

Financial Services & Markets Bill: Mark Cotter KC comments on the final stages of the Bill

3 NOVEMBER 2022

Mark Cotter K.C.



Mark Cotter KC comments in the Director of Finance and SME Magazine on the *Financial Services and Markets Bill*.

The Financial Services and Markets Bill is a hefty piece of legislation currently comprising 328 pages. The final stages of its long journey through Parliament coincides with a period of domestic political and economic chaos the likes of which has not been seen for generations.

In July 2022 the then Chancellor, Nadim Zahawi, promised a bill that would contribute to growth and the fight against inflation by enabling the domestic financial services sector to thrive in post-Brexit Britain. Rishi Sunak himself has described the bill as delivering on “what Brexit was all about”. But as the consultation stage has drawn to a close and the committee

stage begins is the industry response to the bill one that should comfort a Government in desperate need of economic good news or, rather, one that should give it cause for alarm?

A core element of the bill is the tearing up of the European Financial Services Regulations that were retained by Britain post-Brexit in order to facilitate an orderly and smooth withdrawal from the EU. Having voted to withdraw some six years ago and then withdrawn two years ago it may be argued this bill could or should have been ready sooner. However, the bigger controversies relate to what is being put into effect to replace the repealed EU legislation.

The Bill seeks to implement the outcomes of the Future Regulatory Framework Review which consulted in October 2020 and November 2021. The first focused on the Government's proposals for the new Regulatory Regime built on the existing Financial Services and Markets Act 2000 model. The second, set out how most of the retained EU law would be repealed and responsibility for the setting of the new regulatory requirements would be retained by the BoE's Prudential Regulatory Authority and the Financial Conduct Authority. However, there were significant new elements to the structure.

First, a change to the regulators statutory objectives to include secondary objectives requiring a focus on economic growth and international competitiveness. **Second**, new mechanisms for oversight of the regulators by Parliament and the Treasury. **Third**, requirements in relation to the regulators engagement with the sector stakeholders. **Taking each in turn.**

1. Whilst the need for economic growth and international competitiveness is uncontroversial it is not immediately clear how achieving such objectives can consistently be reconciled with the regulators primary objectives of promoting the safety and soundness of firms and the protection of customers. The potential conflict emphasises the need for transparency and openness in how the primary and secondary objectives are approached to ensure the latter is not undermining the former by the creation of back door soft touch regulation.

It is also intended that the growth to be sought under the secondary objective must be sustainable and consistent with the Government's commitment to achieving a net zero economy by 2050. The proposal that the Regulators must "have regard" to this objective

already seems dated as Ukraine burns and Europe enters an energy crisis of a magnitude that equals its political and economic counterparts.

There are more “have regards” such as the need for Regulators to consider the impact of rules and policy on the UK’s trade agreements and deference agreements and report any anticipated impact to the Treasury. The Government has insisted this will not involve the Treasury having a veto and it is not intended that Regulatory standards will be lowered to assist the maintenance of Trade and Deference Agreements. However, in practice this has the potential to be a thorny area particularly bearing in mind the current importance of the UK securing new Trade Agreements.

The whole topic of ‘have regards’ and the proposal that the Treasury be empowered to set ‘have regards’ which the Regulators must consider when setting rules raises the real prospect of tinkering and political interference without scrutiny or oversight.

2. The proposed new mechanisms for oversight and scrutiny of the Regulators themselves includes a proposed Treasury power to require the Regulators to review their rules when it is considered in the public interest to do so. The Treasury would have powers of direction as to the scope, conduct and timing of any such reviews and the resultant reports. However, whilst publication of such reports is intended as the default position, non-publication is anticipated where the public interest so requires. Whilst the government has indicated its view that the Treasury would only invoke this power in exceptional circumstances, it is understandable why many wish to see greater clarity as to precisely when this power could be used.

3. Increased stakeholder input to inform the Regulators rulemaking functions was, unsurprisingly, strongly supported by respondents to the consultation phase. The current stakeholder panels; the Financial Conduct Authorities ‘Listing Authority Advisory Panel’ and the Prudential Regulatory Authorities ‘Practitioner Panel Insurance Sub-Committee’ are to be placed on a statutory footing with corresponding requirements as to transparency as to their work and how they are comprised. Whether this is sufficient to ensure the panels are genuinely representative of stakeholders and possess the necessary expertise to properly carry out their intended function remains to be seen.

There is much more to digest in the 328 pages than the topics above and the merits or otherwise of removing the double volume cap and the share trading obligation is beyond the scope of this review. However, it is clear that the regulatory landscape has the potential to change significantly. Whether the stated Government objectives will be met remains to be seen and is highly unlikely to be known by the time of the next general election, whenever that may be.

Mark Cotter KC of 5 St Andrew's Hill, London and 30 Park Place, Cardiff, is a specialist criminal barrister who assists individuals and businesses facing serious or complex criminal investigations.

Both articles were published on 31 October 2022, and can be accessed here: [*Director of Finance*](#) article and [*SME Magazine*](#).