

FINANCIAL SERVICES (IMPLEMENTATION OF LEGISLATION) BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Financial Services (Implementation of Legislation) Bill [HL] as introduced in the House of Lords on 22 November 2018 (HL Bill 143).

- These Explanatory Notes have been prepared by HM Treasury in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

- 1 The Financial Services (Implementation of Legislation) Bill will provide the Government with the power to implement and make changes to “in flight” files of financial services legislation for two years after the UK’s withdrawal from the European Union in a no-deal scenario. “In-flight” files are pieces of European Union legislation that:
 - are adopted by the European Union, but do not yet apply so cannot be captured by the European Union (Withdrawal) Act 2018 (the “EUWA”). These files are listed in Clause 1 of the Bill; or
 - are currently in negotiation and may be adopted up to two years post EU-exit. These files are listed in the Schedule to the Bill.
- 2 The Bill contains a list of specified EU legislation to which this power, which is sunsetted to two years after exit day, can apply.

Policy background

- 3 The majority of the UK’s financial services legislation is currently negotiated at European Union level. HM Treasury is in the process of completing an “onshoring” project, which will see around 60 Statutory Instruments brought onto the statute book under the EUWA to ensure a functioning financial services regime post-EU exit. The EUWA will transfer the existing body of EU law onto the UK statute book on exit day, but it does not include provisions to update that law after exit. This law is complex and highly detailed, with much introduced in the period since the financial crisis. Being unable to update this body of law (such as to respond to market developments or to international regulatory developments) except through primary legislation represents a risk to the reputation, global competitiveness and efficiency of the UK’s financial markets.
- 4 In particular, a number of important pieces of EU legislation are currently making their way through the European legislative process. These cover a range of financial services policy areas, and in many cases the UK has played a leading role in shaping them for the benefit of the UK financial services industry.
- 5 In a no deal scenario, this Bill provides for a delegated power to deal specifically with these expected changes to the body of financial services law that are currently in the EU pipeline. It provides for the UK to update its regulatory regime and to minimise disruption in a no-deal scenario for up to two years after the point of exit.

Types of ‘in-flight’ file

- 6 There are two types of ‘in-flight’ file provided for in this Bill: i) those that have been adopted, but do not yet apply so are not captured by the EUWA or Regulations made under it; and ii) those that are proposed while the United Kingdom is a member of the EU but which will be finalised in the two years subsequent to EU exit.
- 7 The former category includes, for example, the Prospectus Regulation,¹ which simplifies the framework for prospectuses (a document provided to investors when making an offering on a

¹ Regulation (EU) 2017/1129 of European Parliament and of the Council of 14 June 2017, on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC. Further information can be found at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1129>

regulated market), lowering costs and regulatory burdens for businesses raising capital in the UK. The powers under the EUWA do not allow for the entirety of the Prospectus Regulation to be onshored, as the bulk of the Regulation will not apply until July 2019. EUWA powers apply only to EU legislation that is in application by exit day.

- 8 An example of the latter category is the European Market Infrastructure Regulation – Regulatory Fitness and Performance Programme (EMIR REFIT).² This seeks to provide a more proportionate clearing and reporting framework for firms including a vital pension schemes exemption. This exemption allows pension schemes to access derivative markets without having to meet certain EMIR requirements, so that they can continue to pay UK pensioners.
- 9 There are a number of other pieces of EU legislation that fall into this category. The Government will publish a policy note providing detail on each file following introduction.

Legal Background

- 10 As noted above, the majority of the UK’s financial services legislation has, for a number of years, been negotiated at European Union level. EU Regulations relating to financial services have formed part of the UK’s legal framework through the application of the principle of “Direct Applicability”, where EU law applies automatically within Member States.
- 11 Financial services Directives have generally been transposed by the United Kingdom through the use of section 2(2) of the European Communities Act 1972. This section allows the United Kingdom to implement EU law via secondary legislation, rather than passing primary legislation in each case. Once the United Kingdom leaves the European Union, the principle of Direct Applicability and section 2(2) of the ECA 1972 will cease to apply. As such, in a no deal scenario, there will be no mechanism for the Government to implement financial services legislation into domestic law in a timely way for the benefit of the UK financial services industry. This Bill provides a short-term means to address this legislative gap.

Territorial extent and Application

- 12 Clause 2 sets out the extent of the Bill. The Bill extends to England and Wales, Scotland and Northern Ireland.
- 13 The table in Annex A contains a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions and matters relevant to Standing Orders Nos. 83J to 83X of the House of Commons relating to Public Business.

² Proposal for a Regulation of the European Parliament and of the Council 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 derivatives contracts not cleared by a central counterparty, the registration and supervision of trade repositories and the requirements for trade repositories. Further information can be found here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017PC0208>

Commentary on provisions of Bill

Clause 1: Power in respect of EU financial services legislation with pre-exit origins

- 14 Clause 1 permits the Treasury to make provision corresponding or similar to specified EU financial services legislation in domestic law in the event of a no deal exit, along with the power to make adjustments the Treasury considers appropriate including, in particular, adjustments in connection with the United Kingdom's withdrawal from the European Union. This power will allow the Government to:
- choose to implement only those EU files, or parts of those files, which it deems beneficial for the United Kingdom; and
 - adjust the legislation as it is brought into domestic law to fix any deficiencies and to ensure that it works best in a UK context.
- 15 This is aimed at ensuring the Government can implement legislation which reflects the interests of the UK market and its participants.
- 16 Subsection (2) (a) to (f) provide that pieces of legislation that cannot be transferred into domestic law under the EUWA as their implementation falls subsequent to exit day may be considered specified EU financial services legislation.
- 17 Subsection (2) (g) provides that any EU Regulations or Directives adopted as a result of the proposals listed in the Schedule be considered specified EU financial services legislation.
- 18 Subsections (3) to (9) provide detail on the limitations of the power, ensuring that:
- The power to make adjustments is subject to limitations which apply to the correcting power in the EUWA, as set out in section 8(5) and (7) of that Act. It cannot be used to impose taxation; make retrospective provision; create some criminal offences; establish a public authority; implement a withdrawal agreement; or amend the Human Rights Act 1998 or the devolution settlements;
 - The power is sunsetted to two years, consistent with the EUWA, recognising the importance of putting in place a longer-term solution for updating financial services regulation;
 - The affirmative resolution procedure is required for every instance of the use of the power;
 - The Treasury is mandated to produce and publish annual reports on the exercise of the power.

Clause 2: Extent, commencement and short title

- 19 This section provides that the Bill extends to England and Wales, Scotland and Northern Ireland. The financial services policy issues covered by the Bill are not devolved.

Schedule: List of Proposals for the purposes of section 1

- 20 The Schedule provides a complete list of EU proposals that may result in legislation that the United Kingdom would wish to implement, in part or in whole, in the two years following exit.

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Commencement

21 The Bill comes into force on the day it is passed.

Financial implications of the Bill

22 As this is an enabling Bill, it will not entail changes in public expenditure itself, but expenditure may arise under regulations made under it.

Parliamentary approval for financial costs or for charges imposed

23 This section will be completed when the Bill transfers to the House of Commons.

Compatibility with the European Convention on Human Rights

24 The Government considers that the Financial Services (Implementation of Legislation) Bill is compatible with the European Convention on Human Rights. Accordingly, Lord Bates has made a statement under section 19(1) of the Human Rights Act 1998 to this effect.

Equalities

25 During the passage of the European Union (Withdrawal) Act 2018 through the House of Commons, the Government committed to providing a statement on the impact of EU-exit primary legislation on either the Equality Act 2006 or the Equality Act 2010.

26 The Government considers that the provisions in this Bill will not impact upon any protected groups.

Annex A – Territorial extent and application in the United Kingdom

This Bill extends, and applies in relation to, England, Wales, Scotland and Northern Ireland.

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Legislative Consent Motion needed?
Clause 1	Yes	Yes	Yes	Yes	No
Clause 2	Yes	Yes	Yes	Yes	No
Schedule 1	Yes	Yes	Yes	Yes	No

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