Financial Services Bill 2012: House of Lords committee stages

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This note summarises the Lords' committee proceedings on the *Financial Services Bill*. Particular emphasis is given to accounts of government amendments to the Bill. Not all non-government amendments are mentioned, many such amendments were first raised during the Commons committee stages. An account of these can be found in Research Paper 12/23. A summary of the Lords Third Reading and Report stages can be found in standard note 6496.

The note is organised largely, but not entirely, in a chronological basis. The narrative is not entirely sequential because government and non-government amendments have been treated separately to enable changes made to the Bill by the Government to be more easily located.

Proceedings relate to HL Bill 25.

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1 Introduction

This note outlines the subject matter discussed during the committee stages in very brief detail; only concentrating on government amendments introduced (and agreed to) at this stage. Unless otherwise stated, Opposition amendments were either defeated or withdrawn.

Many of the amendments discussed are alluded to or are based on comments raised by the Treasury Committee. In this respect, further background may be found in its Report *Accountability of the Bank of England*.[1]

Various acronyms are used throughout:

- Financial Services Authority – FSA
- *Financial Services & Markets Act 2000* – FiSMA
- Financial Policy Committee – FPC
- Prudential Regulation Authority – PRA
- Financial Conduct Authority – FCA
- Office of Fair Trading - OFT

2 Day 1: Clause 1 - Deputy governors

2.1 Non-government amendments

Before considering amendments, several Peers, from both sides, commented on the complexity of the Bill. The fact that the Bill amends large sections of the *Financial Services and Markets Act 2000* within some single clauses, means that some clauses are simply lists of references and cross references with an apparently "infinite regress in there somewhere" which are hard to read. It also means, from the point of view of scrutiny that rejection of a clause on a stand part basis could mean wrecking the entire Bill as it would remove 40 pages of it at a stroke.

Responding for the Government, Lord Sassoon said that the Bill had been drafted in this way to reflect the wishes of practitioners who were familiar with the 2000 Act. He pointed out that the Treasury had prepared a full version of FSMA, as it will look if the Bill is passed. This can be found, all 658 pages of it, here.

The Committee started with a debate about the governance of the Bank of England and whether the Court of the Bank should be recast as a Supervisory Board. In the light of Government amendment 13, yet to be debated, which it claimed met most of what had been called for by the amendment, Lord Eatwell withdrew the amendment.

Lords turned their attention to the function of the deputy governors and whether the Bank of England needed additional deputy directors in Amendment three and four. They also discussed the relationship between the Governor and the Deputies, and whether this provided more of a check on the Governor, or whether it made lines of responsibility clearer or more confused. Lord Eatwell related the point of the amendment from the Bishop of

1 *Accountability of the Bank of England*, Treasury Select Committee, 21st Report, HC 874

Durham, that the three main committees, (MPC, FPC and PRA) should each be chaired by a deputy, to his earlier call for a more modern management structure.

Responding for the Government, Lord Sassoon said that underlying the questions about deputy governors were concerns about the enhanced role and authority of the Governor:

> Let me suggest, in answer to the point in Amendment 9, that there are some effective checks and balances in the system. To start with, in each of the governor's roles-as chair of the MPC, the FPC and the PRA, and as head of the Bank itself-he or she will be both supported and challenged by a group of experts. Those experts will include internal Bank executives such as the specialist deputy governors, who we have talked about; the executive directors and the non-executives of the two governing bodies, the court and the PRA board; and external members of the policy committees, the FPC and the MPC. I certainly agree with my noble friend Lord Sharkey that that challenge is important. It is already there and it will continue in the new construct so that in each area of the governor's areas of responsibility, he or she will not be responsible for taking decisions alone. In the MPC and FPC, policy decisions are taken collectively, with each member having a voice and a vote.[2]

Lord McFall introduced an amendment which would require the appointment of a Bank Governor to be "with the consent of the Treasury Committee".[3] Other Peers suggested other forms of approval process. Lord Sassoon rejected this, and the proposal that a Governor might be removed by the same Committee on the grounds that the process would lead to market instability. On the broad issue, he said:

> I have heard some voices speaking up for some form of parliamentary veto, some arguing for consultation, some arguing that it should be the Treasury Committee in another place and some suggesting that it should be that committee and/or-I am not quite sure which-the Economic Affairs Committee of this House. Although it is not the subject of an amendment, I heard at least one suggestion that if we were going to change anything, we should go rather more radical and make it subject to a vote of the whole House in another place. That is a rather broad menu. There are many ways to skin this particular cat but I suggest that there are already robust arrangements in place.[4]

Lord McFall introduced an amendment which would result in a majority of non - Bank representatives on the Monetary Policy Committee and the Financial Policy Committee. He wanted to improve diversity of these bodies membership and counter 'group think'. The Minister rejected the amendment, largely because a Bank committee that did not have a Bank majority could not fairly be said to be a Bank committee.

Clause 1 was agreed to.

2.2 Government amendments

Lord McFall introduced a further amendment that would give the Court of Directors of the Bank the duty to review retrospectively how the Bank has performed against its statutory objectives and at its use of resources. He said:

> The Treasury Committee has concluded that the corporate governance in the Bank of England is well short of that in the best public and private institutions. Given the

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2 HL Deb 26 June 2012, c154
3 HL Deb 26 June 2012, c157
4 HL Deb 26 June 2012, c166

concentration of the regulatory responsibility in the Bank of England, there need to be checks and balances.

[...]

The supervisory court, as the Treasury Committee has recommended, should take an explicit view on the Bank of England's budget, both in the level of changes to the allocation of resources and in prudential and monetary areas. The inclusion of experts on prudential policy, particularly for the chair of the board, is essential. The board currently comprises 12 members. It is a good suggestion to reduce that number to eight, because the best boards have smaller numbers, and 12 is rather unwieldy.

There is also a debate about the board's minutes, and it is suggested that the supervisory board minutes should be published to a timetable similar to that of the Monetary Policy Committee. Again, as has been mentioned, the staff support for a supervisory board has to be upgraded quite a lot to achieve best corporate governance. The ability to conduct ex-post reviews of the Bank's performance, both in prudential and in monetary policy, would help to ensure that lessons are learnt for the future and would be consistent with avoiding second-guessing at a time of policy decision.[5]

Lord Sassoon used this opportunity to describe developments since the Treasury Committee Report and which had led to the Government proposing its own significant amendments to the original Bill:

However, we should not-and I am already clear from our Second Reading debate that we do not as a House-underestimate the court's task. It must effectively oversee the transition to the new arrangements, ensure that the Bank is adequately resourced to meet its new responsibilities, and at the same time provide a vital link of accountability to Parliament.

Recognising this challenge, in January the court published its response to the Treasury Committee's recommendations, proposing the creation of a new oversight committee made up of the court's non-executive directors. The court accepted the Treasury Committee's recommendation for retrospective reviews of policy, proposing that the oversight committee commission these reviews from expert external bodies. The court also accepted that an ex-post review or reviews be published, subject to the need to maintain appropriate confidentiality. In line with the Treasury Committee's proposals, the court proposed to give the oversight committee the papers from the meetings of the MPC and FPC.

[...]

Subsequent to both the Treasury Committee's and the court's response, the Chancellor agreed with the governor and the chairman of court that the oversight committee's remit would be extended to encompass the commissioning of internal reviews of the Bank's policy performance. Finally, as part of our response to the Treasury Committee and the Joint Committee that scrutinised the Bill in draft, the Government committed to considering further whether the proposed reforms ought to placed on a statutory basis.

My honourable friend the Financial Secretary to the Treasury restated this position in another place. As I said during Second Reading, the Government have now determined that that should be done, and we are tabling these amendments.

[5] HL Deb 26 June 2012, c180

Amendment 13 writes the new oversight committee into the Bill, simplifying the governance structure of the Bank by subsuming the role and responsibilities of the existing committee of non-executive directors-the so-called NedCo-into the new oversight committee.

Subsection (2)(a) of new Section 3A provides that the oversight committee will be responsible for keeping under review the Bank's performance in relation to its objectives and strategy. This includes both monetary policy and financial stability, including the responsibilities of the MPC and the FPC.

Subsections (2)(b) and (c) give the oversight committee responsibility for overseeing the Bank's financial management and internal financial controls, and subsection (4) lists a number of additional responsibilities in relation to the procedures of the MPC and the FPC and the terms and conditions and remuneration of key posts within the Bank.

[...]

The oversight committee will be made up of all the non-executive directors of court, but in some cases it may be inappropriate for particular directors to have an active role in certain of the oversight committee's functions. For example, a director of court who is also an external member of the FPC-as is the case with Michael Cohrs at present-should not have a role in directly overseeing the FPC's performance. Subsection (4) of new Section 3B therefore allows the oversight committee to delegate any of its functions to two or more of its members.

New Sections 3C and 3D give the oversight committee an express power to commission and publish external and internal performance reviews.

[...]

Amendment 13 allows reviews of current practice to be carried out that may be appropriate to the functions of the oversight committee in the financial management and internal financial controls of the Bank.

Consistent with the Treasury Committee's recommendations, subsection (5) requires the oversight committee to ensure that sufficient time has elapsed before commissioning any review, to allow it to be effective and to avoid impeding the ability of the Bank to continue to operate effectively while the review takes place.

[N]ew Section 3D would require the oversight committee to publish its reviews, unless publication would be against the public interest. Published reviews will also be laid before Parliament. Where publication of all or part of a review is delayed, the oversight committee must keep that decision under review and publish that material as soon as the sensitivity has reduced.

New Section 3E requires the oversight committee to monitor the Bank's response to the report and ensure that it fully implements recommendations that it accepts. That gives the oversight committee an explicit role in ensuring that reviews translate into real action, and that the Bank fully takes on board the lessons learnt.

The Treasury Committee recommended that non-executives have access to all papers considered by the MPC and the FPC. New Section 3F implements that recommendation and goes even further by allowing members of the oversight committee to attend all MPC and FPC meetings in order to observe their discussions.

> In conclusion, the Government fully recognise the importance of strong lines of accountability for the Bank, given its expanded responsibility and powers. The amendments represent the most significant legislative reform of the governance arrangements of the Bank of England since nationalisation, and on that basis I hope that the Committee will support them.[6]

The amendments were generally welcomed by Peers, though with some questions about some of the detailed parts. One issue raised was why there was the need for a *separate* oversight committee, rather than something carried out by the Court of directors albeit with individuals committed to remaining outside the process if they had vested interest in what was being reviewed. As Lord Burns said:

> Normally within a board, if it was doing this kind of review, it would be the non-executive directors who were in the lead and making the running. I have found from experience that one should do everything one can to keep the executive and non-executive directors together when one is handling these kinds of issues and trying to learn lessons from the past. We do not want a situation where one part of the board feels that it is being picked on by another.[7]

Lord Eatwell, broadly welcomed the amendment, which, he said, was a major concession". He asked what would happen if the Bank rejected the findings of one of the reviews. Would reviews actually be published?

Responding to comments, Lord Sassoon said that no new committee had been created:

> The committee of non-executive directors of the court, the so-called NedCo, already exists; we are folding that committee's responsibilities into the new oversight committee, so we are not proliferating committees.[8]

In response to a question from Lord Eatwell about the powers in practice of the committee to review past events (he used the Northern rock case as his example), Lord Sassoon said:

> Let me address this very directly. The requirement for the oversight committee to ensure that sufficient time has passed before commissioning a review is there precisely to ensure that it does not put itself in the position of second-guessing the Bank's decisions when those decisions are still playing out. After that point, it will be appropriate to assess the effect of those decisions, but while they are playing out it will not be possible effectively to estimate how they are playing out and it would be inappropriate to do so. The way that the amendment is drafted is precisely consistent with the Treasury Committee's recommendation that the reviews be retrospective, rather than in any sense contemporaneous.
>
> I hear clearly what the noble Lord says: there is a difficult balancing act here, between allowing the oversight committee the ability to question everything and not boxing it into questioning the judgments that have been made on policy decisions. Yes, it can challenge and review judgments on policy decisions but it should not be boxed into doing so while the consequences of those decisions are playing out. In substance, that is what the Treasury Committee recommended.[9]

Government amendment 13 was agreed to.

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6 HL Deb 26 June 2012, c182-4
7 HL Deb 26 June 2012, c187
8 HL Deb 26 June 2012, c192
9 HL Deb 26 June 2012, c195

Clause 2 was agreed to.

3 Day 2: Clause 3: Financial stability strategy & the FPC

3.1 Non government amendments

Members of the House of Lords continued to investigate how the Bank of England is run with changes to Clause Three of the bill.

The first group of amendments under the spotlight scrutinised various duties of the Financial Policy Committee (FPC), including a remit for growth and employment.

This included Amendment 34 (later withdrawn) moved by Lord Eatwell (Labour) and Lady Hayter of Kentish Town (Labour). Lord Eatwell introduced his suggested change: 'My amendment would balance a similar requirement on the Monetary Policy Committee to have regard to the general economic policies of the government and argues that the Financial Policy Committee should have regard to the government's growth, employment and other economic objectives.' Amendment 35 (not moved) outlined a financial stability objective for growth.

Lords voted on amendment 35AB, resulting in 197 'contents' (for) and 251 'not contents' (against) the suggested change for 'the FPC to exercise its functions with a view to contributing to the achievement by the Bank of the FCA's integrity objectives'.

Lords discussed how supporting small and medium enterprises (SMEs) could encourage economic growth. Baroness Kramer (Liberal Democrat) argued that the FPC has a role in developing a funding supply for small businesses. 'The FPC has to be engaged and to be part of making sure that there is capacity for funding the system across the whole spectrum, whether it be small, medium or large businesses,' she said.

The LIBOR incident then came under discussion with some Lords asking if there would be an inquiry. Lord Sassoon (Conservative) responded: 'It is time for Parliament, as well as the government, to take clear leadership on these matters. The events of recent days have highlighted that the culture of banking is badly broken. The government are in the process of fixing the system, but we need to change the mindset of the profession and those working in it. This is about restoring banking to what it should be about: to be the most, and not the least, trusted profession.'

Lord Eatwell introduced amendments which highlighted the LIBOR scandal and, as he saw it, the need to specifically charge the FPC and the Financial Conduct Authority (FCA) with responsibility for this market function and to call for a full judicial enquiry.[10] Peers discussed the merits of having a separate investigation of the LIBOR scandal as well as the other investigations currently taking place. The reason for this was to utilise the 'forensic' skills of expert legal teams and to take the issue "out of the cockpit of party politics".[11] The Government minister, Lord Sassoon rejected these calls, describing them as "the Opposition's misguided attempts to slow down what we need to do now".[12] He set out what was needed. First the establishment of the facts – currently the work of the Serious Fraud Office; secondly how the LIBOR system can be 'fixed', currently the work of the Wheatley Committee, and, lastly, a more general look at the ethical and professional standards of the

10 HL Deb 3 July 2012, c603
11 HL Deb 3 July 2012, c604
12 HL Deb 3 July 2012, c620

financial services industry".[13] This, he hoped would be achieved by a soon to be created joint committee of both Houses:

> For this reason, the Government recommend that Parliament considers undertaking an urgent inquiry into the culture and ethics of the banking industry to help shape the urgent reform that is so much needed. The Government propose the establishment of a full parliamentary committee of inquiry, comprised of representatives from both Houses, and set up by a joint resolution of both Houses. The proposed terms of reference for the committee are, building on the Treasury Select Committee's work and drawing on the conclusions of UK and international regulatory and competition investigations into the LIBOR rate-setting process, consider what lessons are to be learnt in relation to transparency, conflicts of interest and the culture and professional standards of the financial services industry, including the interaction of these with civil sanctions and criminal law. While I hear noble Lords seeking to paint this as a narrow inquiry, on any construction, these words will give the Joint Committee a very wide remit.[14]

The joint committee is expected to Report by Christmas.

The amendments were defeated on a division.

Lord McFall moved an amendment which touched on an issue which has been discussed several times in preceding stages, namely, how is financial stability measured? Whereas monetary policy has an inflation target, it is harder to think of an unambiguous stability target. His amendment would require the FPC and the Treasury to agree on one and publish it. He described measure suggested by the Governor:

> The governor set out in his letter to the Treasury Committee a number of indices that we could discuss. I would like this amendment to provoke discussion of a number of those indices-for example, a simple averaged leverage ratio of the major UK banks, the aggregate leverage ratio of the UK banks, the UK long-term real interest rates, the household debt-to-income ratio and the growth of lending in the UK to the non-financial sector, which has been topical now for four or five years without any solution in sight. These indicators are important, but if the Minister thinks that the Monetary Policy Committee and the inflation report, when it is produced to Parliament, are going to cause a bit of heat, in terms of the FPC this will really exercise politicians. We can imagine that certain judgments of the FPC would be unfavourable to a number of politicians who have particular constituency interests, and the FPC would find itself in the eye of the storm. Ahead of time, looking at certain indices and working out, the FPC is extremely important. When a body such as the FPC is given responsibility, it should be allowed to get on with that. I do not want to see it in the eye of the political storm. In order to ensure that that is not the case, we have to get these indices so that we understand what the FPC is about. There is some external assessment so that politicians and others do not just jump on the FPC for a job that it is pursuing as the result of inadequate indicators that have been supplied to it.[15]

Several Peers supported the amendment, largely because it did not specify a particular set of measures, but simply required them to be agreed and published, whatever they were. The Minister's response was that the FPC will already have to report back on its work against a set of indicators, including its views on future threats to stability; the amendment would give the Treasury a veto – what happens if the Treasury and FPC disagree?

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13 HL Deb 3 July 2012, c621
14 HL Deb 3 July 2012, c621
15 HL Deb 3 July 2012, c636

Several other amendments concerning the role, powers and functionality of the FPC were discussed.

3.2 Government amendments

Lord Eatwell moved an amendment that would require the Financial Policy Committee (FPC) to “have regard to the Government's growth, employment and other economic objectives" rather than simply financial stability. Other variants of this aim had also been put down. The difference being the degree of emphasis to be placed on the FPC – ‘have regard to’; ‘promoting’ and ‘supporting’ were the options proposed. The issue had been discussed extensively during the Commons Committee Stage. Lord Eatwell summarised the debate as:

> The issue at stake has been whether financial stability is achieved at the expense of growth and employment or whether financial stability can enhance the growth performance of the economy.[16]

The Government proposed an amendment that was a response to the previous calls for a change of focus. Government amendment 35A is shown below:

> **35A:** Clause 3, page 3, line 35, leave out from first "to" to end of line 36 and insert-
>
> "(a) contributing to the achievement by the Bank of the Financial Stability Objective, and
>
> (b) subject to that, supporting the economic policy of Her Majesty's Government, including its objectives for growth and employment."

Responding to the Debate, Lord Sassoon described how government thinking had evolved:

> **Lord Sassoon:** My Lords, the Government have always been clear that the Financial Policy Committee, as the body responsible for ensuring the stability and safety of the financial sector as a whole, must have financial stability as its primary focus. That is our starting point. However, we have been equally clear that the FPC must balance the pursuit of its primary objective for financial stability with the wider impact of its actions.
>
> In our February 2011 consultation document the Government spoke of the need to,
>
> "build the balance between financial stability and sustainable economic growth",
>
> into the FPC's objectives. In addition, my right honourable friend the Chancellor made clear, when giving evidence to the Treasury Select Committee almost exactly a year ago, that we do not seek "the stability of the graveyard". Our first shot at achieving this symmetry within the FPC's framework was the creation of an economic growth "brake" for the FPC. The provision set out in subsection (4) of new Section 9C prevents the FPC from taking action that would significantly adversely affect the ability of the financial sector to contribute to medium- or long-term economic growth in all cases, regardless of the strength of the financial stability rationale. That is a very strong backstop provision.
>
> However, the Government have listened to calls, both in another place and in our Second Reading debate in this House, for the FPC to be given a positive duty to support economic growth. In response to those calls, government Amendment 35A amends the Bill to give the FPC a secondary objective to support,

[16] HL Deb 3 July 2012, c579

"the economic policy of Her Majesty's Government, including its objectives for growth and employment".

As many noble Lords are aware, this wording is identical to that used in the MPC's secondary objective.

The noble Lord, Lord Eatwell, has used similar wording in his Amendment 34, but in the form of "having regard" rather than a secondary objective. I believe that in this case a secondary objective is more appropriate-more purposive, in the words of my noble friend Lord Hodgson of Astley Abbots-than "having regard". We mean to be purposive here. The Government's intention is to require the FPC to seek proactively to support economic growth. For this, you need an objective, not simply "having regard".[17]

The government amendment was agreed to. Other minor government amendments, including one to Clause 3 requiring the Treasury to set out government policy to the FPC at least each year, were approved.[18]

4 Day 3: Clause 3 – Financial stability strategy & the FPC

4.1 Non-government amendments

As the Bill stands, the FPC can give directions to the FCA if it deems it necessary for financial stability purposes. Baroness Hayter moved amendments which would require that such directions did not conflict with the FCA's consumer protection objective and that it liaises with the financial Services Consumer Panel in its work. The LIBOR scandal was cited as an example of how consumers needed extra protection and yet the FPC was not a consumer orientated body. She gave the example of a cap on mortgage lending which might create 'mortgage prisoners'. The Minister, Lord De Maudley, said that subject to the achievement of its overriding objective, financial stability, Clause 3 of the Bill:

provides that the FPC must, in exercising its functions in relation to the FCA, seek to avoid doing so in a way that would prejudice the advancement of the FCA's operational objectives, including consumer protection.

This provision is contingent on the FPC being able to achieve its own objective for financial stability. That is right, given that financial stability must necessarily take precedence if the new regulatory system is to address the flaws revealed by the crisis. However, this places a clear obligation on the FPC to take into consideration the FCA's objectives before acting, and, in subsection (2), to find a way to minimise any possible conflict. In addition, of course, the presence of the chief executive of the FCA as a voting member of the FPC means that the views of the FCA-and therefore of consumers-will be represented and taken into account.[19]

Further amendments were proposed affecting the FPC. Introducing one, Lord Eatwell said:

I will preface my remarks by saying that over the next several groups we will examine the exceptionalism of the Financial Policy Committee. This committee is an experiment, and it has powers transferred from persons who have the authority of election behind them and are part of the executive, to an administrative function. These powers are substantial: they manage the supply of credit, and possibly, if particular

[17] HL Deb 3 July 2012, c596
[18] HL Deb 3 July 2012, c643
[19] HL Deb 10 July 2012, c1031

> measures were handed over to the FPC, they will manage the demand for credit. Hence, it will have a major impact on the overall macroperformance of the economy.
>
> There is also the potential for the FPC to be in conflict with the Monetary Policy Committee-the MPC-which controls the price of credit. That contradiction could be a serious element in the overall operation and management of the economy. The exceptionalism of the FPC, in our view, requires exceptional scrutiny and consultation as this experiment unfolds. I call it an experiment because we do not as yet know how effective these administrative measures are going to be. We do not as yet know even what they will be in content, so a degree of extra scrutiny and consultation is required at every stage to ensure that major mistakes are not made and that we design effective procedures and secure public acceptance for the role of the Financial Policy Committee.[20]

Amendments called for greater public consultation[21]; consultation in some circumstances with the Treasury Select Committee; and the potential conflict between the FPC and the MPC.

Lord Sassoon, replying said that the likelihood of the two committees working against each other was very low – they shared the same briefing and objectives; they could meet if necessary and the Governor could consult with the Court if needed. Public consultation was fulfilled by the fact the Treasury would determine, by order, what tools the FPC could use. Such orders would be debated.[22] Also, it was standard government practice to allow for three months public consultation on such matters and as such there was no need to write it into the Bill – or into any other Bill.[23]

Debate on amendment 58 concerned the ability of the FPC to confer its macro prudential tools onto the regulators the PRA and the FPC. There was confusion over whether the conferring was by the treasury or by the FPC. Lord Sassoon promised to write to explain the position.[24]

An amendment to include the Deputy Governor for financial stability within the formal consultation process in cases where emergency orders were being discussed was rejected by the Government on the grounds that it might introduce “recreate elements of the dysfunctionality that were in the system as it used to exist”.[25]

Baroness Noakes introduced a long amendment which sought to introduce the super – affirmative procedure for the orders that will proceed the macro prudential tools given to the FPC. She emphasised how ‘experimental’ such powers were and that even the Bank of England did not claim a ‘monopoly of wisdom’.[26] she also noted that:

> The Government recently accepted in the Public Bodies Act 2011 that their powers to wind up such hugely important bodies as the Home Grown Timber Advisory Committee or the Railway Heritage Committee should be subject to the super-affirmative procedure, but it appears that they have yet to be convinced that granting these massive new powers to the FPC is of that importance. It is a no-brainer that the super-

20 HL Deb 10 July 2012 c1042
21 HL Deb 10 July 2012 c1042
22 HL Deb 10 July 2012 c1046
23 HL Deb 10 July 2012 c1047
24 HL Deb 10 July 2012 c1048
25 HL Deb 10 July 2012 c1048
26 HL Deb 10 July 2012 c1056

> affirmative procedure should be used and I hope that my noble friend will be prepared to accept that that is the case.[27]

Speaking, rather broadly, to the amendment Lord Myners gave an insight into his experience on the Court of Directors of the Bank:

> When I was a member of the court, I sat in on a meeting of the Financial Stability Committee. That would have been in 2006 or 2007. At that meeting, one of the governors proposed that as a mechanism to cope with the crisis, the Bank should buy half a dozen or a dozen bicycles in order that members of the Bank could move swiftly and anonymously around the City. That tells us a huge amount about where the Bank sits in terms of its understanding of the complexity of financial markets. Some of the things that we have seen over the past few weeks have simply raised more questions about the wisdom of putting so much power in the hands of the Bank.[28]

Responding, Lord Sassoon said that the Delegated Powers and Regulatory Reform Committee had said that the Bill provided adequate safeguards; he noted that the Chancellor had said that debates could be on the floor of the House:

> The Government have therefore made a commitment, recognising the importance of these tools, to go further than the strict requirements of the procedure in the Bill as it stands. I hope that that will help my noble friends and the Committee generally to understand that we want to do something that recognises the importance of these tools but without locking ourselves into a super-affirmative procedure, which creates the potential for unacceptable delays even in non-critical circumstances. What may be a non-critical circumstance at the start of a procedure that takes a minimum of 124 days may, in the sort of market conditions we have now, be urgent by the time we are well into those 124 days.[29]

Lord Eatwell moved an amendment that would set up a Financial Stability Advisory Panel. He re-iterated the view that the FPC was an 'experiment' (the Minister had referred to it as a 'project') which would benefit from a broad range of advice. He said that there were very few external members of the FPC. Discussion was therefore dominated by the central bank. The United States had set up the Financial Stability Oversight Council to overcome this. He compared the two systems:

> Both the central bank model that we have pursued, which also applies to the European systemic risk board, and the stakeholder model have disadvantages. The key disadvantage of our central bank model is that we do not have enough diversity of opinion or access to new research and critical assessments of FPC measures that the stakeholder model might have. The problem with the stakeholder model is that the United States may find that its Financial Stability Oversight Council becomes mired in differences of opinion from different stakeholder interests and has difficulty in pursuing the coherent macroprudential policy that is required of it.[30]

Responding, Lord de Mauley said that it was important to get the FPC 'right' and to let it call for advice if it felt it needed it.[31]

Clause 3 was agreed to. Clause 4 was agreed to.

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27 HL Deb 10 July 2012 c1057
28 HL Deb 10 July 2012 c1060
29 HL Deb 10 July 2012 c1061
30 HL Deb 10 July 2012 c1068
31 HL Deb 10 July 2012 c1073

Clause 5: The new regulators

Baroness Noakes moved to remove the FCA's strategic objective from the Bill which she thought was little more than a mission statement which other bodies did not have in legislation. Lord Sassoon replied that the FCA had a very broad remit and the strategic objective was an overarching check on its activities.[32]

Lord Flight and Baroness Noakes moved amendments to Clause 5 that would require the FCA to recognise the impact of its rules on the international competitiveness of the UK financial services sector.[33] Baroness Hayter, queried the motivation behind these amendments. She hoped that it was not a return to the view that the City was under-regulated:

> I hope that that the Prime Minister and the Chancellor of the Exchequer are now grown up enough to accept that it was too little rather than too much regulation from which we suffered.[34]

Lord Sharkey moved an amendment to add a 'deprived communities objective' to the list of operational objectives of the FCA.[35] Lord Phillips moved an amendment that would lighten the regulatory burden for the not for profit financial sector.[36]

4.2 Government amendments

Lord De Mauley introduced several amendments to Clause 5[37] affecting the "transparency and openness of the decision making processes of the FPC". One would require the FPC to give an explanation of the use of any of its powers of direction or recommendation to other bodies, another would require it to review its decisions and publish this in the Financial Stability Report.

He explained the first in more detail:

> Amendment 69A supplements this important addition by requiring the FPC to prepare an explanatory statement when exercising its powers of direction and recommendation in relation to the PRA, FCA, the Treasury or the Bank, in relation to the Bank's regulatory functions. Such statements must clearly explain how the FPC considers the exercise of its powers to be consistent with its objectives, including both its primary stability objective and its secondary objective for economic growth-the "brake" which prevents the FPC taking any action that would seriously damage long-term growth. The statement must also explain the FPC's view of the compatibility of its actions with its duties under new Section 9E, which require it to have regard to the Bank's financial stability strategy; to the need to avoid, as far as possible, requiring the PRA or FCA to act in a manner prejudicial to their own objectives; and to the important principles in regulation of proportionality, transparency and international co-operation and co-ordination. Amendment 76A requires the statement to be published in the next financial stability report.
>
> The effect of these amendments will be to ensure that all interested parties-Parliament, the financial services industry and members of the public-will be able to examine, and indeed challenge, the balance that the FPC seeks to strike between stability and

32 HL Deb 10 July 2012 c1090
33 HL Deb 10 July 2012, c1107
34 HL Deb 10 July 2012, c1112
35 HL Deb 10 July 2012, c1116
36 HL Deb 10 July 2012, c1124
37 Amendments 69A, 69B, 74A, 76A toC

> growth. I hope that noble Lords will agree that these are important additions to the FPC, increasing its transparency and accountability, and that they will therefore agree to them.

Turning to the other amendments he said:

> However, the Government are going further than this. Once the FPC has taken action, through its powers of direction and recommendation, Amendment 69B requires it to keep any open action under regular review. In the case of extant directions-that is, directions which have not been revoked-the FPC must review them at least annually. In the case of recommendations, the FPC must make arrangements to keep under review those recommendations it considers to be of continuing relevance. This will ensure that, once it has taken a specific action, the FPC will from time to time consider whether that action remains necessary and proportionate.
>
> Amendment 76B requires the FPC to publish summaries of such reviews in the financial stability report, once again providing for improved openness and accountability. These are important procedural additions which underline the Government's commitment to establishing the FPC as a balanced and proportionate macroprudential regulator.[38]

Lord Eatwell 'broadly welcome[d]' the amendments.

Government amendment 97 would require the Bank to publish records of the meetings of the Court of Directors.[39] The amendment was approved without debate. Other amendments consequential on the establishment of the Oversight committee were accepted. Lord Sassoon, also accepted the logic of an amendment by Baroness Kramer which sought to correct errors of nomenclature in describing the various roles of Bank officers and directors. He concluded that there were a number of anomalies in usage between the 1998 and 2009 *Bank of England Acts* which the current Bill was exposing. He promised to rectify these at a later stage.[40]

5 Day 4: Clause 5 – The new regulators

5.1 Non-government amendments

Baroness Hayter moved an amendment calling for the FCA to raise professional standards amongst approved persons.[41] The debate concentrated on linking this issue with the LIBOR scandal, rather than the parallel movements for improved standards being effected through the retail Distribution Review. The Minister, Lord Sassoon, announced that new threshold conditions for all regulated firms, to be enforced by the new FCA had been published by the Treasury.[42] He pointed out that the long term effect of the Vickers proposals, accepted by government, was that ring fenced banks would be authorised persons in their own right. Hence punishments levied against investment banks, for example over LIBR, might not apply to the retail bank (and vice versa).

38 HL Deb 10 July 2012 c1065
39 HL Deb 10 July 2012 c1082
40 HL Deb 10 July 2012 c1084
41 HL Deb 18 July 2012 c235
42 HL Deb 18 July 2012 c244; *The Financial Services and Markets Act 2000 (Threshold Conditions) Order 2013*

Lord Flight moved an amendment which would require the FCA to work with the Department of Education to deliver financial literacy classes at both primary and secondary levels.[43] The Minister said that the Money Advice Service, not the FCA was the body responsible for such efforts.

Baroness Hayter moved an amendment, prompted by industry concerns, which would set out a memorandum of understanding (MoU) between the OFT and the FCA on their respective competition responsibilities. She, and the industry, feared duplication.[44] She also argued that the FCA should have the power to make referrals to the Competition commission direct, rather than through the OFT as the Bill envisages. Replying, the Minister, Lord De Mauley said that an informal MoU was already being drafted. He acknowledged that co-operation was important and suggested that the relationship between the OFT and the FCA needed time to develop flexibly, rather than be dictated at its outset:

> On the specific issue of competition, [...] the FCA, as the lead regulator for financial services, clearly will need to work closely with the OFT, as the central competition authority. Of course, the regulators will have to co-ordinate their work so that their own resources are used effectively and duplication is avoided. Although they will need to take into account their respective regulatory objectives and priorities, powers, expertise and resources, I contend that we should allow the regulators, based on careful consideration, to develop an effective protocol for working with each other in order to promote competition.[45]

Lord Barnett moved a 'buyer beware' amendment. The FCA should make consumers aware that some risks were unavoidable.[46] Lord Flight said that "the Bill slightly buries "buyer beware".[47] Lord De Mauley, said that "We cannot pursue a zero-failure regime in financial services, and consumers must understand this".[48] He linked policy on this with the earlier one about financial education. Lord McFall then introduced an amendment which would "insert the terms "ability, disability and vulnerability" of consumers" within the consumer protection objective.[49] He gave examples of financial products "shrouded in complexity" such as the split capital investment trusts. He was scornful of much financial innovation, which he thought, along with Paul Volker, had contributed very little to consumers' welfare. In response to the specific points Lord Sassoon noted that the Money Advice Service and the FSA have duties under the *Equality Act 2010* and, in future the PRA and the FCA will take on these duties. Similarly, the Act applies to financial service providers too, in the sense that they must make 'reasonable adjustments' to their services for consumers with disabilities. Therefore Lord Sassoon argued "there is indeed a body of law that goes very much to the points [made]".[50]

Lord Lucas moved an amendment which raised the issue of data protection and financial services. One Peer highlighted the link between some of the new banks, amongst them supermarkets, which have enormous amounts of data about customers through their shopping activities.

43 HL Deb 18 July 2012 c246
44 HL Deb 18 July 2012 c253
45 HL Deb 18 July 2012 c256
46 HL Deb 18 July 2012 c257
47 HL Deb 18 July 2012 c258
48 HL Deb 18 July 2012 c262
49 HL Deb 18 July 2012 c265
50 HL Deb 18 July 2012 c272

The following amendments were then moved as a group:

> It adds the requirement to have regard to the general duty of providers of financial services,
>
> "to provide those services honestly, fairly and professionally in accordance with the best interests of the consumers in question".
>
> Amendment 138A adds to the regulatory principles to be applied by both the PRA and the FCA. It adds the principles that,
>
> "authorised persons should act honestly, fairly, and ... in accordance with the best interests of consumers who are their clients",
>
> and that,
>
> "authorised persons should manage conflicts of interest fairly, both between itself and its clients and between clients".[51]

These amendments address the "moral and cultural failures in significant parts of our system".[52] Peers used the amendments to discuss issues of trust, conflicts of interest and confidence in financial institutions generally. Peers discussed the practicality of introducing 'fiduciary duty' into the principles of regulation. Summing up Baroness Hayter said:

> The duty to work in the client's best interests needs to be in the DNA of every firm, not simply a regulatory intervention power by the FCA. Just as a solicitor's client charter says that he will put the client's interests first-and, incidentally, explain what the costs are likely to be-so there should be an expectation on anyone handling clients' money.
>
> [...]
>
> I believe that these amendments are central to whether the Bill works for consumers, the individuals on whose savings much of this industry is built. Consumers should be able to trust those who advise them, who care for their money and provide financial services; they should be able to trust that the client's interests will always come first.[53]

Lord Sassoon explained the basis for government thinking on this point:

> The amendments all focus on the need for firms and advisers to act honestly, fairly and professionally in the interests of consumers. This follows a recommendation from the Joint Committee in its pre-legislative scrutiny of the Bill. I doubt that anyone in this Committee would question the need for such integrity in firms' dealings with their customers-certainly, they have not done so in this debate-but I do not believe that the approach suggested by the amendments would help secure the outcome intended.
>
> I can assure noble Lords that we carefully considered the wording suggested by the committee, but concluded that the best way to address the concerns underlying its recommendation was to modify the matters to which the FCA is required to have regard, thus reflecting what firms should already be doing, rather than to seek to impose directly some kind of high-level duty on firms.
>
> The consumer protection objective ensures that, as the FCA acts to protect consumers, it will be required to have regard to the level of care that firms should

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51 HL Deb 18 July 2012 c277

52 HL Deb 18 July 2012 c278

53 HL Deb 18 July 2012 c283

provide to their customers, based on the level of risk involved and the capability of the customers. This is set out in new Section 1C(2)(e). The phrase "level of care" is wide enough to ensure that fairness, honesty and professionalism, and certainly acting in consumers' best interests, are all taken into account. I am not sure how the amendments being proposed would add to the existing provisions; in fact, they may narrow the definition of "level of care that is appropriate", which I am sure the Committee would not wish to do.[54]

Lastly, and amendment which would have brought within regulatory scope peer to peer lending was discussed, but was rejected by the Government.

Lord Borrie moved an amendment of significance particularly to the high cost credit industry. It would require “a clear statement, in cash terms, of the total cost of [consumer] credit”[55] Many of the [problems associated with that sector were mentioned in debate. One of the amendments in the group proposed that the regulation of claims management companies should move to the FCA from the Ministry of Justice.[56]

Lord Sassoon, picking up this last point, did not think that the responsibility for claims companies should move to the FCA , for one thing they are not financial service providers. He acknowledged that the current regulation needed improvement and:

> The Ministry of Justice, as we have heard, is the body responsible for regulating the activities of businesses providing claims management services. It carried out a review last year of claims management regulation which concluded that fundamental reform was not needed but identified a number of areas where improvements could be made. A shift in responsibilities now would not address the underlying problems in the conduct of claims management companies and would detract from the concrete steps that the Government are taking to address those problems.
>
> [...]
>
> Since last November, the team has conducted more than 60 audits of claims management companies to identify any evidence of lack of compliance with the rules. That team is working with the Financial Ombudsman Service, the FSA and the Financial Services Compensation Scheme, as well as with major banks, to help identify non-compliant businesses, gather evidence and help improve the claims process for consumers. It is recognised that there is a problem, and the authorities are working in a joined-up way to deal with it. More broadly, the Government have reviewed the conduct rules which all CMCs must comply with as a condition of their licence. The Ministry of Justice will shortly launch a consultation on amending the conduct rules to tighten up on certain practices and provide further clarity. I firmly believe that improvement is needed and that the improvements to regulation of CMCs currently being proposed by the Ministry of Justice are the right course of action. Transferring responsibility for regulation to another body would not be.[57]

With respect to the high cost loans industry he said:

> My colleagues in the Department for Business, Innovation and Skills have been working with the short-term loan industry to ensure that borrowers receive clear information about the cost of a loan in cash terms per £100 in addition to its APR. The four main trade associations, which represent over 90% of the short-term loan industry,

[54] HL Deb 18 July 2012 c284
[55] HL Deb 18 July 2012 c312
[56] HL Deb 18 July 2012 c315
[57] HL Deb 18 July 2012 c318

have agreed to update their codes of practice to reflect this and made other commitments to help consumers, and that will be done by 25 July. I believe that this is very significant progress. Having said that, I would argue that the APR serves a useful purpose in enabling consumers to compare the cost of different credit products, so that will remain in place in addition to the new cash cost number that will be given.

As I think my noble friend recognises, it is important to note that the consumer credit directive is a maximum harmonising directive and one that requires the cost of credit to be expressed as an APR. It does allow for other pricing information to be given, such as the cost of the loan in cash terms, but this must be less prominent than the APR.[58]

6 Day 5: Clause 5 – The new regulators

6.1 Non-government amendments

Baroness Drake move an amendment, promoted by the consumer group *Which?* that would give the FCA explicit authority to challenge practices and services on the grounds of their price and if they are" appropriate to [consumers] needs and represent good value for money". She cited the legal challenges to OFT action against overdraft fees and the original challenge to the PPI action as examples of why such a power was needed.[59]

Lord Whitty supported the amendment. He pointed out how it differed from what had gone before:

> When faced with issues of consumer care and consumer protection, the FSA, in its early days and for much of its time, tended to resort to stipulating the information that the consumer needed to be given. By the time that had gone through the corporate lawyers of the various banks and insurance companies, it amounted to five, six or sometimes 25 pages of close 10-point type, which was even more difficult for the average consumer to understand than it is for the average Member of the House of Lords to understand this Bill.
>
> That is a very passive form of consumer protection and it is a very passive definition of customer care. The amendment attempts to put an obligation on the FCA to ensure that companies operating in this sector operate positive customer care, not simply passive provision of information which a large number of consumers cannot understand.[60]

Responding the Minister, Lord Sassoon, while agreeing with much of the reasoning behind the amendment, said:

> However, let me put on the record what the Government have said a number of times before-both in publications and during discussions in another place-which is that if the FCA finds problems in pricing, charging or in the ability of the consumer to obtain value for money that cause it concern, it will have the mandate and the powers to act. It has the mandate both under the effective competition and the consumer protection objectives, a point that has been made by a number of my noble friends and other noble Lords in this debate. It can apply its extensive regulatory toolkit in pursuit of price intervention, should it think it appropriate to do so. The FCA does not need new powers nor do its objectives need expanding. We simply do not agree with *Which?*'s legal analysis. Fundamentally, it is a narrow legal point.[61]

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58 HL Deb 18 July 2012 c318
59 HL Deb 25 July 2012 c693
60 HL Deb 25 July 2012 c700
61 HL Deb 25 July 2012 c702

Baroness Kramer introduced an amendment which would facilitate the issuance of social market bonds. Her main argument was that the costs associated with the requirement for an authorised person to issue the bond made such issuances uneconomic. She pointed out the oddity that:

> We have the irony that a charity could come to any Member of this House and say, "We have a very good cause. Please give us some money to fund this cause"-no problem with that at all. However, if that charity were to go to any of your Lordships and say, "We have a very good cause. Please give us some money and, no promises, but I will try to get you back your original investment and maybe even a small return on it", that is handcuffs at dawn; it is actually breaking the law. That is an insane situation in which to be placed, but it is where we currently sit.[62]

Lord Sassoon rejected the amendment, because it would deprive investors of all protections from, potentially unworthy promoters, however, he said that:

> but there is another channel as well as further discussions between me and the Bill team where it might be possible to make some progress during the summer on practical steps. So I ask noble Lords to bear with me for a couple of minutes.[63]

He went on to say that this requirement might also be looked at within the context of the Government's existing Red Tape Challenge.[64]

Lord Davies moved an amendment that would add both money laundering and terrorist financing to the non-exhaustive definition of financial crime. Lord Sassoon **agreed to take forward the suggestion regarding terrorist financing**, which had become a more prominent problem than when financial crime was first defined for the *FSMA 2000.*[65]

Baroness Noakes moved an amendment which would require the FCA to review its own conduct if requested by the Treasury Committee. She argued that the circumstances surrounding the FSA's review into its conduct regarding RBS, and its initial reluctance to publish details of its own study, proved the desirability of the amendment.[66]

Responding, Lord de Mauley outlined the new framework of accountability which the Bill introduced:

> It is clear that, under the current system, the regulator is not sufficiently accountable when things have gone wrong, so the regulator itself needs to take primary responsibility for initiating reviews. The Bill provides a much clearer framework for when the FCA should initiate a review into regulatory failure. It includes a number of measures intended to rectify this.
>
> In future the FCA will be required to conduct an investigation and report on possible regulatory failure with the triggers set out in statute. This is supplemented by the power of the Treasury to order an investigation when it considers that an investigation would be in the public interest. The Treasury must, subject to limited exceptions, then lay such a report before Parliament. There are also the value-for-money and NAO audit powers to which my noble friend referred in the previous group. This is an extensive

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62 HL Deb 25 July 2012 c709
63 HL Deb 25 July 2012 c714
64 HL Deb 25 July 2012 c715
65 HL Deb 25 July 2012 c718
66 HL Deb 25 July 2012 c750

> framework that should significantly enhance the ability of Parliament to hold the regulators to account in future.
>
> I understand that the Treasury Select Committee has recommended that the Bill should go further, and clearly Parliament has an important role in calling for reviews. However, it does not need additional powers to do so. If the Treasury Select Committee believed that a review under Clauses 69 to 76 was required but was not being conducted, it could request such a review. The FCA will in any but the most unusual circumstances comply, as is the convention. Of course, the FCA would be available to report back to the Treasury Select Committee. This is, in fact, what happened in the case of the FCA's report on the failure of RBS. Additional wording in the Bill is not necessary.[67]

Baroness Noakes moved one of several amendments which would add promotion of competition to the PRA's objectives. She pointed out that the PRA's reason for being was to prevent failure of systemically important companies – the new regime will be "failure averse". This has the effect, however, of entrenching the existing firms at the expense of new firms. She wanted to redress this imbalance.[68]

Lord Sassoon rejected the amendments on the grounds that:

> all PRA-authorised firms will also be regulated by the FCA according to their objectives, and will therefore fall under the FCA's objective to promote effective competition in the interests of consumers.
>
> [...]
>
> Secondly, the Government's view-this goes to the heart of the new structure-is that the FSA simply has an impossible job in trying to balance so many competing objectives, which has led to its lack of institutional focus on prudential matters. In order to avoid repeating this mistake, we have decided that the PRA should have a single, general objective,
>
> [...]
>
> in addition to the strengthened power for the FCA to make referrals to the OFT included in Clause 40, the Bill provides for both PRA and FCA regulatory requirements and practices to be scrutinised by the competition authorities.[69]

Several amendments were moved to increases the statutory level of consultation which the PRA must engage in and with whom. There was special focus on the insurance part of the PRA's responsibilities and the contrasting requirement for practitioner panels – mandated for the FCA but optional for the PRA.[70] Lors Sassoon accepted the need for the PRA to engage with consumers but:

> the PRA will deliver its policyholder protection mandate through effective prudential regulation. Of course, consumers will be able to respond to public consultations on rules and to the PRA's annual consultation following publication of its annual report. However, the main way in which the consumer interest is represented will be through the FCA. The FCA will provide the PRA with advice and expertise wherever consumer interests need to be taken into account. The draft MOU that has been published by the

67 HL Deb 25 July 2012 c753
68 HL Deb 25 July 2012 c755
69 HL Deb 25 July 2012 c761
70 HL Deb 25 July 2012 c778-9

Bank and the FSA makes clear that such consultation will take place at an early stage.[71]

On the question of practitioner panels he said:

> the FCA panels rightly focus on issues of concern to the FCA and will not have the expertise or mandate to examine the PRA's approach. The PRA and the FCA will develop different approaches to regulation, consistent with their different objectives and the fact that the PRA will be regulating a much smaller number of firms. The panels are free to make representations when the PRA consults on rules, or indeed at any other time. However, I do not think that it would be right to require the PRA to give special attention to representations made by bodies designed and maintained for the purpose of advising the FCA on its work.[72]

6.2 Government amendments

Several amendments were discussed which concerned the insurance life industry, in particular the balance of prudential and conduct based regulation of this sector – which is split between the two regulators (PRA & FCA). Peers drew attention to the discretionary element of with profits funds as one area of particular concern. The Government introduced its own amendment to clarify the role of the PRA, it emphasised that the PRA was only responsible for regulation of discretionary payments from with profits business.[73] In the course of his speech Lord Sassoon outlined the future course of with profits regulation:

> I welcome the opportunity to set out broadly how with-profits will be regulated under the new system. It might be worth just pointing out to the noble Baroness, Lady Drake, that new Section 3F-the "With-profits insurance policies" section on page 31 of the Bill-makes it quite clear that the PRA must secure an appropriate degree of protection for policyholders. That is very clear. It is different from the looser wording, to which she referred, about the insurance objective "contributing" to securing protection. It is clear that the language in new Section 3F for with-profits is stronger than in new Section 2C on the insurance objective. That is an important background to the consideration of this amendment, and a point to which the noble Baroness drew attention.
>
> When regulating a with-profits firm, the regulator is concerned with ensuring that the firm recognises a proper balance between the different interests in the fund. These interests include one that is highlighted in this amendment-the interests of with-profits policyholders to the distribution of profits made by the fund. However, there are other legitimate interests in a with-profits fund. They include the interests of the members of the insurer in the case, for example, of a mutual. In a proprietary firm, the shareholders also have an interest in the profits to be distributed. There are also considerations to be balanced between different types of policyholder. I do not suggest for a minute that the noble Baroness seeks to disapply all these other interests in the with-profits fund. Maybe she does-no, I see that she does not. I am glad about that as we would be fundamentally rewriting the law. That would be the effect of the amendment.
>
> I am grateful to the noble Baroness for bringing up this issue. I must say that a balance needs to be struck between the interests of current policyholders, who will be keen to see all available funds distributed, if they are distributed to them, and the interests of future policyholders, which we have discussed, who will pay the price of excessive generosity to previous generations of policyholders. There is also the overriding concern to ensure that the fund remains solvent and able to make distributions.

71 HL Deb 25 July 2012 c783
72 HL Deb 25 July 2012 c783
73 HL Deb 25 July 2012 c770

> As I said, under the Bill, the PRA is required to secure an appropriate degree of protection for with-profits policyholders in new Section 3F, and it will have to take all of these factors into account. Although the factors to be taken into consideration are complex, in essence the objective of regulation remains the same for with-profits as for any other type of business. The objective fundamentally is to ensure the firm's safety and soundness, while ensuring its proper conduct, including the fair treatment of consumers.[74]

Lord De Mauley moved a further Government amendment (amendment 128BJ) affecting the PRA. He said that "The Government have come to the view that it would be helpful to define more clearly in the legislation how the relationship between the PRA and the rest of the Bank group will work in practice."[75] He continued by explaining how the amendment would support the independence of the PRA:

> The Government have come to the view that it would be helpful to define more clearly in the legislation how the relationship between the PRA and the rest of the Bank group will work in practice. The amendment makes it clear that the PRA board will set the PRA's strategy and will be accountable for the success or failure of that strategy. It also requires the PRA board to consult the Bank about the strategy. That will help to ensure that the PRA's supervisory approach is co-ordinated with the wider financial stability strategy of the Bank. The PRA must publish its strategy. That will help to ensure that Parliament, the financial services industry and the wider public are clear about the PRA's direction of travel and priorities. That will assist with calling the PRA to account for the way that it carries out its regulatory and supervisory responsibilities.
>
> Government Amendment 147A makes it clear that the PRA may not delegate responsibility for setting the strategy, which is clearly appropriate. Government Amendment 147B makes express that the Bank should approve the PRA's budget. In practice, the PRA board will draw up the budget, looking at the strategic priorities for the year ahead, and propose this to the Bank. If variations to the budget are required during the course of the year, that will also require the approval of the Bank. This arrangement will ensure that the PRA must account fully for any budgetary increases. Of course, its expenditure will also be audited by the National Audit Office under the provisions already in the Bill. This will provide strong accountability for costs incurred-costs which, as noble Lords have pointed out during previous debates, are ultimately borne by industry.[76]

Several other Government amendments were approved of including one requiring the FCA to publish a record of each meeting of its governing body and one requiring the PRA to adopt an annual budget approved of by the Bank of England.[77]

Clause 5 was agreed to.

7 Day 6: Clause 6 – Extension of scope of regulation

7.1 Non-government amendments

Lord Sharkey moved an amendment that would bring 'crowd funding' explicitly within the scope of regulation.[78] Currently, the commonest forms of possible crowd funding schemes are prohibited.

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74 HL Deb 25 July 2012 c770
75 HL Deb 25 July 2012 c774
76 HL Deb 25 July 2012 c774-5
77 HL Deb 25 July 2012 c813-4

Lord Stevenson of Balmacara introduced an amendment to bring the activities of debt management companies within the scope of regulation, following concerns expressed by debt charities about their activities and their cost.[79] Similar amendments had been proposed during the Commons committee stage. Lord Sassoon, replying, said that all their activities currently regulated by the OFT would transfer to the FCA when consumer credit is taken on by that body. He repeated a previous reply on this issue that financial services legislation was not the place to regulate such companies because they did not provide financial services. He echoed previous contributions when he said that they are now focussed on PPI claims, but in future could deal with other issues.[80] He outlined progress made through other channels in dealing with these companies:

> I am not satisfied with the conduct in the industry, which is why in August, since we last debated these matters, as the noble Baroness I am sure is aware, the Ministry of Justice announced that, from April 2013, claims management companies will be banned from offering financial rewards or similar benefits as an inducement to make a claim. I understand why there are concerns but, since we last discussed these matters, there has been significant progress.
>
> As has already been noted in this debate, proposals have been consulted on to tighten the conduct rules with which all claims management companies must comply as a condition of their licence. The consultation closed on 3 October and the responses are now being considered. Again, the target date for implementation is April 2013. Also from 2013, the Government intend to extend the Legal Ombudsman's jurisdiction to provide an independent complaints and redress service for clients dissatisfied with the service provided to them by the claims management companies with which they have contracted.
>
> I believe that significant and important work is going on, and that that is the right approach. I hope I have been clear on why I cannot support proposals to make the FCA responsible for claims management regulation, which applies as much now as it will in future.[81]

Clause 6 was agreed to. Clause 7 was agreed to after a brief debate. Clause 8 was agreed to without debate.

Clause 9: Permission to carry on regulated activities

Lord Eatwell moved an amendment to speed up the registration (with the FSA) which has increased of late. Lord Flight proposed another which would make it unnecessary for a PRA approved deposit taker (a bank) to need subsequent FCA approval. He related his experience of "having had responsibility for steering the Metro bank application."Another amendment proposed that UK regulators have regard to European financial service firms' regulators.[82]

A large number of amendments were moved which were connected with the actions and responses of the FCA when they undertake investigations into wrongful conduct by regulated persons.[83]

78 HL Deb 8 October 2012 c832
79 HL Deb 8 October 2012 c837
80 HL Deb 8 October 2012 c840
81 HL Deb 8 October 2012 c840
82 HL Deb 8 October 2012 c854
83 HL Deb 8 October 2012 c858

Clause 9 was agreed to.

Lord Davies of Oldham moved an amendment to Clause 10 which would insert into the Bill a requirement on deposit takers to indicate whether their liabilities were protected by the Financial Services compensation Scheme. Replying, lord Sassoon pointed out that such a requirement existed, albeit in the FSA's Rulebook. He thought that such an approach had the advantage of being more flexible than statutory requirements.[84]

Clause 10 was agreed to. Clause 11 was agreed to without debate.

Lord Flight introduced an amendment to Clause 12 that would require the PRA and FCA to establish simplifying [procedures in respect of holders of significant influence functions for dual regulated firms. Supporting the amendment Viscount Trenchard pointed to the impact on London's competitiveness if there are two processes and procedures to be met with.[85]

Lord Sassoon accepted that the amendment was on the face of it a simpler concept than that expressed in the Bill however:

> the arrangements in the Bill have been thought about, and we believe that they are preferable because they put one regulator in charge of leading the process for approving those who wish to carry out roles involving significant influence over the conduct of affairs of an authorised person. In most cases, this will be the relevant prudential regulator, although the FCA will be able to designate SIFs in dual-regulated firms where the PRA has not done so. For example, the FCA will have a greater interest than the PRA in the chief anti-money laundering officer, so it may wish to designate this function in the absence of the PRA.
>
> We certainly do not think that the administrative process should be excessively difficult or lead to log-jams. The Government expect the two authorities to run a single administrative process for SIF applications, taking into account the statutory timeline. Indeed, the draft memorandum of understanding, published by the Bank and the FSA, makes clear that that is exactly what they will do: run one administrative process. I cannot answer my noble friend's question about whether there will be more or fewer people. All I can say is that they have already documented a process to make it as efficient as possible.[86]

Clause 12 was agreed to. Clause 13 was agreed to without debate.

Clause 14: FCA exercise of functions

Lord Stevenson moved a number of amendments and outlined their background and purpose:

> In June last year, along with every other member of the UN Human Rights Council, the UK endorsed the UN framework on human rights and transnational corporations, which enshrines the state duty to protect alongside the corporate responsibility to respect human rights. The Government, including the Prime Minister, have been enthusiastic in their support for these principles, but so far they have not spelt out how they intend to fulfil them. Listing requirements specifically relating to human rights and sustainable development would be a strong first step. The UK has a duty to protect human rights under international conventions to which it is a signatory. The human rights obligations

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84 HL Deb 8 October 2012 c863

85 HL Deb 8 October 2012 c865-6

86 HL Deb 8 October 2012 c867

of states under international law include the taking of effective measures to prevent human rights abuses by third parties, including companies.

The *Combined Code on Corporate Governance*, issued by the Financial Reporting Council, gives guidance to companies on reporting CSR-related matters. The listing rules of the London Stock Exchange require companies incorporated in the UK and listed on the main market of the exchange to report on how they have applied the combined code in their annual report and accounts. Overseas companies listed on the main market are required to disclose the significant ways in which their corporate governance practices differ from those set out in the code. The reporting obligations in the Companies Act 2006 extend to everything of relevance to the company within the terms of Section 417 of the Act. There are no geographical restrictions on what information is relevant or may be disclosed. Markets are driven by information. If the information they receive is short term and thin, these characteristics will define our markets. These amendments would serve to improve the information available to investors and all external stakeholders.[87]

He continued by outlining what other countries' listing requirements included I this respect:

London is already behind the curve in this area and we suffer reputational risk if we do not act. For instance, the Hong Kong stock exchange mandates that mineral companies must: divulge the likely,

"impact on sustainability of mineral and/or exploration projects";

reveal the,

"claims that may exist over the land on which exploration or mining activity is being carried out, including ancestral or native claims";

and state the company's,

"historical experience of dealing with concerns of local governments and communities on the sites of its mines"

and,

"exploration properties".

The Shanghai stock exchange requires listed companies to commit to environmental protection and community development while pursuing economic goals and protecting shareholders' interests. In Luxembourg, listed companies must have "high standards of integrity", and behave in a "responsible manner". In Malaysia, listing rules include provisions on CSR reporting, and the stock exchange has also developed a CSR framework with accompanying guidance for directors. Human rights are also referenced throughout guidance materials elaborating on the framework, most recently in a training tool for directors.[88]

Lord Sassoon pointed out that it was the Financial Reporting Council which had responsibility for the corporate governance code and the stewardship code. To share the responsibility with the FCA would, he argued, compromise focus. He also made clear that the FSA

[87] HL Deb 8 October 2012 c870

[88] HL Deb 8 October 2012 c870-1

currently, and the FCA in future, would have the ability to write in provisions suggested by the amendments if they thought that they were needed.[89]

Clause 14 was agreed to. Clauses 15 - 21 were agreed to without debate.

Clause 22: Rules and Guidance

Clause 22 allowed Peers to table a large number of single issue amendments – control of client funds; special rules for social enterprises; safeguards on product intervention action; removal of published 'directions' before conclusion of a FSA (FCA) investigation; and extension of the normal statute of limitations protection to financial advisers.[90] Since the last is an issue that is frequently raised at a constituency level by Members, the Minister's response is shown below:

> I turn to the group of amendments that start with Amendment 173AAC relating to the issue of a long-stop requirement for complaints about financial services. When the FSA last looked at the issue in 2007, it said that to introduce a time bar, it would need to be clear that the potential detriment to consumers was outweighed by the benefits to consumers and firms arising from greater certainly among independent financial advisers about the extent of their liabilities. It is this cost benefit analysis that needs to be addressed. The FSA said in its published response of 5 November 2011 to the Treasury Committee's retail distribution review report that,
>
> "the FSA believes the FCA should review this issue again at some point in the future".
>
> I certainly believe it is important that the expert regulator looks at this issue and undertakes the necessary consultation with consumers and firms. I am grateful to my noble friend for this amendment because it has prompted me to look back at the rather unspecific commitment that the FSA gave to the Treasury Committee. As a consequence of my noble friend's prompting, I followed up on the point with the FSA and it has made a commitment that the FCA will consider whether to investigate the case for a long stop as part of its business planning for 2014-15. The timing of that is linked to the settling down of the RDR. Therefore, I am grateful to him for prompting this and I would encourage industry and consumer groups to continue a dialogue with the FSA on this topic.[91]

Lord Davies of Oldham moved an amendment that would require employees to be represented on the remuneration committee of an authorised firm.[92] He was supported by Lord Davies of Stamford, who spoke about his experience of being a member of a remuneration committee of a major corporation.

> When I was chairman of the Vinci remuneration committee, I explored the possibility of putting one of those two employee representatives on our board, on our remuneration committee. I discovered, however, and I think my noble friend may find this helpful, that the individual concerned had a certain personal reluctance to do that. I think he felt that he would spend all his time with his workmates defending any level of executive remuneration, which was bound to be much greater than that of his workmates, and that his life, job and role would be rather blighted as a result. So the right solution may be to introduce an element of compulsion. It is not a magical solution, but it can only be helpful.

[89] HL Deb 8 October 2012 c872
[90] HL Deb 8 October 2012 c876-9
[91] HL Deb 8 October 2012 c882
[92] HL Deb 8 October 2012 c884

> My noble friend's second proposal is even more important. He raises the issue of remuneration consultants. I do not think there has been anything like enough attention paid to the role of remuneration consultants. I have not seen any articles in the financial press or otherwise about the role of remuneration consultants. As far as I know, the matter has never been raised in this House and it is time that it was. Every major public company will have remuneration consultants reporting to the remuneration committee, and we had that in Vinci. However their influence was quite nefarious in many cases. The reason for appointing them was often simply to protect the remuneration committees or the boards from criticism. People often hire executive search consultants for similar reasons. It is not merely for the value that they add, although they do add a lot of value in certain cases. It also protects the boards against any accusation of cronyism or nepotism. In the same way, companies automatically take on remuneration consultants, which is a valuable business for them.
>
> The only remuneration consultants I have ever come across are subsidiaries, either of executive recruitment firms or of accountancy partnerships or firms. They have almost a universal franchise now. Everybody feels they have to hire them. In practice the way they work is very dubious. They carry out for their clients a survey of the executive remuneration in comparable companies of a comparable size in a comparable sector, and then present it to the remuneration committee with a proposal for a level of increase for the senior executives for which the remuneration committee has a responsibility.[93]

Responding, Lord Sassoon pointed out that the Bill affected only authorised persons, not all companies in the UK. He also pointed out that recent consultations on the lines suggested by the amendments had not favoured compulsory appointment:

> It is important to be reminded that, in January this year, the Department for Business published its response to its consultation on executive remuneration, which considered among others, the possibility of giving employees a say on remuneration. Although I do not want to be drawn into a wider debate-we should focus on financial services-the consultation responses nevertheless illuminate what would be appropriate or, as I would say, inappropriate for financial services businesses alone.
>
> The Government's view is that, while there will be qualified and enthusiastic employees willing to take on such a role, there are strong arguments against this proposal, including-on this I agree with the noble Lord, Lord Davies of Stamford-that members of the remuneration committee need to be full board members if they are to understand the overall financial strategy and the wider business and economic context which impact on remuneration policy; that introducing external representatives on a single committee risks obscuring directors' collective responsibility, as well as potentially creating additional tensions, which might reduce the effectiveness of the UK unitary board model; and that the level of responsibility of employee representatives and the possible conflicts of interest they might face would need to be resolved.
>
> As a result of the BIS consultation on executive pay, the Government have decided to proceed with some key reforms, such as the introduction of a binding shareholder vote on remuneration, but the case for requiring companies to include employees on remuneration committees has not been made, and the Government are certainly not going to make or accept it in the narrower context that we are discussing today.[94]

Clause 22 agreed to. Clauses 23 and 24 agreed to without debate.

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93 HL Deb 8 October 2012 c886
94 HL Deb 8 October 2012 c889

7.2 Government amendments

Lord Newby introduced a large number of “minor and technical” government amendments.[95]

Lord Sassoon introduced an amendment affecting the relationship between regulators and the European regulators - ESMA and EBA. The amendment was agreed to without debate.[96]

Clause 9 was agreed to.

Lord Sassoon introduced a series of technical amendments to Schedule 4, deleting the word ‘Authority and substituting for it ‘the appropriate regulator’ throughout the Bill. Similar amendments were made to Clause 14.

Clauses 11, 13 and 14 to 20 and Schedule 5 were agreed to without debate.

Government amendments were moved to Clause 21 which deals with the appeals procedures against FSA (FCA) determinations. Lord Sassoon acknowledged that the hoped for move towards a more judgement-led and pro-active regulator and system raised issues regarding the fairness of the system and the ability of those accused to be able to respond effectively. Currently, appeals against a decision of the FSA are heard before a Tribunal, subject to a quasi judicial procedure before. Lord Sassoon explained the new thinking and the Government’s amendments:

> The reforms, in particular those in this clause, are about giving the new regulators the right focus and mandate. They are also about judgment, and empowering the regulators to use their knowledge, experience and expertise to take difficult decisions, often on a proactive and preventive basis. The changes to the arrangements for appealing firm-specific decisions set out in Clause 21 play a key role in making this happen.
>
> I will be clear about what our changes will mean. Clause 21 carries forward the rights of those who are dissatisfied with a firm-specific decision of the FCA or PRA to refer the matter to the tribunal, and preserves the ability of the tribunal to reconsider the matter afresh on a full-merits basis. There have been no changes to the grounds on which the tribunal will consider references. It will continue to consider references on a full-merits basis. In addition, for disciplinary matters or references under Section 393 of FSMA that relate to third-party rights, the ability of the tribunal to substitute its opinion for that of the regulator remains unchanged.
>
> What has changed is the nature of the directions that the tribunal will be able to give in the case of references that do not fall into the above category. In these cases, where the tribunal decides not to uphold a decision, it will not be able to substitute its decision for that of the regulator. Instead, it will be required to remit the decision back to the regulator, giving directions that it considers appropriate. The directions will be limited to findings relating to matters of fact or law that should or should not be considered by the regulator, and whether or not there were any procedural deficiencies. This is an important part of the move to judgment-led regulation, which recognises that it is the regulator's job to take regulatory decisions, while providing a mechanism for judicial scrutiny of the fairness of those decisions.
>
> I have already set out why the Government attach significant importance to the new arrangements for appealing non-disciplinary decisions. However, we must also ensure that we provide a fair regime for firms, and give certainty and clarity around

[95] HL Deb 8 October 2012 c856
[96] HL Deb 8 October 2012 c862

procedures. That is what government Amendments 184 and 185 seek to do. Where a non-disciplinary reference is made, the tribunal remits the matter to the regulator. The regulator must then reconsider the matter in accordance with the tribunal's directions. These amendments seek to provide clarity about what happens next. They require the regulator to issue a second decision notice rather than moving straight to a final notice, as would be the case under the Bill as drafted. Once a final notice has been issued, the firm's or individual's options for further challenge are strictly limited. A final notice can be appealed to the High Court only by way of a judicial review, on more limited grounds and at the risk of higher costs and lengthier delay.

> Amendments 184 and 185 would require the relevant regulator to issue a second decision notice in all such cases once it has considered the tribunal's direction and reached a new decision in accordance with the tribunal's findings. This means that the firm or individual could challenge the second notice, for example if they do not think that the regulator has properly considered the tribunal's direction in reaching its new decisions. There will be a second hearing before the tribunal, which will be able to consider the full merits of the matter and deal with the case more speedily and, because it will already be familiar with the case, at lesser cost to the firm and the regulator.[97]

Clause 21 was agreed to. Clause 22 agreed to. Clauses 23 and 24 agreed to without debate.

Clause 25: Powers of regulators in relation to parent undertakings

Lord Sassoon moved an amendment to Clause 25:

> New Part 12A of FiSMA, as inserted by Clause 25, confers on the regulators for the first time substantive powers in relation to unregulated parent undertakings of authorised persons. These new powers strengthen the regulatory framework by ensuring that the regulator can take appropriate action in relation to a parent undertaking that itself is not regulated but which controls and exerts influence over an authorised person.

> Amendment 174ZA extends the meaning of "qualifying parent undertaking" so that the new Part 12A powers can also be applied to body corporates which have a place of business in the United Kingdom. At present, the powers are restricted to a parent undertaking that is a body corporate incorporated in the United Kingdom. There is a risk under the new Section 192B(2), as currently drafted, that some financial groups may be beyond the scope of new Part 12A powers or indeed may engage in regulatory arbitrage and restructure their operations to remove themselves from scope. Left unchanged, it would be possible for a firm to evade the powers by incorporating their parent undertaking overseas while retaining a place of business in the UK. It is important that the powers can be deployed for the purpose for which they were designed.

> Amendment 174ZB is a bit of small tidying up of the drafting. As there is only one system of company law in the UK, it is not possible for a body corporate to be incorporated only in "part of" the UK. That is why we are making that second amendment. I beg to move.[98]

Clause 25 was agreed to.

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97 HL Deb 8 October 2012 c874-5

98 HL Deb 8 October 2012 c893

8 Day 7: Clause 26 – Exemption for recognised investment exchanges

Clause 26 was agreed to without debate.

8.1 Non-government amendments

Peers discussed Schedule 9 (discipline & enforcement). Government technical amendments were agreed to. Lord Flight moved an amendment that would restore the existing 28 day period of 'purdah' of the FSA before it could publish the fact that it was investigating disciplinary matters against authorised persons:

> Under FiSMA at present, the FSA is not able to publish its allegations against a firm or individual until they have had an opportunity to challenge them by meeting the FSA's enforcement division. Effectively, that means appearing before the Regulatory Decisions Committee, which acts as a relatively independent judicial body. It seems wrong in principle for an individual or organisation to be publicly labelled guilty before there has been some form of independent judicial process to assess the matter. Stakeholders can also be unfairly affected. I cite the fall of 25% in Standard Chartered's share price when something similar happened in the USA and the New York regulator gave advance notice of publicly alleged wrongdoings by Standard Chartered. It is not just the individuals or organisations that are affected but the pension funds and others who are shareholders.
>
> The Treasury's justification that:
>
> "The new warning notices power is a good idea because it will increase transparency. This will mean that consumers will know at an earlier stage where things are going wrong with a firm or individual and the FCA is taking action",
>
> seems to me to ignore or to override the principles of natural justice and the wider interests of other stakeholders. It was particularly ironic that both the Chancellor of the Exchequer and the Governor of the Bank of England should have complained about the Standard Chartered case when the FSB contains very similar provisions which will enable the same sort of thing to happen in the UK. I grant that the positions are not absolutely analogous but they are pretty similar.[99]

Under the present system, disagreements between the Regulator and the firm are decided upon by a regulatory decisions committee (RDC). Under the Bill, the FSA (FCA & PRA) could publish a decision, safe in the knowledge that it could not be sued, and the procedure in the case of a disagreement was unclear. The RDC was a system that has evolved without statutory backing and the Bill does not specify a replacement model. He continued:

> While the actual decision to publish must be taken by at least one person not directly involved in establishing the evidence on which a decision is based, other decision-makers can participate who have been directly involved in the underlying investigation. I fear that is not very far from the investigators taking the decision where the Government's proposed amendments to the existing law appear to allow the existing safeguards to be substantially bypassed. This in turn throws up the risk that a decision made by a body which includes individuals who have been involved in gathering the evidence on which it is based could be challenged by an affected party as being contrary to the principles of natural justice that no man may be a judge in his own case. Parallels have also been made with bringing charges in criminal proceedings which are public, but the code for crown prosecutors imposes a far higher standard of proof that

99 HL Deb 15 October 2012 c1275

> there is sufficient evidence to provide a realistic prospect of conviction than the much lower standard of proof for a regulator issuing a warning notice.
>
> It seems that in focusing on the value of transparency, the Treasury has ignored the equally important issues both of natural justice and of third-party stakeholder[100]

Several Peers supported the amendment. Lord Deben summarised:

> The length of time that the regulator takes to work means that many people will never be able to prove their innocence because they will already have gone bust. We have not recognised how serious this measure would be for companies. It is not a fair way of proceeding and it is not justified. Frankly, the regulator has not given a single example of when having this power would have improved regulation. I asked but no answer came-all I got was a statement that it will be useful. That is not a satisfactory answer for the removal of a human right.[101]

Baroness Hayter however, argued that early publication of a warning notice was to be welcomed:

> In other areas, we know fairly quickly. If action is taken against a food factory suspected of contaminating food, we as consumers want to know immediately, and the Food Standards Agency lets us know straightaway when it is taking action. Similarly, if a garage had fixed a coach's brakes and was accused of doing it less than satisfactorily-some of us are grandparents-I would not want my grandchild to be on a coach where the garage was already up before the Health and Safety Executive for not having done repair work properly. Similarly, as a shareholder, I would want to know whether BP did have some liability for pollution in the Gulf of Mexico before I parted with money to invest in that company.
>
> There can be ongoing detriment if serious accusations are made and the people involved in parting with their money, as consumers or investors, do not know about it. I am not sure it was right that we heard nothing about LIBOR and the behaviour of banks until that first case was settled. Was it right that Equitable Life went on selling products even when there was a case pending? Many of the difficulties that arose were consequences of that ongoing sale. The first time these names came out there would be a lot of coverage in the press, but once we got over that hurdle-once we had got used to it and grown up-consumers are quite able to know the difference between an accusation and a finding. Keeping those hearings in the dark is quite against consumer interest.[102]

Replying Lord Sassoon said that they had to start from the fact that there had been an enormous amount of 'detriment' – mis selling and the like. "To talk in dramatic terms about human rights and people being proved guilty before they had had a chance to go through natural justice and so on is painting the picture from a completely wrong starting point".[103]

He continued by giving examples of where the new powers would have been used, e.g. Winteflood Securities; and said that the FSA had been consulted about reducing the period from 28 to 14 days. They said that the longer period "has the effect of unnecessarily slowing down the enforcement process". However, he added that:

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[100] HL Deb 15 October 2012 c1276
[101] HL Deb 15 October 2012 c1278
[102] HL Deb 15 October 2012 c1280
[103] HL Deb 15 October 2012 c1281

> I fully agree that firms should have adequate time to make representations. Although 14 days is the new minimum, it is important to note that it remains at the regulator's discretion to specify a longer period-for example where it knows a case is particularly complex. The regulator may decide to extend the period from the outset. The decision whether to extend the period will of course be governed by the principles of natural justice and Article 6 of the European Convention on Human Rights concerning the right to a fair trial. I hope that that gives some reassurance to my noble friend on the narrow point; that is, it is not a blanket 14 days.[104]

He also acknowledged that the regulator will have to take account of the possible consequences of publishing a notice; he pointed out that if, having published a notice, the regulator subsequently decides not to proceed with enforcement, then that decision will also have to be published. He then announced an important concession:

> although we believe this is an important power, the question is whether it will be exercised properly and whether any further protection is needed. We are taking a bold new step in an untested direction and it has to be used responsibly. For that reason-and listening to this debate-**I can say that we intend to return to this issue on Report in this one very specific way: that is, to make provision for a power for the Government to repeal the new warning notices power if at some point in the future the Treasury considers that the power or use of it by the regulators is, or may be, contrary to the public interest.** This does not weaken in any way our commitment to this policy, or our belief that if used responsibly, which we expect it to be, the new power will form a vital part of the FCA's regulatory toolkit.
>
> I hope that what I have just said provides my noble friend with some reassurance that we will be mindful that the power is used in a responsible way which is in the interests of the greater good. Should that not be the case, we will act under a power which we intend to bring forward on Report.[105]

Addressing the same issue Baroness Hayter moved an amendment that would approach the issue in a different way. She proposed the establishment of independent 'Determination Panels' for each regulator. She referred to the fact that the existing RDC is not even part of the statute:

> The second reason is to bring some independence to these hearings to give confidence to those against whom regulatory measures are to be taken that they will have a chance for a fair, objective second hearing-a hearing by people who are apart from, and indeed independent of, the regulator's staff. We know from the FSA's history that such independence was not always there. Although there is now the Regulatory Decisions Committee, it is not guaranteed in statute. Indeed, I know that, partly thanks to some ideas floated on the FSA website, there has been much concern that the RDC may not even continue under the new architecture. However, surely the existence of such a body should be clearly set out in the Bill so that it cannot simply be abolished or amended by the regulators.[106]

She continued:

> However, we cannot assume that the protections afforded by the current framework will simply be transposed into the new regulator's governance arrangements. The current FSA proxies for the new regulators have shown a keen appetite for exercising their judgment and discretion to intervene swiftly and decisively. I welcome that but I

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[104] HL Deb 15 October 2012 c1283
[105] HL Deb 15 October 2012 c1285
[106] HL Deb 15 October 2012 c1288

> am aware that within the industry there are serious concerns that the FSA has, in anticipation of its new powers, begun to exploit the absence of a specific statutory requirement for the RDC.[107]

Replying Lord Sassoon said that they would have to trust the good sense and judgement of successor regulators to replicate an RDC system of some sort, just as the FSA had shown good judgement in setting it up in the first place: "we do not need to hard-wire that [an RDC of some sort] in to the Bill. He thought it should be up to the regulators how they achieve a satisfactory outcome.

Clause 35: Financial Services Compensation Scheme

Baroness Hayter moved an amendment requiring the Government to review at the EU level, the position of the deposits of charities which have been impinged upon by the £85,000 ceiling on protected deposits imposed by the EU by the deposit scheme directive

Lord Hodgson of Astley Abbots moved an amendment that would equate more closely the levies paid to the scheme by a particular levy class with the likely levels of calls made on that class.

Responding to Baroness Hayter for the Government, Lord Newby said that:

> we have listened very carefully to her concerns, and that the Government will consider whether it is appropriate to review the eligible limit to charities in the context of our overall negotiating priorities on this proposal. This is just one of a number of issues that we are considering in the round and as part of the negotiating posture we will take up. I assure her that we will give careful consideration to whether this is the way of achieving what she wants to achieve.[108]

He could not support the other amendment either; put simply it is not as easy to do as one would think and it requires a flexible approach rather than a rigid one set out in statute.

Clauses 35 & 36 agreed to.

Schedule 11 Financial Ombudsman Scheme (FOS)

A large number of amendments were moved concerning the relationship of the FOS and the new regulators including:[109]

- Exercise functions consistent with FCA strategy
- Publication of all determinations
- FCA to conduct oversight of FOS
- Strengthen accountability of FOS to FCA
- Clearer guidance for cases involving regulatory or legal clarification

Baroness Sherlock, an independent director of FOS argued that these amendments threatened the independence of FOS and brought FOS too close to having to decide the regulatory objectives of the FCA. She supported the proposed publication of decisions and

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107 HL Deb 15 October 2012 c1289
108 HL Deb 15 October 2012 c1298
109 HL Deb 15 October 2012 c1321

said that stakeholders had been "very supportive".[110] The Minister agreed with the points she had made, pointing out the general observation that:

> Obviously the FCA will have an important role making and approving the rules of the ombudsman scheme, and must comply with its regulatory objectives and principles in doing so, but I do not believe that the regulator and the FOS should share the same objectives or be held to the same regulatory principles.
>
> The FOS is not a regulator and should not be expected to act like one. Its role is to provide an impartial alternative dispute resolution service for consumers and firms. It is not a consumer protection body, and I would be concerned that by giving the ombudsman consumer protection objectives we would put that impartiality at risk. Moreover, in practice such a duty would be burdensome and difficult to interpret.[111]

Lord Kennedy of Southwark moved an amendment that would set out rules of best practice for 'complainant representatives' or claims management companies (CMCs).[112] He set out some of the bad practice such as blanket phone calls and claims on behalf of people who have never taken the products complained of. Lord Newby sympathised with the amendment but thought that the efforts being made by the Ministry of Justice, which regulates CMCs, were the more appropriate rather than expecting the FOS to 'do something'.

Clause 39 Auditors and actuaries

Baroness Wheatcroft moved an amendment that would require auditors to provide a narrative 'risk report' on the deposit taking institutions they audited. She noted how all the banks which failed had clean audit reports just prior to their collapse.[113] Lord Lawson of Blaby supported the amendment. The Economic Affairs Committee had concluded that audit failure was a contributory cause of the crisis.[114]

Although he thought that it was not the whole answer, Lord Sassoon thought that 'we are on to something here' and promised to see

> whether the Bill can and should go further to require the regulator to make the most of the expertise that auditors can undoubtedly offer. **I am happy to take this issue away and consider whether there is an amendment that I can bring back at Report** that recognises the important role of auditors without cutting across the role of the regulator in the way that I believe this particular amendment may do.[115]

Clause 39 & Schedule 13 agreed to.

Clause 40: Provisions about consumer protection and competition

Baroness Hayter moved an amendment that would allow a consumer 'super complaint' about life insurers to be made to the PRA, rather than just the FCA as in the Bill. The government view is that the FCA is the conduct regulator and complaints of this sort are conduct related not prudential based. Another of her amendments would have enabled the FCA to make

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[110] HL Deb 15 October 2012 c1323
[111] HL Deb 15 October 2012 c1326
[112] HL Deb 15 October 2012 c1329
[113] HL Deb 15 October 2012 c1339
[114] HL Deb 15 October 2012 c1340
[115] HL Deb 15 October 2012 c1343

referrals to the Competition Commission direct, rather than having to make them to the OFT first.[116]

Together with Lord Whitty, Baroness Hayter moved amendments that would enable the Secretary of State to establish collective redress schemes when there were complaints involving large numbers of consumers. Replying Lord Newby said that the Government was considering such a proposal:

> The Government believe that collective proceedings, in the appropriate circumstances, can deliver access to redress and a potential deterrent effect. That is why the Government have been consulting on a range of proposals to make it easier for consumers and small businesses to bring private actions in competition law-including whether to extend to businesses the current right of consumers to bring a collective action following a breach of competition law, and whether to make it easier to bring such actions. The Government are considering the consultation responses and hope to publish their response before the end of the year. We want to take the opportunity to learn from the outcome of that consultation and reflect on the implications for the financial services sector before proceeding to legislation.[117]

Clauses 40 - 42 were agreed to. Clauses 43 -46 agreed to without debate. Clauses 49 - 56 agreed to without debate.

8.2 Government amendments

Clause 27: Powers in relation to investment exchanges and clearing houses

Lord Sassoon moved a number of amendments that would extend existing provisions of the Banking Act 2008 to investment firms and central counterparties.

One of the things which became apparent at the start of the banking crisis in the UK was the fact that banks were treated for insolvency purposes through the same legal format as any other business. It was obvious that such legal procedures were not very helpful in the case of banks. For example, in ‘normal’ insolvencies, the assets of the firm are frozen and the insolvency practitioner tries to realise these assets whilst paying off the debts of the firm. For a bank the assets are, amongst other things, its loans. Hence, the administrator would be in the position of trying to recall loans, mortgages overdrafts etc as soon as the bank got into difficulties, with serious side effects for its millions of borrowers. The main innovation of the Banking Act was to set up a bank-specific resolution procedure which would lead to an orderly wind down of the bank, or to put in place a rescue operation. Recovery and resolution plans are now a prominent feature of the legislative reforms enacted throughout the world. They are sometimes described as living wills.

The amendments proposed by Lord Sassoon would extend these procedures to a wider group of financial institutions. He described the amendments as follows:

> The first group of amendments that I am speaking to today covers the new insolvency regime and arrangements that apply to UK clearing houses and recognised investment exchanges. UK clearing houses form part of the financial market infrastructure that underpins the operations of domestic and international markets. They act as the buyer to every seller and the seller to every buyer, in order to protect trading parties from the risk of counterparty default. The role performed by UK clearing houses means that they

[116] HL Deb 15 October 2012 c1344-6
[117] HL Deb 15 October 2012 c1351

> are particularly exposed to wider market risks, such as the failure of large clearing members.
>
> Recognised investment exchanges, in their capacity as market operators, can operate regulated markets and multilateral trading facilities. These exchanges provide a number of crucial services for the trading of shares, bonds and other securities. Amendment 183ZZA introduces a new subset of recognised clearing houses-UK clearing houses-into the regulatory framework. The reason for this is that it is not appropriate for the Bank of England to exercise the new powers contained in these amendments in respect of foreign clearing houses that are not established in the UK, nor in respect of clearing houses that do not offer central counterparty services. This amendment provides clarity on these points.
>
> Amendments 176A and 176C introduce provisions in relation to the Bank of England's role in winding-up, administration or insolvency proceedings relating to a UK clearing house. These amendments will ensure that the Bank of England and the Treasury are put on notice of the application for the winding up of a clearing house and have the opportunity to consider whether to exercise a resolution power in order to minimise the impact of failure on financial stability. Amendment 176C allows the Bank of England to direct insolvency practitioners appointed in connection with the insolvency of a UK clearing house. Such directions will build on current provisions governing company insolvency but will allow the Bank of England to direct the insolvency practitioner to take steps to minimise the impact of the insolvency on financial stability. In doing so, the Bank must be satisfied that it is desirable, having regard to the public interest in the maintenance of financial stability.
>
> Amendment 176B allows for the Bank to apply to the court for administration of the clearing house and participate in court proceedings. It also requires that the Bank gives its consent before an administrator is appointed to act for a failed UK clearing house. These powers will enable the Bank of England to respond quickly and decisively when a clearing house is in financial difficulty, managing the safe winding up in a manner that minimises any risk to financial stability and the wider economy.
>
> Finally, Amendments 189BD to 189BL relate to insolvency arrangements for recognised investment exchanges. They expand the scope of Part 24 of FiSMA so that it applies to the insolvency of a recognised investment exchange, as it applies to the insolvency of an authorised person. This means that the regulator will be able to apply to a court for an order placing an investment exchange into an appropriate insolvency procedure. These amendments also ensure that the regulator would be put on notice of an application for an order placing an investment exchange into an insolvency procedure and could participate in these proceedings if it considered it necessary in the public interest. I beg to move.[118]

He acknowledged that the Government was putting a lot in the Bill, but noted that the EU was also preparing similar proposals. Since the Government had this Bill before them, it was decided to use it to introduce the changes. No substantial arguments were raised against the measures and they were approved.

Clause 27 was agreed to. Clause 28 agreed to without debate.

Lord Sassoon moved a further amendment, to insert a new clause after Clause 28:

> Amendments 176D and 182ZA build on the existing powers of direction that the Financial Services Authority has under the Financial Services and Markets Act 2000,

[118] HL Deb 15 October 2012 c1261

or FiSMA. This group of amendments gives the Bank of England additional powers to direct UK clearing houses to address risks to their solvency, or indeed any other matter. Specifically, the direction could require a clearing house to make changes to its rules or introduce emergency rules, or require rules to be activated. The existing powers of direction provided for in FiSMA can be used only to direct a clearing house to ensure that it complies with the recognition requirements or its obligations under FiSMA.

[...]

Providing the Bank with additional powers of direction over UK clearing houses is essential to allow the Bank to manage the considerable risks that may be posed by actions of a clearing house that is nevertheless not in breach of its recognition requirements or obligations under FiSMA. Put simply, the powers will enable the Bank to intervene as required to help to ensure that clearing houses act in a way that is consistent with the maintenance of financial stability and wider market confidence. For example, these provisions allow the Bank to issue a direction requiring a UK clearing house to refuse to accept certain investments as collateral, or to require all collateral in relation to specified types of financial transaction to be provided in cash. They also allow the Bank to require a UK clearing house to alter the rules concerning its operation in order to ensure that certain matters do not constitute events on which specified rights become available-for example, early termination rights-or to require a UK clearing house to take action or to refrain from taking action under its default rules.

Although these powers are wide-ranging, building in essential flexibility to manage new and unusual risks, they may be exercised only where the Bank is satisfied that it is desirable to do so, having regard to various clearly defined public interest tests. With one exception, the Bank of England cannot use this power to require shareholders, members or clients to recapitalise or otherwise fund a failing recognised clearing house. The power of direction relates only to the recognised clearing house itself. The exception is where the UK clearing house already has recapitalisation arrangements and agreements in place with its shareholders. In this instance, the Bank of England could use this power to direct the UK clearing house to enforce those arrangements, provided that the necessary conditions and safeguards are met. This is to ensure that the clearing house acts in a way that is consistent with the maintenance of financial stability and wider market confidence.[119]

Baroness Cohen of Pimlico, a non-executive director of the London Stock Exchange- asked two specific questions:

Will the Minister please confirm that the new powers under Amendment 176D cannot and will not be used to direct owners and members of a clearing house to recapitalise or re-fund the default arrangements?

And

will the Minister explain why the Bank has been given two different sets of new powers over clearing houses, each subject to slightly but critically different trigger conditions? Next week we are likely to debate Amendment 193G, which extends the resolution regime specified in the Banking Act 2009 to cover clearing houses as well. The proposed powers under the Act are subject to stiff trigger conditions, principal among which is that the clearing house is likely to fail to meet its threshold conditions under the meaning of FiSMA-namely, that the clearing house may be about breach its licence, including being in danger of running out of money. Even in those

[119] HL Deb 15 October 2012 c1270

> circumstances, though, the Bank is required to consult the Treasury before it can exercise any powers. There is no limiting indication of this sort so far in Amendment 176D-the Bank can apparently just do it all by itself, which would make anyone a little anxious.[120]

Lord Sassoon said he had confirmed the first question in his introduction and, on the second:

> we need to recognise that there are two rather different sets of trigger conditions. The power of direction is designed to avert situations where resolution is necessary. The special resolution regime itself is to be implemented where there is no realistic prospect of the clearing house continuing to function. While I am happy to debate and take away the noble Baroness's point-I will read carefully what she said on the record-I believe that there is a fundamental mis-read-across between the appropriate trigger conditions for a power of direction as opposed to a special resolution regime.[121]

Clause 29 Agreed to. Clauses 30-34 agreed to without discussion.

Several technical amendments to Schedule14 were agreed to.[122] Several technical amendments to Clause 48 were agreed to.[123]

9 Day 8: Clause 57 Treasury power of direction

9.1 Non-government amendments

Baroness Noakes moved an amendment which would widen the Treasury's powers of direction over the Bank of England during a crisis. Currently the Bill limits it to certain, specified, 'instruments of crisis management'. She wanted it to be "broader and future proofed".[124] Replying Lord Sassoon said that under the Bank of England Act 1946, the Treasury already had a general power of direction over the Bank, but, even during the financial crisis this (nuclear) option was thought to be unusable as it would "likely be interpreted as the Chancellor overruling decisions and judgements that should rightly be for the Bank".[125] Hence, Clause 57 was limited and targeted. Clause 57 agreed to. Clauses 58 – 60 agreed to without debate.

Lord Tunnicliffe introduced two new clauses. The first would require any of the regulators to provide the Treasury with notification of 'a material risk to public funds', and the second, which would give the FPC a wider role in informing the Treasury of the possible need for public funds, rather than this being reserved for the Governor. Replying Lord Newby said that it was inconceivable that the Treasury would be unaware of any possible calls on public funds through its general contacts with the Bank. On the second point, he stressed that the approach in the Bill was to provide single points of responsibility and not to diffuse power, and hence responsibility, more widely, as had been the case in the current regime.[126]

Clause 61: Memorandum of understanding – crisis management
Lord Davies of Oldham moved several amendments that affected the MoU. He said:

[120] HL Deb 15 October 2012 c1271
[121] HL Deb 15 October 2012 c1273
[122] HL Deb 15 October 2012 c1353
[123] HL Deb 15 October 2012 c1360
[124] HL Deb 17 October 2012 c1501
[125] HL Deb 17 October 2012 c1504
[126] HL Deb 17 October 2012 c1504-13

> The broad message of this group of amendments is to call for the Financial Conduct Authority to be given an explicit role in the process and its related mechanisms. The tenor of all our amendments today is that the collaboration between the Treasury, the Bank and the regulators is exceptionally important. In particular, why does the Bill allow the Bank, the Treasury and the Prudential Regulation Authority to include in the memorandum provisions on co-operation between any of them and the FCA, but the FCA itself seems to have no reciprocal power? It can like it or lump it; it can accept what is put forward as an agreed position or it can seek to veto, but it is not party to the drafting process. We are concerned about this because the risks of disruption and instability in the financial markets, which are overseen by the FCA, are not being given sufficient weight.[127]

Responding, Lord Sassoon, repeated the point made earlier by Lord Newby about the concentration of responsibility:

> Why do I believe that it would be a mistake to include the FCA as a full participant in the crisis management MoU? The issue goes right to the heart of what the new regulatory architecture is trying to achieve. The Government are committed to moving away from a tripartite model where accountability was confused and diluted, and responsibilities were overlapping and unclear. There cannot be an issue in the Bill that goes closer to the heart of it than the MoU. A key element in achieving the clarity of responsibilities that we need is making the Bank a single point of accountability for financial stability. We debated that, and it goes to the heart of the architecture. This will help to ensure clarity and focus of communication; it will reduce the potential for delay or confusion; and it will provide the best chance of delivering a timely and successful solution to a risk to public funds. The construction of the MoU, and who is and who is not a party to it, flows directly from that central part of the architecture which this Bill seeks to put in place.
>
> Of course there will be occasions on which the FCA might need to be involved in discussions around financial crisis management. For example, the FCA might have a role in identifying how a scenario might impact on the interests of consumers and in suggesting what action should be taken to protect those interests. However, the FCA does not need to be one of the primary participants in the MoU for those interactions to take place. The legislation provides explicitly for this co-operation between the participants to the MoU and the FCA to be covered in the MoU.[128]

Several other amendments were moved which proposed changes to the crisis management aspects of the Bill; the inter-relationships between the main players and the status of the MoU. Most of these had been raised before during the Commons' stages. Clause 61 was agreed to.

Clause 62 MoU: international organisations

Lord Flight moved an amendment requiring the UK authorities to co-ordinate their functions with the European regulators and authorities. For the Government, Lord Newby, gave a detailed account as to how such co-ordination already happened.[129]

Clause 62 was agreed to. Clause 63 agreed to without debate.

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[127] HL Deb 17 October 2012 c1514
[128] HL Deb 17 October 2012 c1515
[129] HL Deb 17 October 2012 c1530

10 Day 9: Clause 64: Treasury arrangement of independent enquiries.

10.1 Non-government amendments

Clause 64: Treasury arrangement of independent enquiries

Baroness Noakes moved several amendments that would have the effect of prescribing more forcefully the Treasury's power and duty under Clause 64 to establish independent enquiries when or if the regulatory system fails to some degree.[130] There was confusion expressed about the tone of the clause. What conditions might exist where the Treasury would not order an enquiry if the regulators had not started their own?

Replying Lord Sassoon said that the example of the RBS FSA enquiry which was originally not published was an example of the 'independent route'. He also confirmed that the Bill, once in law, would enable the Treasury to start enquiries into events that predated the Bill.[131]

He then outlined why he thought the Treasury should have discretion over starting an enquiry, even if there was a good case for one on public interest grounds:

> I turn first to Amendments 190B and 192ZA, which probe why, if the public interest test is met, the Bill provides that the Treasury "may" require an inquiry. By changing "may" to "must", their intended effect-as we have heard-is that in all cases where the test is met, the Treasury should have to require an inquiry. Amendment 190AA achieves the same end by a different means, specifying that the Treasury must arrange an inquiry where the two conditions in Clause 64 are met unless there is a public interest in not doing so. I agree with my noble friend that, if there is an overwhelming public interest in having an independent inquiry or in the regulator carrying out an investigation, the Treasury should step in to ensure that that happens. As it stands, the Bill gives the Treasury a little bit of discretion here. This is not about wriggling out of the need to call for an inquiry; it simply acknowledges that in reality, circumstances may dictate that even though the test is met, an inquiry or an investigation under this Bill is not necessarily the best course of action.
>
> For example, there may already be an alternative independent inquiry going on-perhaps a parliamentary commission or other parliamentary inquiry-or an inquiry under the Inquiries Act. In the case of the provisions relating to investigations carried on by the regulator, the regulator itself may already be carrying on an investigation under Clauses 69 or 70. However, as my noble friend is aware, and as the noble Lord, Lord Barnett, has reminded us, I have already confirmed that I am giving careful thought to the wider use of "may" and "must" throughout the Bill. This is a huge exercise, taking up some mighty brains. All I would say at this stage is that although there are certainly not many cases that deserve intense scrutiny, this is certainly one of the instances that merit serious consideration. I will leave it at that. We will come back if we find any suitable candidates for changing.[132]

Lord Davies of Oldham moved an amendment requiring directions given by the Treasury to regulators to start or stop investigations, to be laid before the House. Replying Lord Sassoon said:

> The group of amendments on which the noble Lord, Lord Davies of Oldham, spoke rather modestly towards the end of this discussion nevertheless are ones which we need to take seriously. Amendment 192ZZA would provide that if the Treasury issues a direction to the FCA not to proceed with an investigation into possible regulatory

[130] HL Deb 24 October 2012 c211
[131] HL Deb 24 October 2012 c214
[132] HL Deb 24 October 2012 c215

> failure, that direction must be laid before Parliament. Amendment 192ZZB makes similar provision for such investigations by the PRA.
>
> Amendment 192C would provide that where the Treasury issues a direction specifying the parameters of an investigation into regulatory failure by the PRA or FCA, or suspending or halting such an investigation, that direction must be laid before Parliament.
>
> The Bill is drafted to give the Treasury some discretion here and, all things being equal, we had wished to preserve this. However, in this instance I am somewhat persuaded by the case that noble Lords have made. The Government are very much committed to greater openness and transparency in our regulatory architecture. **With that in mind, I am happy to confirm that I will be taking on board the insightful comments of this Committee and will return to this issue on Report, placing the Treasury under a duty to disclose any directions issued under Clause 74, unless doing so would not be in the public interest**.[133]

Clause 64 agreed to. Clauses 65 – 73 agreed to without debate.

Clause 74: conduct of investigations

Lord Hodgson moved an amendment requiring any investigator to act not only proportionately but 'reasonably and fairly' too.[134] He thought that the perception in the City was that "investigations are becoming fishing expeditions".

Lord Newby, responding, said that the regulators already had to operate reasonably and fairly under the principles of public law and natural justice respectively. On the general point of regulatory fairness, he said:

> I can understand why people are at this stage worrying about whether the balance that the regulators strike between the interests of the firms and those of the consumers of their products is right. We are pretty confident that it will be. The noble Lord, Lord Davies, pointed out that it is important that the regulators are rigorous and balance the interests of the firms and those of their consumers. The way in which the Bill is structured should enable them to do that and we are confident that they have that very much in mind.[135]

Clause 74 agreed to. Clauses 75 to 79 and 80 to 83 agreed to without debate.

Lord Mitchell introduced an amendment to provide further restrictions on payday loans.[136]

Lord Flight introduced a new clause to facilitate the transfer of retail bank accounts.[137]

10.2 Government amendments

There was a minor amendment to Clause 80. Clause agreed to.

Lord Sassoon moved a number of amendments and new clauses:

> that seek to extend the UK's resolution regime for banks to investment firms, group companies and UK clearing houses. Today, I am introducing the remaining amendments, which put in place a regime that gives the Government and the Bank of

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133 HL Deb 24 October 2012 c216
134 HL Deb 24 October 2012 c218
135 HL Deb 24 October 2012 c226
136 HL Deb 24 October 2012 c256
137 HL Deb 24 October 2012 c267

England the powers to take action when one of these institutions is likely to fail, allowing them to resolve the situation in an orderly manner in order to maintain the financial stability of the UK.

Amendment 193BA adds two new special resolution regime objectives. The collapse of Lehman Brothers in 2008 and MF Global in late 2011 highlighted the difficulties and uncertainties surrounding the treatment of client assets and money when an investment firm enters insolvency. During normal business, client assets and money are held by the investment firm on behalf of the client, in segregated or non-segregated accounts. Firms also rehypothecate client assets, borrowing them to use for their own purposes. There can be complex arrangements to unwind if a firm enters insolvency or resolution.

The new objective 6 is intended to ensure that the resolution authorities look to protect not only cash deposits but also shares and other assets. The new objective will apply to any resolution where client assets are held by the firm, whether it is a bank that offers investment services or an investment firm which is not a bank. To complement this legislation, the FSA has recently launched a wide-ranging consultation on client money and client asset rules. The Government will report to Parliament on the review of the special administration regime-the bespoke insolvency regime for investment firms -by February 2013.

The new objective 7 will help minimise the adverse effect on financial market infrastructure, such as investment exchanges and clearing houses, when stabilisation powers are used. For example, in resolving an investment firm, this objective will require the resolution authorities to consider the impact of their actions on exchanges and clearing houses in which the investment firm was a participant. The effect of the new clause inserted by Amendment 193F is to extend the resolution tools under the special resolution regime to investment firms and their group companies. In doing so, it is important that this legislation captures only those firms that are deemed systemic to the financial stability of the UK. Casting the net too wide, and unnecessarily capturing firms whose failure would not pose a threat, could adversely affect the UK's competitiveness. On the other hand, we do not want to exclude from the special resolution regime those firms that, in normal market circumstances, would not be seen as systemic but which, in times of market crisis, might pose systemic risks.

[...]

This is a difficult balancing act. With an eye to developments in Europe, particularly the European Commission's recovery and resolution directive, the legislation adopts a wide definition of "investment firm" from European law but also confers on the Treasury a power to exclude categories of firm from the special resolution regime. In this way, we can ensure that smaller firms that clearly do not pose a threat to financial stability-such as a small stockbroker or financial adviser-will not be subject to the new regime, while on the other hand providing the necessary flexibility to react as circumstances change.[138]

Baroness Kramer and others picked up the point about the changing shape of EU legislation and how the forthcoming Banking Bill, and how things done now might have to be reversed in the near future. As she put it, the Bankers Association is worried about "marching all the troops up in one direction, finding there has to be substantial change and marching them all down in another direction".[139] However, the Opposition broadly supported the new clauses.

[138] HL Deb 24 October 2012 c227
[139] HL Deb 24 October 2012 c230

Lord Sassoon responded:

> The previous Administration brought forward the 2009 Bill, which necessarily came forward in a hurry as a proper part of the response to the crisis. This Bill picks up a lot of other lessons from the crisis, but the Banking Act 2009 put in place some arrangements for banks. We have now seen through the examples of what happened in the crisis and, regrettably, to MF Global and others since, that the 2009 Act, although it put in place some important new powers, did not cover the waterfront. We are therefore seeking to ensure that we learn the lessons and that arrangements are made that cover other very important parts of the sector.
>
> As I said to the Committee last week, I think that we would be very severely criticised as a Government and as a House of Parliament if we were to delay putting in place an extension of a regime that is already based on one that is in law in the 2009 Act. The banking reform Bill has not yet started its passage in another place and it will be some time after the completion of this Bill that it comes into law. We really should get on and make proper provision, as I said last week, for situations that we do not anticipate. In this very uncertain environment one can never be sure what may next hit the system. It is important, therefore, that we get on to it. In answer to my noble friend Lady Kramer, if there are changes coming out of the banking reform Bill or out of Europe, then in due course we will amend these provisions to take account of that. However, we would be putting ourselves in a terrible position if we said that we can only move at the speed of Europe or at the speed of some slower Bill that is coming on. It is better to put these necessary clauses and arrangements in place now and change them later if we have to.[140]

Clauses 84 and 85 agreed to without debate.

Lord Sassoon moved new clauses to extend the special resolution scheme (for banks) to group companies and to clearing houses. He gave an example of where the first of these might be used:

> The legislation will give the Treasury the power to set conditions to the exercise of powers over group companies. The Government intend, for example, to set the condition that the group in question must be engaged primarily in financial services in order for these powers to be exercisable. We will also set a requirement that the Bank of England exercise powers at the lowest level of the group. The clauses also give the Bank powers similar to those available to the Treasury to remove or vary the appointments of directors of failing entities and, if necessary, to group companies where it exercises stabilisation powers.
>
> It may be useful for me to give an example of how this power might be exercised. There could be a large listed entity-a retailer, for example-that has subsidiaries engaged in banking or other financial services as well as in traditional retail businesses. The extension of powers that we are introducing will ensure that the Bank of England has the ability to exercise share and property transfer powers over financial subgroups operating under the listed retailer, but not in respect of the retailer itself.[141]

He outlined one of the main differences between the bank scheme that for a clearing house:

> One of the main modifications made in the application of the special resolution regime to UK clearing houses is that the third stabilisation option provided under the SRR as it applies to banks that provides for the temporary public ownership of banks, is replaced

[140] HL Deb 24 October 2012 c231
[141] HL Deb 24 October 2012 c237

by a power that allows for the transfer of ownership of a UK clearing house to any person by way of one or more share transfer instruments. In extremis, this could facilitate a share transfer to the Government-that is, a period of temporary public ownership. The other main modification is a reverse share transfer power to allow the Bank of England to transfer back ownership to the UK clearing house in question once the problems have been resolved. In much the same way as for the share transfer powers that I have just described, similar powers for the transfer and reverse-transfer of property rights and liabilities of UK clearing houses are also provided for.

Other modifications to the application of the SRR regime to UK clearing houses have also been provided for in this amendment, including the requirement that the Bank reports to the Chancellor when a share transfer has been enacted and provisions relating to the consequences of a share transfer on a UK clearing house's membership. This amendment also confers power on HM Treasury to make compensation orders in respect of transfers made in respect of UK clearing houses.[142]

Clauses 87 – 90 were agreed to without debate.

Amendments to Schedule 17 (amendments of Banking Act 2009) were agreed to which reflected 'the terminology of Scottish law' and to facilitate the transition from and dissemination of the FSA rulebook to the successor regulators.

Clause 91: Regulation of consumer credit

Lord Newby moved an amendment:

the Government are bringing forward amendments to Clause 91 in response to concerns raised by the Delegated Powers and Regulatory Reform Committee. I am very grateful to that committee, chaired by my noble friend Lady Thomas of Winchester, for its close and rigorous scrutiny of the powers that Clause 91 will confer and for the committee's useful suggestions, which have informed the government amendments that I am now bringing forward.

Clause 91 enables the Treasury to make further provision about consumer credit following the transfer of regulation from the OFT to the FCA. It is necessary to take a power in this instance because the precise amendments that we will need to make to FiSMA and the Consumer Credit Act to effect the transfer will depend on the detailed proposals for the new FCA consumer credit regime, on which we will consult next year. These amendments clarify and put certain limits on how the power may be exercised.

Amendment 194A responds to the committee's concern about the risk of double jeopardy. The amendment provides that, where criminal sanctions under the Consumer Credit Act and regulatory sanctions under FiSMA are available to the FCA in relation to the same act or omission, a person may not be convicted if he has been the subject of regulatory sanctions under FiSMA. This approach reflects that taken in Section 41 of the Regulatory Enforcement and Sanctions Act 2008, which the Delegated Powers Committee helpfully highlighted in its report as a useful precedent.

The second set of amendments in this group responds to the committee's concern about the need to introduce certain constraints on the power in Clause 91 to ensure that it continues to be exercised in accordance with current government policy. Government Amendments 196ZA to 196ZC require the Treasury to have regard to the importance of securing an appropriate degree of protection for consumers and the principle that a burden imposed should be proportionate to its benefits.

[142] HL Deb 24 October 2012 c247

These new duties to have regard reflect the two values underpinning the Clause 91 power. First, the Government remain very conscious of the fact that the primary rationale for the transfer of credit regulation to the FCA is to strengthen consumer protection. Thus, the requirements in the Consumer Credit Act should be repealed only where their effect can be replicated in an FCA rulebook under a FiSMA-based regime or where they are no longer appropriate. Secondly, this duty to have regard confirms that the Government remain committed to ensuring that regulatory burdens on small businesses are proportionate to the benefits.

I hope that these amendments adequately address the committee's concerns.[143]

Clause 91 was agreed to.

Lord Sassoon introduced a new clause which gave the consumer credit regulator (currently the OFT) the power to suspend licences of operators with immediate effect if it considers it urgently necessary to do so to protect consumers. Announcing the new power Lord Sassoon said:

This new licence suspension power is the first step on the road to greater consumer protection in the consumer credit market. It will make sure that bad practice is tackled and that consumers are protected even before the move of consumer credit regulation from the OFT to the powerful new FCA in April 2014.

Noble Lords may ask why the Government are bothering with this change now, given the move to the FCA in 2014. We think it is worth ensuring that the OFT can act as a strong and credible regulator in the interim, particularly to protect vulnerable consumers.

The power has been very well received by those working closely with consumers. For example, the consumer organisation Which? stated:

"Our research has found that people taking out payday loans are often caught in a downward spiral of debt so it is important that the Office of Fair Trading will have the power to instantly suspend the credit licences of unscrupulous lenders caught breaking the existing rules.

This is a good step towards ensuring the regulator has the powers it needs to be a more proactive consumer watchdog. The Government must now ... make sure the regulator has the resources it needs, and ensure there is no gap in supervision as these powers transfer to the Financial Conduct Authority".

The current regime does not allow the OFT to do its job properly in this area. At present, where the OFT calls into question a licence holder's fitness to hold a credit licence it can take various measures, including suspending, varying or revoking the credit licence. However, under the current regime a licence holder's credit licence remains in effect until all rights of appeal have been exhausted, and the licence holder can continue to trade during this period. The appeal process may take up to two years to be completed; we saw that in the case of Yes Loans. The potential for detriment during that time is immense, particularly as rogue operators who are aware that they may soon lose their licence are incentivised to operate even more unscrupulously to maximise profits.

Amendment 196A amends the Consumer Credit Act 1974 to provide for an enhanced licence suspension power which will enable the OFT to suspend a licence with immediate effect or at a specified date, and the test is that the OFT considers it

[143] HL Deb 24 October 2012 c249

urgently necessary to protect consumers. It would be used in cases where there was an urgent need to take action in order to stop actual, or prevent further, consumer detriment.

The sorts of factors that the OFT might take into account when deciding whether or not to use the power would include evidence that the business has engaged in violence or threats of violence, fraud or dishonesty, or is targeting particularly vulnerable consumers with harmful practices. In fact the OFT issued a consultation document yesterday that sets out a number of examples of when and how they might apply the new tool.[144]

Lord Sassoon moved various consequential amendments to Schedule 18.

Clauses 97 – 99 and 104 were agreed to without debate.

[144] HL Deb 24 October 2012 c253-4