

23 October 2019

Mikael Shirazi
Policy Advisor
HM Treasury
1 Horse Guards Road
London, SW1A 2HQ



Dear Mr Shirazi,

Financial Services (Implementation of Legislation) Bill

The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty, or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks, and to consider how such issues should be addressed.

Over the past three years, HM Government has been legislating in preparation for the UK's withdrawal from the European Union ("**Brexit**") and, in particular, for a Brexit in which no future relationship is agreed between the U.K. and the E.U. (a "**No Deal Brexit**"). A key component of these preparations is the European Union (Withdrawal) Act 2018 (the "**Withdrawal Act**") which, *inter alia*, makes provisions to retain in U.K. law all those pieces of E.U. regulation, E.U. decision or E.U. tertiary legislation which are "operative immediately before exit day".¹

In November 2018, the Financial Services (Implementation of Legislation) Bill (the "**Bill**") was introduced in the House of Lords.² The Bill is intended to complement the Withdrawal Act by providing the power to HM Treasury, in a No Deal Brexit, to implement and make changes to a category of legislation which the Bill describes as "in-flight". Paragraph 1 of the explanatory notes to the Bill explains that "in-flight" files are pieces of E.U. financial services legislation that: (1) have been adopted by the E.U., but do not yet apply so do not fall within the scope of the Withdrawal Act (an exhaustive list is provided in Section 1 of the Bill); or (2) are currently in negotiation and may be adopted within two years after exit day (listed in the Schedule to the Bill).

In March 2019, HM Government negotiated two consecutive extensions to the notice period under Article 50 of the Treaty of European Union, setting a new exit day of 31 October 2019. The FMLC understands that, after the second extension was agreed, the passage of the Bill through Parliament was temporarily suspended. On 9 September 2019, Parliament was prorogued, which traditionally signals the end of a parliamentary session. In a House of Commons debate on 5 September 2019, it was confirmed that the Bill had fallen as it failed to receive Royal Assent in the session in

¹ The Withdrawal Act makes provisions to retain in U.K. law all those pieces of E.U. regulation, E.U. decision or E.U. tertiary legislation which are "operative immediately before exit day". Subsection 3(3) of the Withdrawal Act clarifies that any direct E.U. legislation will be considered to be operative immediately before exit day if "in the case of anything which comes into force at a particular time and is stated to apply from a later time, it is in force and applies immediately before exit day."

² Financial Services (Implementation of Legislation) Bill [HL] 2017-19. The Bill is available at: <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0143/18143.pdf> and the explanatory notes which accompany it can be accessed at: <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0143/18143en.pdf>. A policy note published by HM Treasury on the Bill can also be accessed at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759855/1_Financial_Services_Implementation_of_Legislation_Bill_Policy_doc_pdf.pdf.

+44 (0)20 7601 4286
chiefexecutive@fmlc.org

8 Lothbury
London
EC2R 7HH
www.fmlc.org

Registered Charity Number: 1164902.

which it was introduced.³ In a series of votes on 22 October 2019, Parliament indicated support for the Withdrawal Agreement negotiated between the U.K. and E.U. on 17 October 2019 but rejected the Prime Minister's proposal to review related legislation over a compressed timeline. As a result, a further extension to the Article 50 notice period until 31 January 2020 seems likely. Although, in principle, the Withdrawal Agreement has Parliament's support, its ratification remains subject to Parliamentary scrutiny and potential political changes over the next three months. A no deal Brexit therefore remains a possibility.

The FMLC considers it essential that the Bill is resuscitated and passed so as to ensure continuity and certainty for the financial services industry. The in-flight legislation listed in Section 1 of the Bill are sections of larger dossiers of legislation which have greatly impacted firms' operational planning over the past two years. Uncertainty about whether or not this legislation will apply in the U.K. will not only have a negative impact on firms' future planning but it might also fetter any applications for equivalence under the E.U.'s regulatory framework to which U.K. firms might be subject, post-Brexit, in order to obtain market access. A similar argument can be made in respect of the legislation listed in the Schedule to the Bill, which includes proposals for laws which are in the E.U.'s legislative pipeline and may be adopted over the next two years. This includes updates to essential pieces of the legislative jigsaw.

The FMLC notes, however, that the lapse in time since the Bill was first introduced means that it might need to be updated. For example, Section 1 of the Bill will need to be updated to:

- 1) remove certain items which will now fall within the scope of the Withdrawal Act—such as “the provisions of the Prospectus Regulation that apply from 21 July 2019” in subsection 1(2)(d);⁴ and
- 2) include other pieces of legislation which have come into force on or after 1 April 2019 but which will not come into effect before 1 November 2019 or 1 February 2020 (as the case might be). This includes, for example, certain provisions of Regulation (EU) No 2019/834 amending Regulation (EU) No 648/2012 as regards the clearing obligation, the suspension of the clearing obligation, the reporting requirements, the risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories (the “**EMIR Refit**”), which are to apply after exit day.⁵

A few reservations

In January 2019, the FMLC sent a letter to HM Treasury drawing attention to two issues of legal uncertainty which are likely to arise in relation to Section 1 of the Bill.⁶ The Committee noted that the “in-flight” legislation listed in Section 1(2) does not take into account “in-flight” pieces of E.U. Level 2 legislation—like Commission Delegated Regulations which implement regulatory technical standards (“**RTS**”) issued by

³ Business of the House, House of Commons Hansard, Volume 664 (5 September 2019), available at: <https://hansard.parliament.uk/Commons/2019-09-05/debates/8BA285E9-02C2-40B7-B97C-C546D527A6B3/BusinessOfTheHouse>.

⁴ Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

⁵ See Article 2 of the EMIR Refit which provides, for example, that some provisions apply only from 18 June 2021.

⁶ FMLC, *Letter to HM Treasury: Financial Services (Implementation of Legislation) Bill*, (3 January 2019), available at: <http://fmlc.org/letter-to-hm-treasury-financial-services-implementation-of-legislation-bill-3-january-2019/>.

European Supervisory Authorities in support of Level 1 legislation. Instead, HM Government has bestowed upon the U.K.'s regulatory authorities the power to make "standards instruments" prescribing U.K. binding technical standards ("BTS"). The Committee was—and remains—concerned that a degree of dissonance will develop in the U.K.'s regulatory framework for financial services: while Level 1 legislation would be incorporated in the U.K. in a manner similar to that in E.U. Member States, the interpretation of that legislation, which is constrained by the technical standards, could differ significantly in the U.K. and the E.U. In the case of primary legislation which has been adopted pre-Brexit, where market participants expect to comply with E.U. requirements and conditions, creating a possibly divergent set of U.K. standards in secondary legislation seems to add an unnecessary complication. By way of example, Regulation (EU) 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation (the "**Securitisation Regulation**") came into effect on 1 January 2019, and was onshored by the Withdrawal Act, but, while the European Securities and Markets Authority has published an Opinion on the delegated legislation, it has not yet been adopted by the Commission and may fall to be onshored after Brexit through BTS.

A second complexity arises because the list in Section 1 of the Bill limits the scope of HM Treasury's power to make regulations to implement "in-flight" legislation to only those identified therein. The FMLC had noted that, unless more similar legislation was planned, those pieces of "in-flight" legislation which are not specific to financial services but which nevertheless impose obligations and requirements on financial markets participants will not be implemented by this means post-Brexit.

The FMLC would urge HM Treasury and HM Government to consider the points raised above as the Bill is revised to reflect changes on or after 1 April 2019.

I and Members of the Committee would be delighted to meet you to discuss the issues raised in this letter. Please do not hesitate to contact me should you wish to arrange a meeting or if you have any questions.

Yours sincerely,

A handwritten signature in black ink that reads "Joanna Perkins". The signature is written in a cursive style with a large initial 'J'.

Joanna Perkins
FMLC Chief Executive

cc: Sophie Mitchell

