

FINANCIAL SERVICES BILL

Supplementary memorandum from Her Majesty's Treasury to the Delegated Powers and Regulatory Reform Committee

Introduction

1. This supplementary memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Financial Services Bill ("the Bill"). The Bill was introduced into the House of Commons on 21st October 2020 and was brought from the Commons to the Lords on 14th January 2021.
2. The Government has tabled amendments to the Bill for Report Stage in the House of Lords. These amendments include changes to existing delegated powers, both those in the Bill and those in existing legislation. This supplementary memorandum covers the changes made by the relevant amendments, but should also be read alongside the Delegated Powers Memorandum for the Bill dated 14th January 2021.¹

Amendments

Prudential regulation of credit institutions and investment firms

Clause 2 and Schedule 2, paragraph 1: prudential regulation of certain investment firms by FCA rules

- new section 143C of the Financial Services and Markets Act 2000 (duty to make rules applying to FCA investment firms)

- amendments to new section 143G of the Financial Services and Markets Act 2000 (matters to consider when making Part 9C rules) and insertion of paragraph 21A (carbon target) into Schedule 2, Part 3 to the Bill

Power conferred on: the Financial Conduct Authority

Power exercised by: rules made in accordance with Part 9C of the Financial Services and Markets Act 2000

Parliamentary Procedure: none

Context and Purpose

3. Paragraphs 16 to 20 of the Delegated Powers Memorandum for the Bill set out a new duty on the Financial Conduct Authority ("FCA") to make rules applying to FCA investment firms under new Part 9C of the Financial Services and Markets Act 2000 ("FSMA"), in exercise of its existing powers to make general rules. Paragraphs 21 to 24 explain that the new duty on the FCA is also framed within an accountability framework. While the Government considers the most appropriate way to legislate for the new rules for FCA investment firms is to allow the FCA to make rules for FCA investment firms, the FCA is subjected to an enhanced accountability framework and consultation requirements set out in sections 143G to 143I FSMA. The accountability

¹ <https://publications.parliament.uk/pa/bills/lbill/58-01/162/5801162-DPM.pdf>

framework will enable greater scrutiny of the FCA's decision-making by enhancing transparency for Parliament, industry and the public.

4. The amendments include the addition of paragraph (ba) to new section 143G(1) FSMA to introduce a further matter to which the FCA must have regard when making Part 9C rules, namely that the FCA must have regard to the target in section 1 of the Climate Change Act 2008 (carbon target for 2050).
5. The FCA has already issued its initial consultation on proposed rules under Part 9C, which it intends will come into force on 1st January 2022. This date is intended to allow adequate time for firms to respond to the consultation, for the FCA to consider responses, and for final or near-final draft rules to be published with adequate time for firms to be able to implement necessary changes to their procedures before the rules come into force. In order not to reopen matters already under consultation or to delay the timetable for the Part 9C rules already consulted on, the amendments also include the addition of paragraph 21A to Schedule 2, which provides that this further requirement under section 143G(1)(ba) does not apply to rules that are made on or before 1st January 2022.

Justification for taking the power

6. Paragraph 23 of the Delegated Powers Memorandum explains that the accountability framework will include requirements to ensure that the wider objectives of the Government and Parliament are taken into account, in addition to the FCA's strategic and operational objectives. New clause 143G(1)(ba) FSMA is being inserted into the Bill in order to ensure that the FCA has regard to the issue of the Government's target of net zero as provided for in section 1 of the Climate Change Act 2008 in making further Part 9C rules.

Justification for the procedure

7. It is considered that no Parliamentary oversight is required in relation to the exercise of this power by the FCA as the FCA is exercising its rule-making powers on the basis of the framework set out in FSMA.

Clause 3 and Schedule 3 Part 1, paragraph 1 and Schedule 3 Part 2 paragraph 7: prudential regulation of credit institutions etc

- new section 144C of the Financial Services and Markets Act 2000 (matters to consider when making CRR Rules) and new section 192XA Financial Services and Markets Act 2000 (rules applying to holding companies)

- amendments to new section 144C and insertion of paragraph 24A (carbon target) into Schedule 3, Part 4 to the Bill

Power conferred on: the Prudential Regulation Authority

Power exercised by: rules made in accordance with Part 9D and section 192XA of the Financial Services and Markets Act 2000

Parliamentary Procedure: none

Context and Purpose

8. Paragraphs 64 to 68 of the Delegated Powers Memorandum for the Bill set out the framework in which the Prudential Regulation Authority ("PRA") can make new

“CRR rules”. Paragraphs 69 to 72 of the Delegated Powers Memorandum explain that making new CRR rules is also framed within an accountability framework. While the Government considers the most appropriate way to provide for new CRR rules is to allow the PRA to make new rules on aspects of the prudential regime, the PRA is subjected to an enhanced accountability framework and consultation requirements set out in sections 144C and 144D FSMA. The enhanced accountability framework and consultation requirements also extend to rules made under section 192XA FSMA that do not constitute CRR Rules (see new section 192XB FSMA). The accountability framework will enable greater scrutiny of the PRA’s decision-making by enhancing transparency for Parliament, industry and the public.

9. The amendments include the addition of paragraph (ca) to new section 144C(1) FSMA to introduce a further matter to which the PRA must have regard when making CRR rules and other rules made under section 192XA, namely that the PRA must have regard to the target in section 1 of the Climate Change Act 2008 (carbon target for 2050).
10. The PRA has already issued its initial consultation on proposed CRR rules, which it intends will come into force on 1st January 2022. This date is intended to allow adequate time for firms to respond to the consultation, for the PRA to consider responses, and for final or near-final draft rules to be published with adequate time for firms to be able to implement necessary changes to their procedures before the rules come into force. In order not to reopen matters already under consultation or to delay the timetable for the rules already consulted on, the amendments also include the addition of new paragraph 24A to Schedule 3, which provides that this further requirement under section 144C(1)(ca) FSMA does not apply to rules that are made on or before 1st January 2022.

Justification for taking the power

11. Paragraphs 70 to 72 of the Delegated Powers Memorandum explain that the accountability framework will include requirements to ensure that the wider objectives of the Government and Parliament are taken into account, in addition to the PRA’s strategic and operational objectives. New clause 144C(1)(ca) FSMA is being inserted into the Bill in order to ensure that the PRA has regard to the issue of the Government’s target of net zero as provided for in section 1 of the Climate Change Act 2008 in making further CRR rules or section 192XA rules.

Justification for the procedure

12. It is considered that no Parliamentary oversight is required in relation to the exercise of this power by the PRA as the PRA is exercising its rule-making powers on the basis of the framework set out in FSMA.

Debt respite scheme

Clause 34: debt respite scheme

- amendments to clause 34 and to subsection (2) of clause 44 (extent)

Power conferred on: the Secretary of State²

Power exercised by: regulations made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and purpose

13. These amendments are being made as the Northern Ireland Executive has indicated that it will not be possible to complete the Legislative Consent Motion process in the Northern Ireland Assembly in time for this Bill. The amendments remove changes to the regulation-making power in section 7 of the Financial Guidance and Claims Act 2018 (“FGCA”) in respect of Northern Ireland where those changes make provision for a transferred (i.e. devolved) purpose. Consequently, these amendments have been tabled in line with the Sewel Convention that Parliament will not normally legislate with regard to devolved matters without the consent of the devolved legislature.
14. The relevant changes are those comprised in the new subsection (4A) of section 7 of the FGCA. Those changes permit regulations to be made that fully reflect particular elements of the ‘statutory debt repayment plan’ (“SDRP”) policy. In particular, the changes permit regulations made under section 7 of the FGCA: (i) to compel a creditor to accept an SDRP in certain limited circumstances without their consent, and (ii) to provide for a charging mechanism through which creditors will contribute to the cost of running the scheme and the repayment plans. More information on the changes to the section 7 regulation-making power, and the justifications for those changes, is set out at paragraphs 437 to 442 of the Delegated Powers Memorandum for the Bill.
15. As a result of these amendments, regulations made under section 7 of the FGCA will not be capable of making the provision set out in new subsection (4A), and described above, in respect of Northern Ireland.

Regulated activities and application of Consumer Credit Act 1974

New clause after clause 35: regulated activities and application of Consumer Credit Act 1974

- extending the application of section 107(6) of the Financial Services Act 2012 (power to make provision about the application of the Consumer Credit Act 1974)

Power conferred on: the Treasury

Power exercised by: order made by statutory instrument

Parliamentary Procedure: draft affirmative

Context and Purpose

16. Under section 107(6) of the Financial Services Act 2012, the Treasury may exclude the application of any provision of the Consumer Credit Act 1974 (“CCA”) in relation to a

² Section 26(2) of the FGCA provides that certain references in the Act to the Secretary of State, including those in section 7, are to be read as references to the Secretary of State or the Treasury. As a result, the regulation-making power conferred by section 7 of the FGCA and amended by clause 34 of the Bill can also be exercised by the Treasury.

“transferred activity”, as defined in s107(1). This defines such activities to include those for which a licence from the Office of Fair Trading (“OFT”) was required under the previous consumer credit regime, or those which were subject to a limited set of exemptions.

17. This power is therefore available in relation to the vast majority of consumer credit activities currently regulated by the FCA. The exercise of the power is subject to a duty on the Treasury to have regard to the appropriate degree of consumer protection and to ensuring that burdens or restrictions are proportionate to the benefits. However, this power is not currently available in relation to activities which were exempt under other provisions of the CCA.
18. The new clause after clause 35 modifies this power to extend it, ensuring that it covers any activities which are currently exempt from FCA regulation by virtue of article 60F(2) and (3) of the Regulated Activities Order³ (“RAO”). These exemptions are currently used, amongst other things, to provide interest-free buy-now-pay-later credit agreements, which the Government has committed to bringing within the scope of FCA regulation in line with the recommendations of the Woolard Review of the unsecured credit market.⁴ The Treasury intend to consult on the definition of the credit agreements to be brought into FCA regulation to ensure that the exemptions remain available where appropriate.

Justification for taking the power

19. The Treasury already have this power in relation to most consumer credit activities (the Financial Services Act 2012 conferred the power as part of the wider transfer of responsibility for consumer credit from the OFT to the FCA). The power allows the consumer protection regime imposed under the CCA to be amended to “fit” with the regime now in force under FSMA. As the Government has committed to bringing new activities within the scope of FCA regulation, it would be incongruous for this power not to be available in relation to the activities currently exempt under Article 60F(2) and (3) RAO.
20. This could potentially result in regulation which is disproportionate and unsuited to the current FSMA regime. As these buy-now-pay-later products are interest-free, they are inherently lower-risk than most other forms of borrowing, and can be a useful tool for people to manage their finances when used appropriately. Regulation should therefore ensure that consumers are protected whilst also ensuring that regulation is proportionate, and that it remains viable for firms to continue to offer these products.
21. As noted above, the Treasury intend to consult before determining the scope of the activities to be brought within FCA regulation. An order under section 22 of FSMA will then be required to bring such activities into regulation, and FCA rules proposed. When responsibility for consumer credit was transferred from the OFT to the FCA, some of the consumer protections in the CCA were replaced by FCA rules, which can be tailored to particular credit agreements.
22. The extent to which the CCA regime will need to be amended can therefore only be ascertained in light of the scope of the section 22 FSMA order and the extent of the

³ The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (S.I. 2001/544)

⁴ *Review into change and innovation in the unsecured credit market*, accessible here: <https://www.fca.org.uk/about/woolard-review-unsecured-credit>

proposed FCA rules in relation to those activities. It is therefore considered appropriate to provide a power to make such amendments at this stage.

Justification for the procedure

23. It is considered appropriate for any exercise of this power (i.e. the section 107(6) power, as modified by the Bill) in relation to the activities described above to be subject to the same procedure as any current exercise of the section 107(6) power (see section 116 of the Financial Services Act 2012). As the power may exclude the application of an Act of Parliament to particular activities or repeal provisions of that Act that relate to such activities, the Treasury consider that the draft affirmative procedure provides the appropriate level of scrutiny for the exercise of such a power.

Her Majesty's Treasury

17th March 2021