

Promoting Consumer Rights in the Financial Services and Markets Bill



September 2022

FSMB: overview

- Once in a generation opportunity to reset UK financial services regulation
- Should pass into law by late Spring 2023
- Key purpose: onshoring of EU powers
- Opportunities to amend
 - (Oppose/re-draft negative clauses)
 - Far more important, make the case for inclusion of new rights and protections
 - Focus on righting acknowledged historical wrongs/anomalies
- Compelling proof there's a need to upweight consumer rights:
 - Panorama
 - New PM
 - Call for Evidence about the FCA

Our proposed amendments: overview

- ‘Politics is the art of the possible’:
 - Not trying to reinvent the structures of UK financial regulation
 - Strengthening, not challenging, competitiveness and deregulation agendas
 - Addressing known regulatory anomalies, fixing perverse incentives and governance
 - Intended outcomes: creating conditions that nudge industry and regulators to become more responsive/accountable to consumer interests; rebuilding confidence
 - Based on three universal truths:
 - ‘If you screw up, you should pay up’
 - ‘What’s sauce for the goose is sauce for the gander’
 - ‘Sunlight is the best disinfectant’
- Overall message: ‘these measures are *offensively reasonable*, therefore, obstructing them is *intrinsically and unavoidably unreasonable*’

Amendment 1: 'If you (regulators) screw up, you pay up'

- The FCA has enjoyed immunity from civil liability* since FSMA 2000
- Complaints Scheme doesn't work - regulators set the rules, appoint the Complaints Commissioner, set her budget, and ignore her findings
- She says: "*Ex gratia compensation payments due to... regulatory failures on the part of the FCA will, in practice, never be available to complainants*"
- Proposed amendment:
 - Mandate that Complaints Scheme covers regulatory failure losses
 - Make Complaints Commissioner findings binding on regulators
 - End immunity, disapply Limitation Act for first six years
 - Backstop where FCA unable/unwilling to secure redress from firms

Amendment 2: 'What's source for the goose...'

- Consumers have campaigned for a duty of care since FSMA 2000
- Would be owed by 'authorised persons' (firms/managers) to 'consumers'
- Parliament obliged FCA to consult, implement rules, last year
- FCA instead introduced inferior Consumer Duty
 - Many exemptions (handover to unauthorised firms, no contractual link, historic injustices, exit fees, etc.)
 - No private right of action
- Proposed amendment:
 - Statutory duty of care owed by authorised persons to consumers

Amendment 3: 'Sunlight is the best disinfectant'

- FCA is currently answerable to three industry panels, one consumer one
- FSMB as drafted would change this to five, or even six, to one
- Consumer Panel is FCA-appointed, mustn't criticise without forewarning
- The FCA's operational objectives (consumer protection, competition, market integrity) impact hugely on consumers, yet voices are seldom heard
- Consumer-led oversight body, as in Australia, much needed
- Proposed amendment:
 - Introduce statutory Financial Regulator's Supervision Council ('FRSC')

Role of the FRSC

- Hiring and firing:
 - Jointly with the Treasury: FCA Chair and Chief Executive (now HMT)
 - Solely: two FCA NEDs (formerly NCC, now BEIS); directors of Financial Ombudsman Service, members/Chair of Consumer Panel (FCA); the Complaints Commissioner ('the regulators' [FCA])
- Reviews:
 - Annually of the FCA and the regulatory regime (currently, not done)
 - Periodically of FCA treatment of whistleblowers/their evidence (same)
 - Commission/oversee independent ones after regulatory failures (FCA)
- Oversee Complaints Scheme rules, budgets, payments (FCA/nobody)

Overcoming objections

- **Civil liability of FCA will impose a heavy burden on the industry**
 - True, in the short term. But alternative is consumers bearing the cost (unjust, narrower shoulders, deterrent to using financial services)
 - Industry would gain from consumer boost, demand better regulation
- **Waiving Limitation Act is retroactive legislation**
 - No: Parliament always intended consumers to be compensated
 - Impossible to fix the FCA while it's denying past failings
- **Duty of care isn't needed given FCA's Consumer Duty**
 - Consumer Duty is materially inferior
- **Who funds the FRSC? 1% top-slice of FCA income**
- **Who runs it? What's within the Overton window yet would avoid capture?**

The political context

- **PM reportedly accepts the FCA is defective, regulators generally captured**
 - Our amendments are pragmatic, low-risk vs FCA/PRA/PSR merger
 - But they acknowledge/address problems; FSMB currently doesn't
- **Focus on competitiveness agenda, deregulation**
 - UK: huge deadweight loss caused by consumer distrust of industry
 - Abroad: regulators/govts/EU wary of granting equivalence/MR
 - Consumer Duty is 121 pages, vs 1-par duty of care. Huge costs imposed
- **Populism**
 - Duty of care: who's sovereign, Parliament or the City?
 - Offensively reasonable: 'screw up, pay up; sauce for the goose; sunlight'
 - Overall: there are many votes in consumer rights, none in corporatism

Questions and next steps

- Is there broad support for the amendments?
- Any suggested tweaks or omissions?
- Does anyone already have suggested drafting they can share?
- If not, we would appreciate Parliamentarians' help working with legal team
- Are any MPs present or represented on the Parliamentary Bill Committee?
- Is there still time to get onto it?
- If so, and if eligible, please do so!
- Will schedule (25 October deadline) change?
- What are the best tactics for getting amendments accepted
 - By Government
 - Otherwise

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