Financial Services and Markets Bill

Written evidence submitted by UK Finance (FSMB43)

Evidence to the Public Bill Committee

October 2022

Introduction

1. UK Finance is the collective voice for the banking and finance industry. Representing around 300 firms, we act to enhance competitiveness, support customers and facilitate innovation. We welcome the opportunity to provide written evidence to the Public Bill Committee, following our chief executive's appearance before it on 19 October.
2. We strongly welcome the Financial Services and Market Bill and responded to many of the consultations that fed into it. It is an important piece of legislation that gives the UK the opportunity to create a more competitive financial services sector post-Brexit, while preserving high regulatory standards tailored to our needs. The Bill also represents an important step forward in addressing important public policy issues around access to cash and authorised push payment (APP) fraud. We look forward to working with the relevant regulators on the detail of these reforms.
3. This evidence sets out our positions on the Bill's provisions in relation to:
    a. **Retained EU law**. We support the government's intentions to transfer the majority of retained EU law from the statute book to regulators' rules through a multi-year process.
    b. **Implementing the outcomes of the Wholesale Markets Review and Prospectus Regime Review**. These reforms will strengthen the UK's competitiveness as a global financial centre.
    c. **A new secondary objective on competitiveness and economic growth.** We support the proposed objective. Knowing that competitiveness will be a consideration in regulators' decisions-making will give businesses the confidence to expand their UK presences and invest in the future.
    d. **The accountability of the regulators in discharging their functions.** Given the regulators' remits and powers are being expanded, we support the enhanced accountability measures in the Bill but believe more is needed to give those affected by regulation the ability to challenge regulators' decisions.
    e. **The role of the Financial Ombudsman Service (FOS).** We believe stronger requirements are needed to ensure the Financial Conduct Authority (FCA) can override FOS decisions that may have wider implications. Annex 1 sets out a proposed amendment that would enable this.
    f. **APP Fraud.** We support the Bill making provision for a legally-backed reimbursement framework for fraud victims, but have concerns that the Payment Systems Regulator's (PSR) proposals for the framework do not strike the right balance between firms' and customers' responsibilities.
    g. **Access to Cash.** We support the measures introduced by the Bill to ensure continued access to cash for those who need it. The new access to cash legal and

regulatory requirements will enshrine and build on the voluntary arrangements already in place, which in our view provide a proportionate response to the issue.

4. Finally, we believe the Bill should be amended to enable reform of the Consumer Credit Act 1974 (CCA). This piece of legislation is unfit for the digital age. It constrains innovation and frustrates firms' ability to act in their customers' interests. We welcome the Government's commitment[1] to review the Act with a view to repealing it and giving full responsibility for regulating consumer credit to the FCA. However, there needs to be a means of enacting these reforms. It is unlikely there will be another suitable legislative to enact the outcome of the review in this Parliament, and we therefore urge the committee to use this Bill to give HM Treasury the powers to implement the outcomes of the CCA review once concluded. Not doing so would be a missed opportunity and prolong an unacceptable status quo unnecessarily. Annex 2 contains a proposed amendment to the Bill that would provide for this.

5. If you have any questions relating to this response, please contact Daniel Wraith, Manager, Public Affairs and Public Policy, at daniel.wraith@ukfinance.org.uk.

Main Evidence

Retained EU Law

6. The Bill implements the outcomes of the Future Regulatory Framework (FRF) review, a once in a generation assessment of the legislative framework in which financial services regulation operates. One of the main aims of the review was to address retained EU law—the significant body of legislation and regulation inherited from the UK's membership of the EU that currently resides in legislation, having been "onshored" at the time of Brexit. Enabled by the FSM Bill, the Government intends to repeal the majority of retained EU law from the statute book over a number of years, delegating responsibility for rule-making in those areas to the relevant regulator. This amounts to a return to the model of regulation established by the Financial Services and Markets Act 2000 (FSMA), with independent, expert regulators acting to advance policy objectives set for them by Parliament.

7. We support transferring EU regulation from the statute book, where it can only be amended by an Act of Parliament, to the regulators' rulebooks. Regulators have considerable expertise, and, as they do not need primary legislation to change their rules, they can respond quickly to new developments in the markets which they oversee.

8. We look forward to working with the government, parliament and the regulators throughout this multi-year process. WThe Prudential Regulation Authority (PRA) and the FCA already have significant responsibilities and finite resources with which to discharge them. Continuous dialogue and close coordination with HM Treasury is needed to avoid the pace of the domestication process exceeding the regulators' capacity and firms' ability to comply with the resulting rules. HM Treasury and the regulators should take into account the wider regulatory context, including other domestic and international initiatives, to ensure that firms have the requisite capacity and resources to monitor, review and track the process.

Implementing the outcomes of the Wholesale Markets Review and Prospectus Regime Review

9. Through the Wholesale Markets Review and Prospectus Regime Review, the Government is taking advantage of the opportunity to refine and tailor retained EU law to meet the needs of the UK. Specific improvements will include:

[1] https://www.gov.uk/government/news/uk-commits-to-reform-of-the-consumer-credit-act

a. enabling small businesses and retail investors to better access the crucial funding which UK capital markets provide.

b. streamlining and simplifying requirements to make secondary markets more efficient for end-investors and customers.

c. delivering a more flexible and user-friendly Prospectus Regime, which will help UK-founded businesses to invest and grow and attract innovative companies from overseas by allowing them to raise cash and establish a foothold in the UK.

10. By enacting these changes, the Bill will strengthen the UK as a leading global centre for financial services.

A new secondary objective on competitiveness and economic growth.

11. We strongly support the Bill assigning a new secondary objective to the PRA and FCA to facilitate the international competitiveness of the economy of the UK (including in particular the financial services sector) and its growth in the medium to long term.

12. The new objective will send a clear signal that the UK is open for business. We believe that knowing competitiveness will be a consideration in regulators' decisions-making will give businesses the confidence to expand their UK presences and invest in the future.

13. Crucially, the objective would be secondary to the PRA's and FCA's existing primary objectives of promoting financial stability, market integrity, competition and consumer protection. This new objective would not enable – let alone require – the regulators to do anything contrary to advancing them.

14. But where the regulators are considering alternative courses of action that would advance their primary objectives, it is right that they should give due weight to those that promote international competitiveness and growth.

The accountability of the regulators in discharging their functions

15. It is vital that the regulators, like all public bodies, be accountable under the law for meeting their statutory duties. It is inevitable that they will sometimes make mistakes and therefore equally important that suitable mechanisms exist for holding them to account. This is the key regard in which we believe the Bill falls short, with the result that the regulators' enhanced roles will not be matched by enhanced accountability, to the detriment of the overall regulatory framework. To address this, we continue to recommend a mechanism for triggering a rule review based on the existing supercomplaint model.[2]

16. Nonetheless, we welcome all of the individual measures in the Bill to strengthen regulatory accountability.

17. In particular, we support the measures to improve the cost-benefit analyses (CBAs) that the regulators conduct to justify their proposed interventions. It is essential that a regulator be able to confidently demonstrate that the benefits of an intervention will exceed the costs. Better CBAs ultimately lead to higher quality regulation and minimise the likelihood of unintended consequences. Similarly, we welcome the measures to require the regulators' to keep their existing rules under review, to ensure that they are working as was intended when introduced.

18. We believe these measures could be improved. In particular, the FCA and PRA should be required to publish joint statements of policy on how they conduct CBAs and post-

[2] See annex 1 at https://www.ukfinance.org.uk/system/files/UK%20Finance%20response%20to%20FRF%20consultation%20on%20proposals%20for%20reform.pdf.

implementation reviews (PIRs), and that there should only be one panel to scrutinise the CBAs of both regulators. There should not be significant differences in how two financial services regulators approach CBAs and PIRs, so it is inefficient for them to produce separate methodologies and to be scrutinised by separate panels. In the interests of transparency, the regulators' should be required to consult publicly on their statements of policy.

The role of the Financial Ombudsman Service

19. The Financial Ombudsman Service (FOS) performs a valuable function. Each year it resolves many thousands of disputes without incurring the costs, procedural complexity or delay associated with the court system. This benefits both banking and finance providers and their customers. In most cases, the FOS decision will be limited to the facts of the specific complaint. In those circumstances, a degree of legal certainty and consistency is rightly foregone in pursuit of an efficient, low-cost dispute resolution process.

20. However, sometimes decisions can have significant wider implications for individual firms or the industry as a whole. Since the FCA Handbook requires firms to ensure outcomes of FOS determinations are applied in future complaint handling, certain decisions can set precedent. This places the FOS in the role of a quasi-regulator, establishing rules without a requirement to consider their impact, consult on them or produce a CBA as would normally be required of the FCA. This is not what Parliament intended when it established the FOS. The resulting legal uncertainty causes unnecessary operational costs, which are ultimately passed onto customers. This deters innovation and can risk financial exclusion.

21. In January 2022, the FOS announced the 'Wider Implications Framework' to inform its work on cases with wider implications. While we welcome the intent, we believe it is not sufficient to address the issue, because:

    - neither financial services firms nor trade associations are able to participate in the framework; and

    - the framework provides for cooperation and dialogue between the FCA and FOS, but its voluntary nature means it cannot require them to arrive at an agreed course of action where their respective remits lead them to different conclusions.

22. The Bill as drafted (clause 37) introduces a new duty for the FCA, the FOS and the Financial Services Compensation Scheme (FSCS) to cooperate and consult on matters of mutual interest while exercising their statutory functions. However, this simply amounts to a formalisation of the wider implications framework. It does not fundamentally resolve the underlying issue surrounding the FCA's and FOS's conflicting mandates. We believe stronger provisions are needed to ensure that FOS decisions with wider implications do not diverge from FCA rules.

23. To achieve this, we believe the Bill should be amended to provide for a new power for the FCA to override FOS decisions that the FCA believes undermine its role as regulator. Our proposed amendment to the Bill is set out in the annex 1. It is an adaptation of the override power already available to the Bank of England in respect of other regulators under Section 100 of the Financial Services (Banking Reform) Act.

24. Another issue concerns the way in which the FOS funds the processing of complaints. FSMA currently only permits the FOS to levy case fees from complaint respondents, which unhelpfully constrains the options available to the FOS in how it recovers its costs. The activity and impact of claims management companies were not considered when FSMA was passed. We believe it should now be recalibrated to ensure that FOS' operational

costs are recharged in a fair and proportionate manner, with such costs being recouped from professional organisations that contribute to the FOS' operational workload.

25. To enable this, we propose that the Bill be used to amend Paragraph 15(1) of Schedule 17 to FSMA to permit scheme rules to require persons engaging in claims-management activity to pay fees.

Authorised Push Payment (APP) Fraud

26. APP scams, where someone is deceived into authorising a payment to a criminal, have increased in both value and volume. In 2021, a total of £583.2 million was lost to APP fraud, a 39 per cent increase compared to the same period in 2020. Fraud on this scale undermines consumer confidence, increases the costs of conducting business and impairs the competitiveness of the UK. In addition, the links between fraud, organised crime and terrorism pose a significant and growing threat to the UK's national security.

27. The banking and finance industry is committed to stopping fraud happening in the first place, but for those who have lost money, banks have reimbursed millions of pounds to customers. We have long called for a regulated code, backed by legislation, to ensure consumer protections apply consistently. We therefore welcome the provisions in the Bill providing for the PSR to introduce a liability framework for the reimbursement of fraud victims.

28. The PSR is currently consulting on a proposed reimbursement framework that would see victims of APP fraud fully reimbursed under nearly all circumstances, with liability split evenly between the sending and the receiving payment service providers (PSP). Only if a customer is found to have been "grossly negligent" – a term that the PSR does not explicitly define – would the PSP not be liable to reimburse the customer.

29. We are engaging with the PSR on the detail of its proposals. Consumers are better protected when they are educated, responsible and alert to the threat and its consequences. We believe that knowing that they will almost certainly be reimbursed removes the incentive for customers to take sensible steps to reduce their risk of being defrauded.

30. We continue to advocate for a joined-up approach from policymakers, regulators and industries to tackle fraud at source. The inclusion of fraudulent advertising in the Online Safety Bill – which must resume its progress through Parliament – provides welcome recognition that other sectors have an important role to play to combat fraud. We are committed to working with Parliament on this Bill, the Online Safety Bill and the Economic Crime and Corporate Transparency Bill, to ensure the UK's legislative framework is fit for purpose.

31. During his appearance before the Committee on 19 October, our chief executive was asked about the unlocking of suspended accounts (due to suspected criminality) so that the funds could be used for fraud prevention. In his response, as opposed to directly commenting on the Bill, he highlighted the fact there is ongoing work being led by the Home Office, supported by industry, which is testing the options for building a comprehensive framework to more easily release funds believed to be illicit for use against other economic crime priorities. There is action being taken in this regard by one of our members, which is being done in part to support the scoping of whether further legislation and regulation may be required to more easily achieve this goal.

Access to cash

32. We support the measures introduced by the FSM Bill around access to cash. The industry is committed to ensuring continued access to cash for those who need it. UK Finance, through the Cash Action Group (CAG), has been assessing cash needs across the country. In certain places this has led to the commissioning of new shared banking hubs, as well as other measures to preserve access. Since the start of 2022, the CAG has announced that it will be opening 23 new shared Banking Hubs in addition to the 2 Hubs established during the pilots.

33. The new legal and regulatory requirements provided for by the Bill will enshrine and build on the voluntary arrangements already in place, which in our view provide a proportionate response to the issue. Just as importantly, we believe that the voluntary approach will help pave the way for the new statutory requirements by making sure there are workable mechanisms already in place for industry to deliver against them – including an independent assessment of communities' needs and a mechanism (through a collectively owned company) for banks to provide sustainable shared services. Without this preparatory work, there could have been an unhelpful hiatus as industry worked out how best to meet the new responsibilities – causing many months, perhaps years, of delay.

Annex 1: proposed amendment for an FCA-FOS 'override'

Explanation: This amendment would give the FCA the power to overrule a decision by the FOS where the FCA believes that the decision would have 'wider implications' (e.g. set a precedent) that would affect its ability to regulate coherently.

Power of Financial Conduct Authority to require Financial Ombudsman Service to refrain from specified action

(1) Where the first, second and third conditions are met, the Financial Conduct Authority may give a direction under this section to the Financial Ombudsman Service.

(2) The first condition is that the Financial Ombudsman Service is proposing to exercise any of its powers in relation to the determination of a complaint.

(3) The second condition is that the Financial Conduct Authority is of the opinion that the exercise of the power in the manner proposed may have implications beyond the specifics of the complaint in question.

(4) The third condition is that the Financial Conduct Authority is of the opinion that the giving of the direction is necessary in order to avoid the possible consequence falling within subsection (3).

(5) A direction under this section is a direction requiring the Financial Ombudsman Service not to exercise the power or not to exercise it in a specified manner.

(6) The direction may be expressed to have effect during a specified period or until revoked.

Annex 2: proposed amendment to enable HM Treasury to implement the findings of its review of the Consumer Credit Act 1974

Explanation: This amendment would give HM Treasury the powers necessary to implement the findings of its ongoing review of the Consumer Credit Act 1974, saving the need for further primary legislation.

Regulation of consumer credit

(1) The Treasury may by regulations make such provision as they consider appropriate for the purpose of, or in connection with, the regulation of consumer credit.

(2) The power under subsection (1) is exercisable only by making such provision as the Treasury consider necessary or desirable for or in connection with one or more of the following purposes:

> *a) promoting effectiveness in the functioning of financial markets;*
>
> *b) promoting effective competition in the interests of consumers in financial services and markets;*
>
> *c) facilitating the international competitiveness of the economy of the United Kingdom and its growth in the medium to long term;*
>
> *d) protecting consumers;*

e) providing for efficient and effective regulatory, enforcement, investigatory and supervisory arrangements in relation to the provision of financial services or the operation of financial markets.

(3) The provision that may be made by regulations under this section includes provision –

a) conferring powers on the Treasury (including a power to legislate);

b) conferring powers, or imposing duties, on the FCA (including a power to make rules or other instruments).

(4) In exercising their powers under this section, the Treasury must have regard to –

a) the general principle that consumers should take responsibility for their decisions,

b) the importance of securing an appropriate degree of protection for consumers, and

c) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction.

(5) The power to make regulations under this section includes the power to modify legislation.

(6) Regulations under this section are subject to the affirmative procedure.

(7) Before making regulations under this section, the Treasury must consult the FCA.

(8) Where regulations under this section are subject to the made affirmative procedure the statutory instrument containing them must be laid before Parliament after being made.

(9) Regulations contained in a statutory instrument laid before Parliament under subsection (1) cease to have effect at the end of the period of 28 days beginning with the day on which the instrument is made unless, during that period, the instrument is approved by a resolution of each House of Parliament.

(10) In calculating the period of 28 days, no account is to be taken of any whole days that fall within a period during which –

a) Parliament is dissolved or prorogued, or

b) either House of Parliament is adjourned for more than four days.

(11) If regulations cease to have effect as a result of subsection (10), that does not –

a) affect the validity of anything previously done under the regulations, or

b) prevent the making of new regulations.

(12) In this section, "legislation" means primary legislation, subordinate legislation and retained direct EU legislation.

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