Financial Services and Markets Bill: Back to the future - Revocation, restatement and replacement of onshored EU law

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This briefing is one in a series on the Financial Services and Markets Bill (FSMB). In this briefing we discuss the revocation of onshored EU law contained in the FSMB, focusing on some questions of relevance to firms.

Background

Haven't we done Brexit already?

In legislative terms the government has already 'got Brexit done'. The EU Withdrawal Act 2018 (as amended) (the **EUWA**) repealed the European Communities Act 1972 and brought to an end the jurisdiction of the Court of Justice of the EU in the UK on 31 December 2020. But the legacy of European law hangs heavy over UK law, and particularly on the UK financial services regulatory framework. EU (as opposed to domestic) legislative change dominated the reform of financial markets following the global financial crisis, leaving the UK with an alphabet soup of regulations – EMIR, CRR, MiFIR, MAR and so forth – and directives – CRD, MiFID and so on – which overwhelmingly set the substantive requirements of UK firms. Given the scale of the EU legislation there was neither the time nor the will to reform it during the run-in to the UK's exit from the single market. As the repeal of all of that EU regulation without any successor rules would have left the UK legal system in disarray, the Government chose to perpetuate EU legislation by 'onshoring' it - converting EU law as it stood on exit day into domestic law and making technical changes to ensure that it continued to function notwithstanding the UK's exit from the single market.

This rather awkward halfway house was only ever intended to be temporary – there is little to be gained in remaining subject to a static body of EU law in perpetuity, and the complexities caused by this patchwork approach make piecing the law together very time-consuming. Following a consultation on the optimal structure for UK financial services post-Brexit, the FSMB is intended to create the legislative and institutional architecture to support a move away from onshored EU legislation

towards the historic approach taken under the Financial Services and Markets Act, whereby primary responsibility for regulation is delegated to the UK regulatory authorities, subject to the oversight of Parliament – taking us back to the future, as it were.

The job ahead

The scale of reform necessary to move away from the EU legacy is intimidating. The government's own retained EU law **dashboard** indicates that there are 365 pieces of onshored EU law in existence which are relevant to financial services. That onshored legislation includes much that is sensible, uncontroversial and should be retained; some that is obscure and/or duplicative of pre-existing UK law which was arguably perfectly adequate, and typically still exists in parallel with the EU requirements; and some that is inappropriate to the position of the UK outside the single market or positively wrong-headed. To review all the legislation, identify the policy changes that should be made, create new rules in place of the legislation, consult on them (including cost-benefit analysis – the FSMB includes enhanced obligations on the regulators to provide cost-benefit analysis) and permit the regulated sector time to implement them is a job that will take several years.

Revocation

What is to be revoked?

Section 1 of the FSMB fires the starting gun on the reform process. Section 1(1) provides for the revocation of a long list of legislation listed in Schedule 1 (the **target legislation**). That list comprises the onshored EU regulations described above, onshored EU tertiary legislation (technical standards and other delegated legislation) made under EU financial services regulations and directives and UK subordinate legislation implementing retained EU legislation. To hammer the point home, Part 5 of Schedule 1 revokes any EU legislation and UK subordinate legislation implementing EU legislation not listed in the earlier parts so far as it is 'relating to' financial services or markets – in the sense that its purpose, or one of its main purposes, is for or in connection with the imposition of requirements on the provision of financial services or the operation of financial markets or exchanges. Depending on how HM Treasury (HMT) choose to implement the revocation of legislation in Part 5, this could present some interesting boundary cases on EU legislation which is not mentioned in the earlier Parts of the Schedule which bears on financial services – for example broader EU (or EU-derived) consumer protection legislation.

The regulators' rules implementing EU legislation are not within the scope of the revocation power, as it is unnecessary: the regulators themselves have the power to change the rules without legislative intervention.

When?

As revocation can only take effect once replacement rules have been made, the Bill leaves revocation to be made by HM Treasury (**HMT**) by way of statutory instrument. The Bill permits a staggered process of revocation and replacement, which could take place in a piecemeal fashion.

What effect would revocation have?

Section 1(1) of the Bill provides for the revocation – i.e. repeal – of the target legislation.

Section 1(3) provides that any rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from any of the target legislation 'will cease to be recognised and available in domestic law'. It is unclear whether this provision is intended to operate in tandem with the revocation of the target legislation, or to apply as a 'sweep-up' provision to take effect at the end of the revocation process.

What would revocation mean for accrued rights, obligations etc?

In the ordinary course, the repeal of legislation is prospective – it does not affect accrued rights and obligations, or on-foot proceedings, arising under the repealed legislation (section 16 Interpretation Act 1978) unless the repealing legislation provides otherwise. It is not as clear as it might be that this prospective approach applies in the case of the target legislation or the rights deriving from that legislation: subsection 1(3), in particular, leaves

some ambiguity as to its effect on accrued rights and obligations under the target legislation as and when it becomes effective (at least when you look at the words in isolation).

We very much doubt that it is the intention of the Government to deprive parties of accrued rights and obligations deriving from EU-derived legislation, not least because it seems unlikely that the new legislative regime will introduce a fundamentally different set of regulatory obligations. Insider dealing will no doubt still be subject to sanction and payment service providers' liability for unauthorised payment transactions will no doubt still exist under the new regime. To remove that sanction/liability in relation to insider trading/unauthorised transactions that took place prior to revocation would make no sense whatsoever. Nevertheless, it would be helpful to clarify the drafting to put the question beyond doubt.

In-flight processes

What does seem clear is that 'in-flight transactions' and processes under EU-derived law at the point of revocation and/or implementation of subsection 1(3) may need to be dealt with through transitional provision to the extent that they may otherwise cease to be recognised. For example, at the point of revocation there may be ongoing investigations or enforcement actions from the regulators under onshored EMIR. It would be to no-one's benefit for them to terminate and have to restart (assuming that liability for the underlying events was also preserved).

Can revoked legislation, and its effects, be preserved?

Section 1(5) enables HMT to preserve subordinate legislation (but not retained EU legislation). Section 72(5) enables HMT to 'make transitional or saving provision in connection with the coming into force of any provision of' the Bill. It is not clear whether this is intended to be used to preserve rights, liabilities etc that would otherwise be lost under subsection 1(3): given that the power is limited to provisions in connection with the coming into force of the provisions, it would seem that it is not intended to.

As discussed further below, section 4 provides that the power contemplates restating revoked legislation with modifications necessary or desirable to further the purposes set out in Section 3(2). Those purposes include protecting and enhancing the integrity and stability of the financial systems operating in the UK, protecting consumers and providing for efficient and effective regulatory, enforcement, investigatory and supervisory arrangements. It is possible that the section 4 power could be used to preserve rights under restated law – but again it is not clear, and section 4 would not apply to legislation that is not restated.

Would revocation affect other legislation?

The legislative work will not stop at revocation. The legislation listed in Schedule 1 is not standalone. Much of it amends other UK law. Section 1(4) seeks to avoid revocation contagion by providing that where revoked law has amended other legislation, that other legislation and the amendments made to it are unaffected. An example of legislation that has been (copiously) amended by the legislation targeted for revocation is the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (the **RAO**), which establishes the regulatory perimeter in the UK. Even though this will not be revoked, it will undoubtedly need review and reform to realign it with the desired end policy of the UK government.

It also seems likely that revocation may create friction between revoked and remaining EU-derived law if revocation occurs on a staggered basis: for example, authorisation or certification under the Credit Rating Agency Regulation (CRAR) is a condition to a body being an external credit assessment institution (ECAI) under the CRR. If the CRAR were revoked before the CRR, then there would be no ECAIs under the CRR unless the CRR were also amended to permit ECAIs under the successor rules to the CRAR. As each tranche of EU-derived law is revoked the authorities will need to review related legislation and rules to ensure that there are no unintended consequences of this sort.

Transitional amendments

In light of the long time it is likely to take to generate new rules and revoke the legislation, sections 2

and 3 permit transitional amendments to be made to onshored EU legislation between the passing of the Bill and the revocation of the relevant legislation. Section 2 provides for the implementation of the Wholesale Markets Review, including changes relating to MiFIR, EMIR and the Securitisation Regulation – these are to be discussed in a separate briefing. Section 3 empowers HMT to make further transitional amendments to the legislation, subject to various constraints.

Restatement

Following the principle of 'if it ain't broke, don't fix it', the Bill permits the restatement of retained law through secondary legislation. The explanatory notes to the Bill indicate that restatement may be used to preserve key definitions in legislation, existing powers and processes (for example relating to authorisation) and powers to assess equivalence. Sections 4 to 5 empower the restatement and modification of target legislation as legislation, and section 6 removes the requirement for the regulators to consult when they are restating target legislation as rules, where permitted by HMT.

The end of the beginning

The 'FSMAification' of EU-derived law is going to be a long and arduous journey, legally speaking. For those of us hoping that Big Bang 2.0 will result in a less complicated patchwork of legislation and regulation in this area, we remain cautious for now. We will all also need to carefully engage in every consultation around each revocation to consider the potential unintended consequences of section 1(3), should it survive the legislative process.

If you have any questions about the subjects covered in this alert, please get in touch with your usual A&O contact.

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