



HM Treasury, 1 Horse Guards Road, London, SW1A 2HQ

Dame Angela Eagle DBE
Interim Chair of the Treasury Committee
House of Commons
Committee Office
London
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2 November 2022

Dear Dame Angela,

Financial Services and Markets Bill 2022

During my appearance before the Treasury Select Committee on 11 October to give evidence on the Financial Services and Markets (FSM) Bill, I committed to follow up in writing on questions regarding the delegated powers in the Bill.

Approach to Delegated Powers

The FSM Bill includes a number of delegated powers, including Henry VIII powers.

As set out during the evidence session, the government has provided a memorandum to the Delegated Powers and Regulatory Reform Committee. The memorandum explains that delegated powers have only been used where necessary to ensure the effective functioning of the financial services regulatory framework. In particular, the powers are used to:

1. Enable the regulators to make the direct rules that financial services firms must comply with, in line with the long standing FSMA model of regulation.
2. Allow HM Treasury to give effect to decisions that will be taken in the future, following the processes established in the Bill and with appropriate parliamentary scrutiny and engagement.
3. Provide appropriate flexibility in the legislation to enable updates to specific provisions so the UK can keep pace with market developments.

4. Set out additional technical detail that is too detailed for primary legislation.

The memorandum provides extensive detail on each of the delegated powers in the Bill, the rationale for it, and the Parliamentary procedure applied to the use of the power.

My officials have worked with the Office of Parliamentary Counsel to ensure that the powers are well precedented in similar legislation, for example the Financial Services and Markets Act 2000 (FSMA) and the Banking Act 2009, and have been drafted to allow for appropriate Parliamentary oversight.

Powers in relation to Retained EU Law

The main powers in the Bill relate to retained EU law, which are not unconstrained powers or open-ended powers to make new policy. They can only be used to amend retained EU law before it is repealed, to restate retained EU law, with or without modifications, and to remove references to EU Directives.

HM Treasury is only able to exercise these powers in line with the purposes listed in clause 3, or for the purpose of making the law clearer or more accessible. These powers are therefore consistent with the principle that Parliament sets the overall framework approach to regulation, and delegates responsibilities to government and the financial services regulators operating within that framework.

The exercise of these powers will be subject to appropriate parliamentary scrutiny and so will almost always be subject to the affirmative procedure. The only exception is where the power is used to make transitional modifications to either EU tertiary legislation, or legislation which was originally made under the negative procedure. In this case it is appropriate to follow precedent and apply the negative procedure.

I acknowledge that while these are relatively broad powers, they are appropriately constrained with appropriate parliamentary scrutiny.

Clause 8 – the Designated Activities Regime

During the evidence session, you raised the provisions in Clause 8, and specifically subsection (3) of new section 71Q which gives HM Treasury the power to modify existing criminal offences.

Clause 8 of the Bill inserts a new permanent regulatory regime into FSMA called the Designated Activities Regime (DAR). This new Part 5A of FSMA will ensure that the UK's financial markets continue to be subject to proportionate regulation which reflects the kind of risk that these activities pose, and the types of firms and persons who carry them out, once retained EU law is repealed.

As explained during the evidence session, there are many pieces of retained EU law which set the rules for activities which are not FSMA regulated activities, and which apply to a broader range of entities than FSMA authorised persons. Some of those activities may be carried out by some firms which may not consider themselves to be "financial services" firms at all – for example, car manufacturers entering into contracts for metal derivatives, or firms wishing to list on a stock exchange. The DAR will enable the regulation of certain activities in a proportionate manner that is calibrated to the risks they pose.

The DAR will enable this by giving powers to HM Treasury to 'designate' an activity, make regulations relating to the carrying out of that activity, and confer rulemaking powers on the FCA in relation to that activity. The FCA will then be able to make detailed regulatory requirements relating to the carrying out of the designated activity in their rulebook.

Designating activities regulations made by HM Treasury will be subject to the draft affirmative procedure, meaning that they must be debated and approved by both Houses of Parliament before being made. There is an exemption where, for reasons of urgency, HM Treasury must act quickly. In such cases designated activity regulations will be subject to the made affirmative procedure. This means that designated activities regulations must be laid after being made and cease to have effect at the end of the period of 28 days unless approved by Parliament before the end of that period. I am content that these are the appropriate procedures, and they are similar to the existing procedures in paragraph 26 of Schedule 2 to FSMA for adding activities to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

Turning specifically to new section 71Q, I reiterate the evidence I gave the Committee, and confirm that these provisions do not give HM Treasury a power to create *new* criminal offences under the DAR. Where criminal offences relating to retained EU law already exists within FSMA, and are attached to an activity which HM Treasury decides to designate under the DAR, the Bill provides a power in subsection (3) of section 71Q to create enforcement frameworks for designated activities by applying existing provisions of FSMA with or without amendments. For example, instead of creating a new investigation power for the

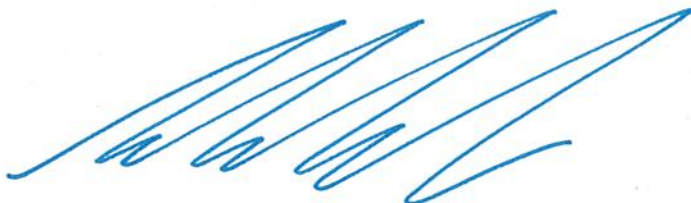
FCA, regulations made under the DAR could apply existing provisions in FSMA. Subsection (3) also allows regulations made under the DAR to apply, with or without amendments, criminal offences already in FSMA. This will allow HM Treasury to bring these offences in line with, or make them consistent with, the designation of the activities to which they relate.

For example, Part 6 of FSMA contains existing criminal offences relating to the offering of securities and admission of securities to trading on a regulated market, in each case unless an FCA-approved prospectus is made available. The government has committed to delivering the reforms to the UK Prospectus Regime through the DAR, and this will involve designating an activity of offering securities. When it does so, the power in section 71Q will allow HM Treasury to maintain the existing criminal offence of offering securities and to modify it, including by adjusting the scope of the offence to reflect the scope of the new designated activity, to deliver a regulatory outcome best suited to UK markets.

This is very different from taking a power to create new offences. The government will only be able to apply and modify, including by extending the scope of, criminal offences which already exist within FSMA, to the extent that they still apply to the carrying on of the designated activity in question. This would not enable HM Treasury to create a wholly new criminal offence in relation to this activity.

The government understands the importance of using delegated powers appropriately and ensuring appropriate parliamentary scrutiny at all times. I should add that I will be happy to engage further with your or any members of your committee as Parliament continues to consider this important financial services legislation.

Kind regards,

A handwritten signature in blue ink, consisting of several fluid, overlapping strokes that form a stylized representation of the name Andrew Griffith.

ANDREW GRIFFITH MP