



HM Treasury

FCA Rulemaking Power for Payments – Illustrative Statutory Instrument

Policy Note

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Statutory Instrument

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Chapter 1

Overview

Policy background

1.1 The Financial Services and Markets (FSM) Bill was introduced to Parliament on 20 July 2022. The FSM Bill will repeal retained EU law on financial services so that it can be replaced with an approach to regulation that is designed for the UK, building on the existing UK model principally set out in the Financial Services and Markets Act 2000 (FSMA). Under this model of regulation, the financial services regulators generally make the detailed regulatory requirements that apply to firms, operating within a framework established by government and Parliament. Adapting to this model implements the outcomes of the Future Regulatory Framework (FRF) review.

1.2 In line with the objective of the Future Regulatory Framework (FRF) Review to establish a comprehensive FSMA model of regulation, the regulators need to have the appropriate powers to make rules when retained EU law is repealed. In its November 2021 consultation on the FRF Review, the government committed to ensuring that the regulatory authorities had the necessary powers – including in relation to payments regulation – to replace direct regulatory requirements in retained EU law, if existing powers were insufficient.

1.3 The purpose of this note is to explain how His Majesty's (HM) Treasury may use powers in the FSM Bill to ensure that the Financial Conduct Authority (FCA) has sufficient rulemaking powers over its retained EU payments law. This illustrative statutory instrument (SI) focuses on the rulemaking powers of the FCA, as the regulator responsible for applying and enforcing almost all retained EU law for payments. Through the FSM Bill, the government will repeal retained EU law, including for payment services and e-money, and replace it with a regulatory framework tailored to the UK. This requires the FCA to have the ability to replace the necessary rules to ensure the future regulation of payment services and e-money. A similar SI will be progressed for the Payment Systems Regulator (PSR) to ensure it has sufficient powers of direction (the PSR's equivalent for rulemaking) in relation to its retained EU payments law.

Summary of the illustrative statutory instrument

1.4 The ability of the FCA to establish regulatory requirements in relation to retained EU payments law is currently restricted, and this illustrative SI therefore seeks to remove this restriction to ensure that

the FCA has a sufficient rulemaking powers for payment services and e-money.

1.5 This illustrative SI will amend the Payment Services Regulations 2017 (PSR 2017) and the Electronic Money Regulations 2011 (EMR 2011) to remove restrictive conditions on the use of the FCA's rulemaking power and ensure that the FCA has sufficient powers to make rules for payment services and e-money, and ensure the ability to repeal and replace retained EU law smoothly.

1.6 Today, the FCA is only able to make rules in the payments area if it has acted or will act in the same way for credit institutions. This prevents the FCA from making certain rules, including in relation to prudential policy, for the payments sector. In removing these constraints and extending the application of existing rulemaking powers in FSMA to the payment services and e-money regulations, the FCA will be equipped to set firm-facing rules as necessary for it to be able to set standards in payments.

1.7 This illustrative SI will give the FCA rulemaking powers in relation to retained EU payments legislation that are based on its existing general rulemaking powers in FSMA. In doing this, HM Treasury will be granting the FCA the means to set requirements and make rules for payment services and e-money as EU law is repealed. This is consistent with the approach of the comprehensive FSMA model, which intends that the regulatory perimeter will be set by Parliament and the government, with the financial services regulators generally responsible for setting the direct regulatory requirements which apply to supervised entities.

1.8 This regulatory regime will also enable the FCA to respond quickly to the fast evolving payments landscape, by making or amending rules as necessary, and thereby delivering an agile and responsive regulatory framework of international repute.

1.9 Lastly, this illustrative SI includes some minor provisions to ensure that aspects of the accountability framework in Chapter 3 of the FSM Bill will apply to the FCA in the area of payment services and e-money specifically.

1.10 As stated, this SI is being published for illustrative purposes and should not be treated as final. HM Treasury has the discretion to amend this SI further before the final legislation is laid before Parliament following Royal Assent of the FSM Bill.

Chapter 2

How are the Financial Services and Markets Bill powers being used?

2.1 Given that the FCA's rulemaking power under its retained EU payments law is currently restricted, this illustrative SI looks to remedy this prior to HM Treasury commencing the repeal of retained EU law for payment services and e-money.

2.2 Under the powers conferred by s.3 and s.70(2) of the FSM Bill, this illustrative SI therefore uses the new power to make transitional amendments in clause 3 of the FSM Bill, for the purpose set out in clause 3(2)(j) of providing for efficient and effective regulatory arrangements in relation to the provision of financial services or the operation of financial markets. In line with this purpose, this SI will amend retained EU payments law (PSR 2017 and EMR 2011) to provide the FCA with sufficient rulemaking powers over payment services and e-money. In accordance with s.3(6) of the FSM Bill, HM Treasury has consulted the FCA on the making of this amendment.

2.3 It is envisaged that this rulemaking power will then be preserved in the final regulatory regime for payment services and e-money once repeal of the relevant retained EU law is commenced, meaning that the FCA will have the necessary general rulemaking powers for payment services and e-money as it has for authorised persons under FSMA. The purpose of addressing this issue now is to ensure that there is no gap in the FCA's powers in the intervening period before repeal is commenced. This is not a problem in other sub-sectors regulated under FSMA, for which the FCA already has the rulemaking powers it needs.

2.4 In order to remove the constraint to the application of the FCA's general rulemaking power in s.137A FSMA for the payments and e-money regimes, this illustrative SI will employ the power to make transitional amendments in clause 3 of the FSM Bill to delete the following provisions:

- Paragraph 3(1)(d) of Schedule 6 to the PSR 2017
- Paragraph 2A(1)(c) of Schedule 3 to the EMR 2011

2.5 In order to grant the FCA sufficient rulemaking powers to set technical regulatory requirements as relevant and necessary for payment services and e-money, this illustrative SI will use the clause 3

power to make transitional amendments to extend the FCA's powers (based on the existing rulemaking regime in FSMA) in Schedule 6 to the PSR 2017 and Schedule 3 to the EMR 2011, as follows:

- s.137B FSMA, which establishes the FCA's powers to rules in relation to client money, will be extended to the PSR 2017 and EMR 2011.
- s.138C FSMA, which sets out the evidential provisions, will be more clearly applied to the PSR 2017 and EMR 2011 (these are clarificatory changes only).
- s.138D FSMA, which sets out provisions related to actions for damages for breach of an FCA rule, will be more clearly applied to the PSR 2017 and EMR 2011 (these are clarificatory changes only).
- s.137P FSMA, which establishes the power of the FCA to make control of information rules, will be extended to the PSR 2017 and EMR 2011.
- s.340 FSMA, which establishes the FCA's ability to make rules in relation to audit firms, will be extended to the PSR 2017, with the relevant modifications. This will be applied in addition to s.341-346 of Part 22 which already apply with minor modifications. The whole of FSMA Part 22 already applies to the EMR 2011 under Schedule 3, with the relevant modifications. Minor additional modifications are made in relation to s.340 specifically, to ensure the provisions are more clearly applied.

2.6 The power to make transitional amendments is also used to deliver minor adjustments to ensure that aspects of the accountability framework in Chapter 3 of the FSM Bill applies to the FCA in the area of payment services and e-money specifically.

Chapter 3

Role of the regulator

3.1 This illustrative SI has been developed to remedy the gaps in the FCA's rulemaking powers that HM Treasury has identified and explained in earlier consultations.

3.2 These gaps are not remedied directly in the FSM Bill, as it requires an amendment to retained EU law and so is capable of being delivered using the powers to make transitional amendment to retained EU law, as set out in the FSM Bill, rather than requiring primary legislative change. This is unlike other gaps in regulators' rulemaking powers which have been remedied in the Bill directly, for example in relation to the Bank of England's regulation of central counterparties and central securities depositories.

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