he does "not accept that the Government and regulators are not taking action to prevent fraud".[295]

Mutuals and Credit Unions

Several MPs spoke about Government support for the mutuals sector. In his opening speech Richard Fuller said that "[c]lause 63 allows credit unions in

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284 HC Deb 7 September 2022, vol 719 col 281
285 As above, col 278
286 As above
287 As above
288 As above, col 320
289 As above, col 309
290 As above, col 285
291 As above, col 289
292 As above, col 294
293 As above, col 320
294 As above, col 303
295 As above, col 345

Great Britain to offer a wider range of products and services to their members".[296] Tulip Siddiq said that while it "contains some welcome and long-overdue provisions", she thought it "lacks ambition" arguing that it "does little to address the outdated regulatory regime faced by credit unions, building societies and co-operative banks".[297]

Emma Hardy noted that she gives "credit to the Government for what they are doing on credit unions",[298] but Seema Malhotra said that the "Government's plans for the sector could be far more ambitious".[299]

9.2 Public Bill Committee

The Financial Services and Markets Bill 2023-23 Public Bill Committee (PBC) met nine times between 19 October and 3 November 2022.[300] The PBC had 17 Members:

- 10 Conservatives: Economic Secretary Andrew Griffith, Gareth Bacon, Shaun Bailey, Harriett Baldwin, Gareth Davies, Stephen Hammond, Sally-Ann Hart, Alan Mak, Joy Morrissey and Craig Tracey
- 5 Labour: Shadow Minister Tulip Siddiq, Emma Hardy, Dame Angela Eagle, Siobhain McDonagh and Liz Twist
- 2 SNP: Peter Grant and Martin Docherty-Hughes[301]

In the first two sittings (on 19 October), oral evidence was taken from the following witnesses:

- Victoria Saporta, Executive Director of Prudential Policy, Prudential Regulation Authority
- Sheldon Mills, Executive Director of Consumers and Competition, Financial Conduct Authority
- Sarah Pritchard, Executive Director of Markets, Financial Conduct Authority
- Emma Reynolds, Managing Director, Public Affairs, Policy and Research, TheCityUK
- David Postings, Chief Executive Officer, UK Finance

296 As above, col 285
297 As above
298 As above, col 325
299 As above, col 300
300 See House of Commons Official Report, Financial Services and Markets Bill, Compilation pdf of sittings, 4 November 2022
301 As above, see (for example) pp 1-2

- Chris Hemsley, Managing Director, Payment Systems Regulator
- Charlotte Clark CBE, Director of Regulation, Association of British Insurers
- Karen Northey, Corporate Affairs Director, Investment Association
- Sir Jon Cunliffe, Deputy Governor, The Bank of England
- Paddy Greene, Head of Money Policy, Which?
- Natalie Ceeney CBE, Chair, Cash Action Group
- Martin Coppack, Director, Fair by Design
- William Wright, Managing Director, New Financial
- Robert Kelly, Chief Executive Officer, Association of British Credit Unions Ltd
- Robin Fieth, Chief Executive, Building Societies Association, and Director, Co-operatives UK
- Mike Haley, Chief Executive, CIFAS
- Adam Jackson, Policy Director, Innovate Finance
- Martin Taylor, Former External Member, Financial Policy Committee, Bank of England[302]

Line-by-line consideration took place in the following seven sittings, starting from 25 October.

Part 1, Chapter 1 (clauses 1 to 7 – revocation of retained EU law)

Clause 1 and Schedule 1

As introduced, clause 1 of the Bill provides for the revocation of legislative instruments (forming part of retained EU law). Those instruments are listed in Schedule 1. This revocation would happen subject only to Treasury-made commencement regulations.

Commencement regulations notably attract no further Parliamentary scrutiny.

An amendment in the name of SNP MP Peter Grant was debated, which would have changed this arrangement. Under amendment 44, it would not be

302 As above, see pp 1-2 and 35-36

sufficient for the Treasury simply to make commencement regulations to cause the relevant legislation to expire.

Instead, the Treasury would have to proactively make expiry regulations. These would be made under the negative resolution procedure, and could therefore be annulled by Parliament.

The amendment also would have provided that expiry regulations could only be made in certain circumstances. Specifically, it included a proviso that they could not, in the assessment of the Chancellor of the Exchequer, "prejudice the interests of consumers" unless "alternative and adequate provision" had been made to "mitigate" those prejudicial effects.

Amendment 44 was defeated on a division (2 Ayes to 10 Noes). The clause was then agreed to without amendment or division.

Schedule 1, which lists relevant retained EU law set to expire under clause 1, was agreed to without a division.

Clauses 2-4 and Schedule 2

The provisions concerned with transitional arrangements for retained EU law in clauses 2 and 3 and Schedule 2 were agreed to without a division, as were the powers in clause 4 to "restate" financial services-related retained EU law in other domestic legislation.

Clause 5

The Treasury's power in subsection 5(1) would enable it to modify legislation to replace existing references to EU directives with "other appropriate provision".

Government amendment 2, which was made without a division, adds the words "if any". The effect of this is to clarify that the references to EU directives can simply be deleted, without making any other provision at all.

Clauses 6-7

Both clause 6 (which disapplies consultation requirements when restating retained EU law) and clause 7 (which provides a glossary for Chapter 1 of Part 1) were agreed to without a division.

Part 1, Chapter 2 (clauses 8 to 23)

Clauses 8 (Designated activities regime) and 9 to 12 (Financial market infrastructure: general rules and requirements)

Five amendments were tabled to clause 8 – four by the SNP (Peter Grant, Martin Docherty-Hughes and Owen Thompson) and one by Treasury Minister Andrew Griffith. None were tabled to clause 9 to 12.

Government amendment

The amendment tabled by Mr Griffith (Amendment 22) was debated alongside Government New Clause 14. Mr Griffith explained that while clauses 21 and 22 of the Bill would specifically extend regulation to stablecoins – or "digital settlement assets" – the Government regarded it as important to give the Treasury powers "to respond to developments in the crypto sector more quickly and deliver regulation in an agile, risk-based way that is consistent with our approach to the broader financial services sector."[303]

He emphasised that the Government intended to consult more widely before any new powers were introduced, and that any subsequent changes arising from the current proposals would be subject to the affirmative procedure. Tulip Siddiq welcomed the proposals on behalf of the Opposition, noting that they would help to protect customers. The amendment and new clause were agreed to without a division, and New Clause 14 became a new clause 61 (Cryptoassets) of the Bill.

The new clause would amend section 417 of the Financial Services and Markets Act 2000 (FSMA 2000) to include a definition of "cryptoasset". The definition would be:

> "any cryptographically secured digital representation of value or contractual rights that—
>
> (a) can be transferred, stored or traded electronically, and
>
> (b) that uses technology supporting the recording or storage of data (which may include distributed ledger technology)."

It would use that definition to extend section 21 (restrictions on financial promotion) and section 22 (regulated activities) of FSMA 2000 to include situations "where an asset, right or interest is, or comprises or represents, a cryptoasset".[304]

SNP amendments

The four SNP amendments sought to:

- "allow the Treasury to designate and regulate businesses which seek to raise finance by soliciting contributions from the general public other than by an authorised share issue" (for example, by issuing "mini-bonds" to public). The amendment (Amendment 34) was withdrawn after Mr Griffith said he believed that the legislation was "already sufficiently broad in scope" to cover such businesses;[305]
- "allow for nominated representatives to be held personally liable for the carrying out of a designated activity when an organisation has been found liable" (Amendment 35). Peter Grant explained that the amendment "seeks not to require but to allow the designated activity regulations in specific circumstances to make regulations that say,

[303] PBC 25 October 2022

[304] As above – see the text of NC14

[305] As above

"There will be occasions when individuals who have carried out the misconduct will be held personally liable to people who have suffered"."[306]

Andrew Griffith said the amendment "cannot be supported" on the basis "that limited liability is an important principle in UK law". Mr Grant decided to press the amendment to a division on the basis of the "Government's inexcusable delay in closing the loopholes", where it was defeated by 10 votes to 2;[307] and

- "remove the Treasury's proposed power to make regulations which modify legislation of the Welsh Senedd, Scottish Parliament or Northern Ireland Assembly for purposes connected with the regulation of designated activities" (Amendments 36 and 37, debated together). Mr Grant summarised the amendment as saying "Hands aff oor Parliament", and that (as drafted) clause 8 would "give power to Ministers of the reserved Parliament to override decisions of the democratically elected national Parliaments of three of the four equal-partner nations in the Union".[308]

  Andrew Griffith said the clause contained "an essential power that gives the Treasury the ability to ensure that legislation works consistently and effectively when changes are brought about by virtue of the DAR".[309] However, Mr Grant pressed Amendment 36 to a division on the basis that "Every time I see such a power grab in legislation, I will speak against it, stand against it, and vote against it." The amendment was defeated by 10 votes to 2. Mr Grant subsequently agreed that it "does not make a lot of sense to press amendment 37 now that amendment 36 has gone".[310]

Clauses 13 to 17 (Financial market infrastructure: piloting powers)

The Bill would require the Treasury to prepare and publish a report on financial market infrastructure sandbox arrangements.[311] **Amendment 38** proposed by the SNP would require that report to include the views of any relevant regulator.[312] Government Minister Andrew Griffith expressed concern that doing so would require the Treasury to publish detailed views given by the FCA and Bank of England in response to a consultation. This would inhibit their input and might force them to share commercially or market sensitive.[313] Peter Grant (SNP) said that his amendment did not intend such a level of reporting detail. He would therefore withdraw "and bring it back with a slightly different wording at a later stage."[314]

306 As above
307 As above
308 As above
309 As above
310 As above
311 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (PDF), para 156
312 PCB Deb 25 October 2022 c127
313 PCB Deb 25 October 2022 c127
314 PCB Deb 25 October 2022 c132

Clauses 18 and 19 (Powers in relation to critical third parties)

No amendments were proposed to clauses 18 and 19.

Clause 20 (Financial promotion)

The Bill would establish a “regulatory gateway” for firms wishing to approve financial promotions by unauthorised firms.[315] SNP **amendment 39** would prevent operators seeking approval from an authorised person for the content of a communication in situations where another authorised person had already not given approval, unless it is permitted by the Financial Conduct Authority.[316] The Explanatory Notes explained that its purpose was to prevent operators from “shopping around” for approval.[317]

Peter Grant (SNP) said that he would not press the amendment if the Minister did not feel that it was necessary or its purpose could be achieved through a better route.[318] Andrew Griffith said that the clause in the Bill “is a genuine enhancement of the regulatory infrastructure”.[319]

The amendment was withdrawn.[320]

Clauses 21 and 22 (Digital settlement assets)

The Bill would give the Treasury the power to make regulations for payments that include digital settlement assets. No amendments were proposed to these clauses, but Andrew Griffith said that the Government had committed to publishing a consultation later in the year on stablecoins and central bank currencies.[321]

Clause 23 (Mutual recognition)

No amendments were proposed to clause 23.

Part 1, Chapter 3 (clauses 24 to 46)

Clauses 24 to 26 (FCA and PRA objectives and regulatory principles)

Four amendments were tabled to clause 24; two by the SNP and two by Conservative backbencher Stephen Hammond. No amendments were tabled to clauses 25 and 26; all three clauses were agreed to without a division.

The two SNP amendments were not moved and therefore not debated. The two amendments tabled by Mr Hammond (amendments 46 and 47) were debated together. Mr Hammond explained that the two amendments, “which are fairly simple, would change “facilitating” to “promoting”. Facilitating

315 Explanatory Notes to the Financial Services and Markets Bill 2022-23 (PDF), paras 879-895
316 PCB Deb 25 October 2022 c136
317 PCB Deb 25 October 2022 c136
318 PCB Deb 25 October 2022 c137
319 PCB Deb 25 October 2022 c138
320 PCB Deb 25 October 2022 c140
321 PBC 27 October 2022 c149

almost implies letting something happen, perhaps through disregard. There should be active promotion of the secondary objective to remain internationally competitive."[322]

He said the amendments would help "make sure that the regulators stay on track and are held to their duty regarding the new secondary objective" on international competitiveness and growth that would be imposed on the regulators (the FCA and PRA) by clause 24. Mr Hammond withdrew the amendment following comments from Mr Griffith on "the importance of the Government's plans on growth and competitiveness".[323]

Clauses 27 to 32 (FRA and PRA powers to make rules etc)

One amendment was proposed to clause 28, and one to clause 29. No amendments were tabled to the remaining clauses, which were agreed to without a division.

The amendment to clause 28 (Amendment 48), tabled by Stephen Hammond, would (in his words) ensure "that regulators report regularly and transparently on key metrics" which the Treasury could specify. Its aim is "to ensure that the regulator not only has the objective, but has to report on it on a very clear set of metrics, which would then allow us in Parliament and the public to ensure that it is meeting the objective."[324] Mr Hammond withdrew the amendment after assurances from Mr Griffith that he was "open to discussing the matter with my hon. Friend outside the Committee to see what further reassurance the Government could give".[325]

The amendment to clause 29 (Amendment 1), was tabled in the names of Labour MPs Emma Hardy and Siobhain McDonagh, and Conservative MP Kevin Hollinrake (who was appointed a Government Minister in the Department for BEIS on the day the amendment was debated). The amendment sought to require the regulators to have regard to financial inclusion when making rules. It was debated alongside New Clauses 2 and 3, which followed the same theme of financial inclusion. Mr Griffith responded that he "would like to take this matter away" to "consider the matter further",[326] but Emma Hardy opted nonetheless to push the amendment to a vote, where it was defeated by 5 votes to 9.

Clauses 33 to 36 (FCA and PRA engagement) and 37 (Co-operation of FCA, PRA and others)

322 PBC Compilation pdf of sittings, p153
323 As above, p157
324 As above, p169
325 As above, p171
326 As above, p178

Two amendments were tabled to clause 34, and two to clause 36. No amendments were tabled to clauses 33, 35 or 37; all of these clauses were agreed to without a division.

The two amendments to clause 34 were tabled by Stephen Hammond. These (Amendments 49 and 55, debated together) sought to require "that the FCA and the PRA list all the consultees" to its public consultations. Mr Griffith responded that the amendments, if made, "could deter stakeholders that want to respond confidentially from engaging fully with the regulators' consultations".[327] Mr Hammond subsequently agreed to withdraw the amendments.

The two amendments to clause 36 (Amendments 3 and 4) were tabled by Government Minister Andrew Griffith. He explained that the amendments "make a technical change to the new requirements for the FCA and PRA to notify the Treasury Committee when they publish a consultation. Clause 36 contains a minor drafting error, by requiring the regulators to set out how the proposed rules are "compatible" with the regulatory principles. The Government have tabled these amendments to correct that and remove any ambiguity, and to align the requirement in clause 36 with the broader requirements in FSMA."[328] The amendments were agreed without a division.

Clauses 38 to 42 (FCA and PRA panels and policy statements)

Four amendments were tabled to clause 40 by Stephen Hammond. No amendments were tabled to clauses 38, 39, 41 and 42; all clauses were agreed to without a division.

As summarised by Andrew Griffith, the amendments would seek to "introduce specific requirements for the FCA in relation to its approach to CBA [Cost-benefit Analysis] and the creation of its CBA panel". Amendment 51 seeks to add a requirement for the FCA, when appointing persons to its CBA panel, to appoint at least two members who are "external to the FCA, the Treasury, or the Bank of England"". Amendment 52 "would require the FCA to consider representations made to it by non-governmental bodies and recognised industry or trade association bodies in relation to its development of a CBA". Amendments 53 and 54 "would require the FCA and PRA to publish annual responses to the representations made to them by their CBA panels".[329] Mr Hammond explained that the amendments seek to "address the concern that the panel has marked its own homework", but agreed to withdraw the amendments after a commitment from Mr Griffith "to meet my hon. Friend and consider these matters further before Report."[330]

Clauses 43 to 45 (Bank of England regulatory powers)

No amendments were proposed to these clauses.

[327] As above, p181
[328] As above, p186
[329] As above, p190
[330] As above, p192

Clauses 46 and 47 (Payment Systems Regulator)

The Government tabled **new clause 13** which would add the chair of the Payment Systems Regulator to the board of the FCA.[331] Since the Payment Service Regulator was set up in 2014 its chair had also been chair of the FCA and had therefore been on the FCA board.[332] Andrew Griffith explained that the roles would be performed by separate individuals following the appointment of Ashley Alder as the FCA chair in July 2022.[333]

The new clause was agreed without division[334] and became a new clause 47 of the Bill.

Clauses 47 and 48 (Access to cash) (as amended in Committee, clauses 48 and 49)

The Bill would make provision for a regulatory framework to protect access to cash. Both Labour and the SNP tabled a series of amendments to extend the proposed legislation.[335]

The SNP **amendment 40** would make reference to the provision of free of charge cash in schedule 8 and **amendments 41** and **42** would change the definition of cash withdrawal services to include both those that are free of charge and those that are not.[336] Martin Docherty-Hughes (SNP) said that it was "vital to protect" access to free-of-charge cash.[337] Shaun Bailey (Con) said that he thought he agreed with the rationale for the amendment .[338]

Economic Secretary Andrew Griffith said that the Government did not believe that it is appropriate for legislation to stipulate that access to cash must be free.[339] He said that the current definition in schedule 8 was wide enough to already cover the SNP amendments.[340]

The SNP amendments were withdrawn on the understanding that there would be a vote on the Labour amendments.[341]

Labour tabled amendments that also focused on the question of free-of-charge cash:

331 PBC 1 November 2022 c242
332 PBC 1 November 2022 c242
333 PBC 1 November 2022 c242
334 PBC 1 November 2022 c244-245
335 PBC 1 November 2022 c202-203
336 PBC 1 November 2022 c202-203
337 PBC 1 November 2022 c204
338 PBC 1 November 2022 c205-206
339 Andrew Griffith was appointed Economic Secretary to the Treasury on 27 October 2022; PBC 1 November 2022 c213
340 PBC 1 November 2022 c214
341 PBC 1 November 2022 c215

- Amendment 16 would require the Treasury to prepare a cash access policy statement which explicitly covered "both free of charge and paid access".
- **Amendment 17** would require the FCA to consider the provision of free and fee-charging services as part of its powers to require designated bodies to ensure continued "reasonable access" to cash services.
- **Amendment 18** would define a local deficiency of cash in terms of access to free of charge cash services.
- **New clause 10** would require the Treasury to make regulations guaranteeing a minimum level of access to free-of-charge cash access services.
- **New clause 11** would require the FCA to monitor, collect data and report on levels of cash acceptance among retailers and service providers.
- **New clause 12** would require to the Treasury to make regulations guaranteeing a minimum level of access to free-of-charge cash access services for small businesses.[342]

Siobhain McDonagh (Lab) said that "[w]ithout Government intervention, we are losing free access to cash in our society."[343] She said that she did not believe that the FCA would not require free access to cash unless it was legislated for.[344]

Labour's Shadow Minister, Tulip Siddiq, said that Labour had sympathised with the principle behind SNP **amendments 41** and **42 (as discussed above)**, but that the Labour amendments "would better achieve free cash access".[345] She said that the Bill was "a welcome step in guaranteeing access to cash, but … goes nowhere near far enough in ensuring that cash is available for those who depend on it."[346]

Andrew Griffith said that the Government felt that the requirements for the Treasury in **new clauses 10** and **12** regarding free-of charge access risked undermining the FCA's wider ability to protect access to cash.[347] He said that the Government was sympathetic to the intention of **new clause 11** to ensure acceptance of cash, but it could "risk placing a disproportionate regulatory burden on many businesses".[348]

342 PBC 1 November 2022 c202-203
343 PBC 1 November 2022 c207
344 PBC 1 November 2022 c208
345 PBC 1 November 2022 c210
346 PBC 1 November 2022 c210-211
347 PBC 1 November 2022 c214
348 PBC 1 November 2022 c214

Amendment 16 was pressed to a division, but this was defeated by 9 votes to 6, with Conservative Members voting against.[349]

Labour tabled three further amendments - **19**, **20** and **21 -.** which would require the FCA to collect and publish data relating to access to cash.[350] Debate focused on whether the FCA would act without legislation.[351] Andrew Griffith said that the Bill would give the FCA "very significant powers" to ensure reasonable provision of cash access services and that it would be held to account by the Treasury Select Committee and Parliament.[352] The amendments were withdrawn.[353]

Labour also tabled two new clauses relating to access to essential in-person banking services (rather than simply access to cash):

- **New Clause 4** would require the Treasury and FCA to conduct and publish a review of community need for, and access to, essential in-person banking services, and enable the FCA to ensure areas in need of such services have a minimum level of access.[354]
- **New Clause 5** would require the Treasury to publish a policy statement setting out its policies in relation to the provision of essential in-person banking services.[355]

Tulip Siddiq said that the FCA had submitted evidence to the Committee that the powers in the Bill do not extend to the provision of wider banking services beyond access to cash.[356] Labour Members argued that maintaining local face-to-face banking provision was important. Tulip Siddiq said that Labour was not opposed to closing bank branches; and access to face-to-face services could be delivered through banking hubs or other models of community provision.[357]

Stephen Hammond said that the proposed clauses needed to "more tightly define the practicality of how" access to essential in-person banking services is defined.[358] He said that to achieve its aim the new clauses would need to "contain the stipulation that to get a banking licence in the United Kingdom, one needs to pay a certain amount of social levy so that banking hubs can be established."[359]

349 PBC 1 November 2022 c216
350 PBC 1 November 2022 c216
351 PBC 1 November 2022 c216-220
352 PBC 1 November 2022 c219
353 PBC 1 November 2022 c220
354 PBC 3 November 2022 c258-259
355 PBC 3 November 2022 c259
356 PBC 3 November 2022 c260
357 PBC 3 November 2022 c261
358 PBC 3 November 2022 c264
359 PBC 3 November 2022 c264

Andrew Griffith said that the Government did not back the new Clauses because it would not be proportionate to legislate to intervene in the market.[360]

The new clauses were withdrawn.[361]

Parts 3 to 5: Clauses 49 to 51 (as amended in Committee, clauses 50 to 52)

Clauses 49 to 51 (Performance of functions relating to financial market infrastructure, central counterparties in financial difficulties, and insurers in financial difficulties)

No amendments were tabled to clauses 49 to 51. However, a number of Government amendments were tabled to Schedule 11 (incorporated by clause 50, regarding central counterparties in financial difficulty) and Schedule 12 (incorporated by clause 51, regarding insurers in financial difficulty).

The fifteen amendments (Amendments 9 to 15 and 24 to 31) tabled to Schedule 11 were all Government amendments. Mr Griffith explained that they "are technical amendments that will ensure that schedule 11 functions as intended, reflecting the original policy intent by rectifying drafting errors and ensuring the legislation is applied consistently across the UK".[362] The amendments were agreed without a division.

Two Government amendments (Amendments 32 and 33) were also tabled to Schedule 12. Mr Griffith said these amendments "ensure that the drafting meets full policy intent. Amendment 32 ensures that the moratorium on legal proceedings does not interfere with certain collateral and security arrangements among participants in the financial markets. It also provides the Treasury with the power to amend the list of exclusions, which is given legal force by amendment 33. Both amendments mirror exclusions and a similar power to amend the exclusions contained in schedule 13." The amendments were agreed without further debate or a division.

Clauses 52 to 60 (Miscellaneous) (as amended in Committee, clauses 53 to 60)

No amendments were proposed to these clauses.

Clauses 60 and 61 (Bank of England Levy) (as amended in Committee, clauses 62 and 63)

These clauses would replace the Cash Ratio Deposit scheme – which funds the Bank of England's policy functions – with a new Bank of England levy. No

[360] PBC 3 November 2022 c266

[361] PBC 3 November 2022 c267

[362] As above, p223

amendments were tabled to either clause, and the Committee agreed both clauses without a vote.

Introducing these clauses the Economic Secretary Andrew Griffith noted that "the levy will deliver a more reliable and stable funding stream to the Bank, and banks and building societies will benefit from greater certainty about the size of their annual contributions towards those functions." He went on to explain, "secondary legislation will be introduced in due course to set out further details of the operationalisation of the levy, including how institutions' contributions will be determined. The Treasury will consult on the draft legislation and has committed to review it every five years."[363]

Clauses 62 to 65 (Other miscellaneous provisions) (as amended in Committee, clauses 64 to 67)

No amendments were tabled to these clauses.

Part 7: clauses 66 to 73 (as amended in Committee, clauses 68 to 75)

No amendments were tabled to clauses 66, 68, 69, 71 and 73.

Three Government amendments were tabled to clause 67 (Pre-commencement consultation), which explains that a regulator's duty to consult under certain parts of the Bill can be done before the relevant part of the Bill comes into force. The three Government amendments to clause 67 (Mr Griffith explained) "[broaden] the effect of clause 67 so that it applies to all consultation duties arising under the Bill rather than only those duties specifically mentioned in subsection (3) of that clause."[364] The amendments were made without debate or division.

One Government amendment (Amendment 8) was tabled (and made) to clause 70 (concerning regulation-making powers under the Bill), which (according to the accompanying explanatory statement) "ensures that clause 4(1) of the Bill (power to restate and modify saved legislation) is within the scope of clause 70 for the purpose of being able to rely on the powers in clause 70, when making regulations by virtue of clause 4(1)."[365] A Government amendment (Amendment 23) to clause 72 (Commencement) also inserted that New Clause 13 (current clause 47) would come into force two months after the Bill receives Royal Assent.

Both Governments amendments 8 and 23 were made without debate or a division.

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[363] As above, p233

[364] As above, p243

[365] As above, p246

New Clauses

Eighteen new clauses were tabled during the Bill's Committee stage. Of these:

- Two new clauses (both Government amendments, being New Clauses 13 and 14) were agreed without a division and are now included in the Bill as clauses 47 (Chair of the Payment Systems Regulator as member of FCA Board) and 61 (Cryptoassets). See the commentary above on New Clause 13 and New Clause 14 for discussion of those new clauses;
- Two new clauses (New Clauses 2 and 3) were tabled in the names of Emma Hardy and Siobhain McDonagh. Both related to financial inclusion, and were debated alongside Amendment 1 to clause 29 (see the commentary above), but were not separately called for a vote;
- Two new clauses (New Clauses 4 and 5) concerning access to cash were tabled in the name of Shadow Minister Tulip Siddiq, and New Clause 4 was withdrawn after debate (with New Clause 5 not separately called for a vote);
- Three new clauses (New Clauses 10, 11 and 12) concerning access to cash were tabled in the name of Siobhain McDonagh, and were debated alongside clause 47 (see the commentary above) but not separately called for a vote;
- Four further new clauses (New Clauses 15, 16, 18 and 19) were debated but withdrawn rather than pressed to a division; and
- Four new clauses (New Clauses 1, 6, 7 (debated with NC8) and 9) were defeated on division, and are discussed below.[366]

Amendments defeated upon division

New Clause 1

New Clause 1, tabled in the names of Labour MPs Stella Creasy, Emma Hardy and Liz Twist, would "bring the non-interest-bearing elements of bring buy-now-pay-later lending and similar services under the regulatory ambit of the FCA, as proposed by the Government consultation carried out in 2022." Emma Hardy explained that the new clause "would ensure that some key protections form part of the regulation" of buy-now-pay-later lending, including "that buy now, pay later users have access to the Financial Ombudsman Service, that there are credit checks before use, and that users are protected by section 75 of the Consumer Credit Act 1974", adding that there was "little sign that the Government recognise the urgency to act" on this issue.[367]

Dame Angela Eagle, Siobhain McDonagh, Shadow Minister Tulip Siddiq and Martin Docherty-Hughes of the SNP also expressed support for the amendment. In response, Economic Secretary Andrew Griffith explained that

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[366] Proceedings at PBC Stage, Committee Stage decisions, 3 November 2022, pp17-26

[367] PBC Compilation pdf of sittings, p253

the Government "hear and understand the frustration of colleagues that the legislation [on regulation of buy-now-pay-later] has taken a certain amount of time to mature, but it is also an innovative product and something that provides real utility to millions of people. It is important that we get this right." He said that the Government "are now developing the necessary legislation and intend to consult on that draft legislation soon. The Government aim to lay secondary legislation in mid-2023".[368]

Emma Hardy decided to press the new clause to a vote, where it was defeated by 6 votes to 8.

New Clause 6

New Clause 6, in the name of Tulip Siddiq, "would require the Treasury to publish a national strategy for the detection, prevention and investigation of fraud and associated financial crime, after having consulted relevant stakeholders. The strategy must include arrangements for a data sharing agreement between law enforcement agencies, regulators and others to track stolen money". Tulip Siddiq said the amendment would "put in place a single, dedicated national strategy to tackle fraud" to "make sure that the outdated way of tackling fraud is challenged once and for all".[369]

Andrew Griffith responded that there "absolutely should be a national strategy [to tackle fraud], and there will be" one published "later this year". But Tulip Siddiq decided to nonetheless press the new clause to a vote, because "I want to hold the Minister to account and ensure he does not push this commitment too far down the road".[370] The new clause was defeated by 6 votes to 9.

New Clause 7 (and 8)

Labour tabled two **new clauses**, **7** and **8**, which would require the FCA and Prudential Regulation Authority (PRA) to report annually on how they have considered the specific needs of mutual and co-operative financial services.[371]

Andrew Griffith said that the Government considers that such arrangements are already in place.[372] The new clause was pushed to division, but this was defeated by 8 votes to 5, with Conservative Members voting against and Labour Members in favour.[373]

New Clause 9

New Clause 9, also in the name of Tulip Siddiq, would "require the Treasury to publish an updated Green Finance Strategy. This must include a Green Taxonomy and Sustainability Disclosure Requirements." Tulip Siddiq

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368 As above, p257
369 As above, p268-9
370 As above, p274
371 PBC 3 November 2022 c275
372 PBC 3 November 2022 c279
373 PBC 3 November 2022 c280

explained that “we were promised that the UK would become the world’s first net zero financial centre; instead, we are falling behind global competitors”, so there was a need for “a concrete green finance strategy for regulators and the sector to work towards”.[374]

Andrew Griffith responded that the UK was ranked “highest in the world for green finance” for the “third successive year” in the Global Green Finance Index, and that there was a “comprehensive amount of very thorough work being done by the Government in this domain”.[375]

Tulip Siddiq said that the Minister was “increasingly complacent in his attitude”[376] and opted to press the new clause to a division, where it was defeated by 6 votes to 8.

Having considered all amendments and clauses, the amended Bill was then reported back to the House at 3:09pm on Thursday 3 November 2022.[377]

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[374] PBC Compilation pdf of sittings, p281
[375] As above, p283-4
[376] As above
[377] As above, p298

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