

The Post-Brexit Accountability of the Financial Conduct Authority: Developing Parliament's Institutional Capability

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1 Introduction

The Financial Conduct Authority ('FCA') came into being in 2013, in the aftermath of the global financial crisis of 2007-2008. At that point there was an institutional 'rearranging of the deckchairs' in response to the perceived failings of its predecessor, the Financial Services Authority (the 'FSA'). It was considered that there were serious flaws in the allocating and coordinating of functions across the Bank of England, HM Treasury ('HMT'), and the FSA, and that the FSA's responsibilities were too broad to enable sufficient focus on the stability of firms.¹ Amidst other reforms, the FCA was created and made responsible for conduct regulation.

The FCA works in a highly dynamic field; a vast and complex body of provisions apply to financial services, often taking the form of less 'headline grabbing' delegated legislation.² Over the decades, the regulatory framework has also evolved to factor in the UK's membership of the EU, during which an increasing amount of financial regulation was set at the EU level. A combination of the EU's development of the single market in financial services, plus legislative interventions to tackle the failings of the global financial crisis, has led to EU law embracing many areas of regulation, often in considerable detail.³

The UK's departure raises the question as to how important policy and regulatory functions, which were formerly conducted at the EU level, should operate in a standalone UK regime.⁴ Focusing on the FCA, it is to be granted greater rule-making powers and as a quid pro quo, it will be subject to an enhanced accountability framework.⁵ This is a delicate issue; given the greater responsibilities being

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¹ HMT, *Proposals for Reform* (November 2021) para 1.11.

² One study estimated there to be over 13,000 pages of rules, guidance and supervisory statements published by the FCA and its sibling body, the Prudential Regulation Authority, New City Agenda, *Cultural Change in the FCA, PRA & Bank of England: Practising What They Preach?* (August 2016) 10-11.

³ HMT (n 1) para 1.36.

⁴ HMT, *Phase II Consultation* (October 2020) para 1.3.

⁵ HMT, *Prudential Standards in the Financial Services Bill: June Update: Policy Statement* (June 2020) paras 1.14-1.22; HMT, *Financial Services and Markets Bill* (Bill 146, 2022-23) chapters 1-3.

transferred to the regulator, sufficient accountability and transparency is necessary, however, it is also important not to undermine its independence.⁶

This article analyses the existing FCA framework, considers particular government proposals as they apply to the FCA (to be implemented via the 2022-23 Financial Services and Markets Bill),⁷ and makes normative proposals regarding a framework governing its future accountability. It suggests that a number of the proposals generate concerns, not least in terms of increasing the regulator's operational burden, and that they could require the FCA to make difficult assessments between competing objectives. Moreover, the rebalancing of the FCA/HMT relationship could impact on the FCA's relative independence. In comparison, the proposals regarding future Parliamentary scrutiny are very light-touch. It argues that rather than focusing on the FCA/HMT relationship, it would be preferable to develop Parliament's institutional capability to scrutinise the regulator. As the FCA will be producing and amending a significant body of regulation that can have an impact on the whole of society, technical democratic oversight is vital.⁸ In this regard, it suggests that a joint Parliamentary committee should be created with a mandate focused on scrutinising financial services and its regulation, as well as overseeing the regulator's operational functions. The article also draws insights from the Joint Committee on Human Rights as well as the comparative example of the Australian Joint Committee on Corporations and Financial Services to inform the discussion of institutional design. In particular, for such a committee to have the ability to operate effectively, it should be cross-party, apolitical, and will need to be properly resourced so that it can grapple with the highly technical and dynamic nature of financial regulation. Finally, it should be noted that although the article's focus is the FCA, the UK's regulatory model encompasses the FCA's sibling body, the Prudential Regulation Authority ('PRA') (as well as other bodies, such as the Bank of England having particular oversight responsibilities). While tackling the overall model is beyond the article's scope, a new specialist committee should have the jurisdiction to consider the entirety of the UK's financial ecosystem.

The article is structured as follows: section 2 examines the FCA's current objectives and the FCA's relative independence; section 3 considers existing accountability mechanisms. Section 4 discusses the government's proposals; section 5 makes normative proposals. Section 6 concludes.

⁶ Treasury Committee, *The Future Framework for Regulation of Financial Services* (Fifth Report of Session 2021–22, June 2021) para 36. There can also be the risk of 'over-accountability', where the regulator can struggle to adequately respond to anyone, Julia Black, 'Accountability and UK Financial Regulators' (LSE: Rebooting UK Financial Regulation for a Post-Brexit World - A Conference Summary (Policy Briefing 45, June 2021)) 6.

⁷ HMT, *Financial Services and Markets Bill* (n 5).

⁸ IRSG, *Proposals for Reform Consultation - Response* (April 2022) (n 120) 2.

2 The FCA

2.1 The FCA's Functions

The FCA is a relatively young regulator; it was established by statute in 2013.⁹ It is responsible for maintaining the integrity of the provision of financial services to users;¹⁰ and has a single strategic objective: to ensure the relevant markets function well.¹¹ There are three operational objectives, which support the strategic objective. These focus on safeguarding consumer protection, protecting the integrity of the financial services market, and promoting effective competition in the interests of consumers.¹² Separate from its competition objective, the FCA must also discharge its general functions so as to promote competition in the interests of consumers, so far as this is compatible with advancing the consumer protection or integrity objective.¹³ The FCA's objectives provide a mandate for it to take action, but do not impose a statutory duty on it to act, nor do they establish a standard of conduct to be expected of regulated firms.¹⁴ When discharging its functions, it must 'have regard' of eight regulatory principles, which set out policy issues and considerations which it must take into account.¹⁵ It must also have regard for the importance of taking action to minimise the extent it is possible for a business to be used for a purpose connected with financial crime.¹⁶ When the FCA considers how to advance its objectives and discharges its other relevant duties, it is also required to have regard to recommendations made to it by HMT about aspects of the government's policy.¹⁷

Whilst the regulator's functions are inevitably of a technical nature, they bring clarity to its mandate and, as discussed later in the article, contribute to ensuring its accountability. At the same time, however, although the FCA has a broad area of regulation, this culmination of objectives, principles, freestanding duties, and considerations of which it should take account risks overloading it. Be that as it may, as considered in section 4 below, the government is introducing a new 'growth and international competitiveness' objective to complement the FCA's existing operational objectives.¹⁸

⁹ Financial Services Act 2012, section 6, amending the Financial Services and Markets Act 2000 ('FSMA').

¹⁰ FCA and Bank of England, *Memorandum of Understanding between the Financial Conduct Authority and the Bank of England* (2019) para 3.

¹¹ FSMA 2000, section 1B; see also section 1F for the 'relevant markets'.

¹² Ibid, section 1C; section 1D; and section 1E.

¹³ Ibid section 1B(4).

¹⁴ Financial Services Act 2012, Explanatory Notes para 98.

¹⁵ FSMA 2000, section 3B.

¹⁶ Ibid section 1B(5).

¹⁷ Ibid section 1JA(1); HMT, *Recommendations for the FCA* (23 March 2021)

¹⁸ HMT, *Proposals for Reform* (n 1) para 3.19; HMT, *Financial Services and Markets Bill* (n 5) clause 24.

This could point towards a return to the more ‘light-touch’ approach that was in place prior to the financial crisis, even though this approach did not end well for anyone, including for the regulator.¹⁹

2.2 The FCA’s Independence

A key dimension to the FCA’s independence is its political independence. In relation to this, the FCA is an independent company and there is a strong focus on independence in its founding statute: it operates independently of government, and it is not to be regarded as acting on behalf of the Crown.²⁰ The FCA does not receive funding from the government; it is funded by the firms it regulates through fee-raising powers.²¹ At the same time, independence may be regarded as a relative concept. The FCA is an agency created by statute; it is a public body that operates on behalf of the government and its broad policy direction will be that of the government’s.²² Arguably the focus should be particularly on the regulator’s operational independence; its ability to carry out its operations without there being undue political or commercial interference.²³ The importance of its operational independence is also emphasised by international standard setting bodies.²⁴ There are then a number of distinct aspects to its political independence: regulatory, supervisory, institutional, and budgetary.

2.3 Regulatory Independence

With respect to setting regulatory policy, the FCA has the power to make rules and policies in pursuit of its objectives, although it is subject to statutory requirements regarding this. The FCA is generally required to consult the PRA about the proposed rules²⁵ and is usually required to consult publicly.²⁶ The PRA also has a limited veto in respect of the FCA’s regulatory powers regarding dual-regulated²⁷ firms where it is of the opinion that the power’s exercise would constitute a financial stability risk.²⁸ When this veto was proposed, it was considered that it risked the perception that the FCA was a

¹⁹ Andrew Bailey, *Speech on the Future of Financial Conduct Regulation* (23 April 2019); Eilis Ferran, ‘International Competitiveness and Financial Regulators’ Mandates: Coming around Again’ (Working Paper, June 2022).

²⁰ FSMA 2000, Schedule 1ZA, para 16.

²¹ Ibid, Schedule 1ZA, para 23; FCA, *The FCA’s Approach to Advancing Its Objectives* (December 2015), para 1.3.

²² IMF, *Governance Practices at Financial Regulatory and Supervisory Agencies* (Working Paper 09/135, July 2009) 10.

²³ Ibid 10.

²⁴ IOSCO, *Objectives and Principles of Securities Regulation* (2017): Principle A2; Basel Committee on Banking Supervision, *Core Principles for Effective Banking Supervision* (2012): Principle 2.

²⁵ FSMA 2000, section 138I. Exemptions are included under section 138I(10).

²⁶ Ibid section 138I (there are exemptions under section 138L, although the FCA will still be required to consult the PRA).

²⁷ This refers to the split in regulatory responsibility for most firms between the FCA and the PRA.

²⁸ FSMA 2000 section 3I; section 3L.

second class regulator.²⁹ Certainly, given the PRA's role, the FCA can be regarded as having only relative independence regarding its regulatory activities.

2.4 Supervisory Independence

The FCA has quasi-judicial supervisory and enforcement responsibilities.³⁰ Parliament has granted the FCA a range of tools and independent powers to deliver its supervisory objectives,³¹ and HMT has stated that it is accepted practice for such functions to be exercised independently of governmental departments.³² As Enriques and Hertig argue, supervision is a highly technical task; although more pessimistically, as supervision can be particularly risky, it may be delegated by politicians so that unelected agencies can serve as scapegoats in the event of policy failure.³³

2.5 Institutional Independence

With respect to the FCA's institutional independence, there are, again, a number of elements. Its governance structure should include multimember committees of experts and there should be clear rules governing the appointment and departure of senior personnel so that they have security of tenure. Its decision-making should also be transparent and open as far as possible to enable scrutiny of regulatory decisions.³⁴

The FCA is governed by a Board and it is conventional for such appointments to be made by the government's executive branch. These are largely the prerogative of HMT.³⁵ The FCA's Board must include: a Chair and Chief Executive ('CEO') appointed by HMT; the Bank of England's Deputy Governor for Prudential Regulation (appointed by the Crown);³⁶ two non-executive members appointed jointly by HMT and the Secretary of State for Business, Energy, and Industrial Strategy; and at least one other

²⁹ Treasury Committee, *Financial Conduct Authority* (Twenty-sixth Report of Session 2010–12 January 2012) paras 95–96.

³⁰ E.g. FCA, *FCA Mission: Approach to Supervision* (April 2019) chapter 1.

³¹ *Ibid* 5.

³² HMT, *Phase II Consultation* (n 4) para 2.9.

³³ Luca Enriques and Gerard Hertig, 'Improving the Governance of Financial Supervisors' (2011) 12 *European Business Organization Law Review* 357–361; Alberto Alesina and Guido Tabellini, *Why Do Politicians Delegate?* (NBER Working Paper 11531, 2005) 18–19.

³⁴ Marc Quintyn and Michael W. Taylor, *Should Financial Sector Regulators Be Independent?* (IMF Economic Issues No 32, March 2004).

³⁵ IMF (n 22) 13.

³⁶ FSMA 2000, schedule 1ZA, para 2(2)(c); Bank of England Act 1988, section 1(2)(d); Bank of England, *Governance of the Bank Including Matters Reserved to Court* (December 2019).

member appointed by HMT.³⁷ Overall, the Board has a majority of members that are non-executive directors ('NEDs'), all of which are considered independent.³⁸ It has also established certain committees, many of which are comprised solely of NEDs, to which it delegates particular powers, duties and decision-making responsibilities.³⁹ A 2017 review found that NEDs were able to speak broadly on the issues and there was a good quality of debate at the Board, in which challenge by NEDs was robust but constructively framed.⁴⁰ A 2021 review also reported on a 'strong, experienced and independent Board'.⁴¹

There is currently no legislative provision for the FCA's CEO appointment to be for a single, non-renewable appointment.⁴² The Chair also does not have a fixed term. Both are appointed and discharged by HMT. Indeed, the terms of service of all appointed directors are determined by HMT.⁴³ In contrast, the appointment of the Governor of the Bank of England is enshrined in law as a single, non-renewable term, which should protect against political control.⁴⁴ However, the CEO's term of office must not begin before there is legislative confirmation: the person is required to appear before the Treasury Select Committee (or, if earlier, three months from the date of their appointment).⁴⁵ Accordingly, in line with IMF recommendations, both the government and Parliament are involved in the CEO's appointment. Regarding dismissal, statute spells out the grounds for the termination of a Board member.⁴⁶

The absence of legislative provisions regarding (particularly) the CEO's appointment impacts on their security of tenure; this risks impacting on their ability to take action without fear of dismissal.⁴⁷ Over the years, external interventions, such as HMT not renewing then CEO's (Martin Wheatley's) contract

³⁷ FSMA 2000, schedule 1ZA, para 2(2); FCA, *Corporate Governance of the Financial Conduct Authority* (March 2020), para 2.3; FCA, *FCA, Annual Report and Accounts (2020/21)* 85.

³⁸ FSMA 2000 Schedule 1ZA, para 2(4); FCA, *Annual Report and Accounts* (n 37) 85.

³⁹ FCA, *Corporate Governance of the Financial Conduct Authority* (n 37) 8-9. Its governance framework also includes an executive committee and a number of executive sub-committees.

⁴⁰ FCA, *Review of Board Effectiveness* (2017) 8.

⁴¹ FCA, *Review of Board Effectiveness* (2021) 3-4.

⁴² HMT, *Chief Executive of the Financial Conduct Authority* (22 June 2020). In 2016, the Chancellor stated that the government would seek to make the appointment subject to a fixed, renewable five-year term, however at the time of writing, subsequent governments have not followed up on this, Chancellor of the Exchequer, *Letter to the Chairman of the House of Commons Treasury Committee* (19 April 2016).

⁴³ In the case of the two non-executive directors appointed jointly, the term is determined by HMT in consultation with the Secretary of State, FSMA 2000, Schedule 1ZA, para 2; FCA Articles of Association, art 7.1.

⁴⁴ Bank of England Act 1988, Schedule 1, para 1 (as amended by the Financial Services Act 2012).

⁴⁵ FSMA 2000, Schedule 1ZA, para 2A.

⁴⁶ See *ibid*, Schedule 1ZA, para 4. Where the member was appointed jointly by HMT and the Secretary of State, the Treasury must consult the Secretary of State before removing the person.

⁴⁷ Marc Quintyn and Michael W. Taylor, *Regulatory and Supervisory Independence and Financial Stability* (IMF Working Paper WP/02/46, 2002) 20.

in 2015 have raised questions regarding the FCA's independence.⁴⁸ Rather than concerns playing out about his ability to take action due to the lack of security of tenure, Wheatley was perceived as taking a heavy-handed approach, including extracting record sanctions from the industry in the post-financial crisis era.⁴⁹ Indeed, it has been argued that while the media coverage focused on whether or not he had done a good job, the question was really about how the CEO of an independent agency could be defenestrated.⁵⁰

More recently, in 2021, the FCA Chair announced he would step down before the end of his first term⁵¹ when it can be customary for a second term to be offered. It is unclear if a further term was declined or not offered. The Chair may have been disenchanted with the FCA; or it could have been an acknowledgement of responsibilities for the FCA's failures, including the collapse of the mini-bond provider London Capital & Finance ('LC&F'), discussed in section 3 below. It has also been suggested there were signs of tension with the government, and a need to reset the relationship between HMT, the regulators, and Parliament.⁵² Taken together, the lack of security of tenure of those in senior positions may result in the regulator being subject to political influence. Moreover, politicians may also lean towards politically loyal candidates, which could affect an agency's effectiveness.⁵³

The final element relates to decision-making procedures. These should be open and transparent to the extent consistent with commercial confidentiality. A presumption in favour of openness enables the public and industry to scrutinise regulatory decisions, reducing the risk of political interference.⁵⁴ The FCA is required to publicly consult with the industry, consumers, and other interested parties as part of the policymaking process; the FCA is also required to take account of principles of good regulation, including the desirability of publishing information about regulated firms and individuals (with appropriate safeguards) or requiring them to do so, and to exercise its functions as transparently as possible.⁵⁵ Such procedures also facilitate its accountability, as discussed in section 3.

2.6 Budgetary Independence

⁴⁸ 'Martin Wheatley Resigns as Chief of Financial Conduct Authority' *Financial Times* (17 July 2015).

⁴⁹ 'FCA: On the Wrong Side of the Argument?' *Financial Times* (2 July 2015).

⁵⁰ House of Lords Industry and Regulators Committee, *Corrected Oral Evidence: (Sir Paul Tucker)* (May 2022) 20.

⁵¹ FCA, *Charles Randell to Step Down as FCA and PSR Chair in Spring 2022* (October 2021).

⁵² Ben Martin, 'Financial Conduct Authority Chief Charles Randell to Go' *The Times* (16 October 2021).

⁵³ Luca Enriques and Gerard Hertig (n 33) 373.

⁵⁴ Marc Quintyn and Michael W. Taylor, *Regulatory and Supervisory Independence and Financial Stability* (n 47) 20.

⁵⁵ FSMA 2000, section 3B(1)(g) and (h).

As identified in section 2, the regulator does not receive funding from the government; it is funded by the firms it regulates through fee-raising powers.⁵⁶ This has several advantages, including the avoidance of political interference, and more freedom to set its budget.⁵⁷ However, as discussed in section 2.7 below, it can lead to dependence on the industry it regulates, which can open the door to regulatory capture. There may also be risks that during an economic downturn, the industry could have difficulty in paying the fees, leaving it with insufficient resources.⁵⁸ The main alternative is funding drawn from government budgets, which also generates challenges; it can lead to risks of political interference and battles regarding the allocation of funds.⁵⁹ On balance, the fee-based model appears preferable; it guarantees a more stable funding source, and allows for supervisory services to be better priced and adjusted for market developments.⁶⁰

2.7 Regulatory Capture

A further key aspect is freedom from regulatory capture, including by the industry it regulates. Essentially, the concern is of the regulator being ‘turned’ by the industry it is regulating. This can result in the regulated industry exercising excessive influence, which can result in the ‘captured’ regulator acting mainly in the interests of the industry and crafting rules so as to minimise industry costs.⁶¹ Such issues can also be reinforced by the ‘revolving door’ phenomenon, where senior individuals move from regulators to industry or political life and vice versa, often several times.⁶² This can generate conflicts of interest by creating incentives to adopt policies which favour the regulated industry.⁶³ These are continual risks for regulators; yet, while it can be a fine line to tread, the input of stakeholders with specialist knowledge can provide the regulator with valuable information in relation to its policy formation activities.⁶⁴ Moreover, reflecting on Martin Wheatley’s departure considered

⁵⁶ Ibid, Schedule 1ZA, para 23; FCA, *The Fca’s Approach to Advancing Its Objectives* (December 2015), para 1.3.

⁵⁷ Marc Quintyn and Michael W. Taylor, *Regulatory and Supervisory Independence and Financial Stability* (n 47) 21.

⁵⁸ Marc Quintyn and Michael W. Taylor, *Should Financial Sector Regulators Be Independent?* (n 34).

⁵⁹ Ellis Ferran, ‘Institutional Design: The Choices for National Systems’ in Niamh Moloney, Ellis Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015) 123.

⁶⁰ Financial Stability Board, *Intensity and Effectiveness of SIFI Supervision* (November 2010) 5.

⁶¹ Daniel C. Hardy, *Regulatory Capture in Banking* (IMF Working Paper WP/06/34, 2006) 3.

⁶² House of Commons, *Banking Standards: Written Evidence from Ian Taplin* (February 2013).

⁶³ Samuel McPhilemy, ‘Formal Rules Versus Informal Relationships: Prudential Banking Supervision at the FSA before the Crash’ (2013) 18 *New Political Economy* 748, 753. Although beyond the scope of the article, as McPhilemy discusses, there are both ‘hard’ and ‘soft’ variants of regulatory capture. The hard variant builds on assumptions of individual rationality and self-interested politicians; the soft variant focuses on ideas as the means by which industry influences regulators and politicians.

⁶⁴ Luca Enriques and Gerard Hertig (n 33) 376-377; Daniel C. Hardy (n 61) 21.

above, it may be that political influences remain more of an acute risk for the FCA than regulatory capture concerns.

Overall this section demonstrates that the FCA's independence is relative; it operates with some degree of independence from the government. However, the lack of security of tenure of those in senior positions means it can risk being subject to political influence. The FCA's (relative) independence then raises the related aspect: the need for accountability. This is also key to its effective independence.⁶⁵ As section 3 explores, political legitimacy requires that unelected public agencies be accountable for how they use the powers delegated to it.⁶⁶ Moreover, as highlighted in the introduction, accountability now takes on a new prominence, given the post-Brexit expansion to the FCA's responsibilities.

3 Accountability: Who Watches the Watchers?

3.1 What is Accountability?

While there can be a lack of clarity about what is meant by accountability, definitions tend to focus on the giving account of and a justification of one's actions to another party.⁶⁷ 'Strong' accountability mechanisms can also encompass a response to the regulator's explanation where the regulator does not meet the required standard (this could be the imposition of a penalty such as removal from office).⁶⁸ Accountability mechanisms fall into different categories: there can be ex ante tools such as engaging in consultations on proposed policies; and ex post accountability such as the provision of annual reports.⁶⁹ As the FCA operates in a 'multiple-principals' environment, it is accountable to a range of principals, including the legislative and executive branches of government, and to industry and the public at large.

3.2 FCA: Accountability Arrangements

⁶⁵ Marc Quintyn and Michael W. Taylor, *Should Financial Sector Regulators Be Independent?* (n 34).

⁶⁶ Ibid.

⁶⁷ E.g. Mark Bovens, *Analysing and Assessing Public Accountability. A Conceptual Framework* (European Governance Papers No C-06-01, 2006).

⁶⁸ Joanna Bird, 'Regulating the Regulators: Accountability of Australian Regulators' (2011) 35 Melbourne University Law Review 739, 741.

⁶⁹ Eva Hüpkens, Marc Quintyn and Michael W. Taylor, *Accountability Arrangements for Financial Sector Regulators* (IMF Economic Issues 39, 2006) 6-7.

In general terms, the FCA is currently subject to an extensive range of accountability arrangements including constitutional mechanisms; judicial review; as well as accountability to the supervised industry, customers, and the public. This section focuses on some of its key constitutional accountability mechanisms before examining, in section 4, the new constitutional measures being proposed by the government. This section suggests that, while not flawless, the current mechanisms largely strike a sensible balance between enabling the regulator the independence and dynamism to act when necessary and for there to be robust accountability.⁷⁰

3.2.1 Constitutional Accountability

All UK financial regulators are accountable to Parliament, largely through Treasury Ministers.⁷¹ The regulator reports to HMT every year on its progress through its annual report,⁷² and HMT submits a report to Parliament examining the FCA's performance against its statutory objectives.⁷³ HMT may require the FCA to undertake an investigation into regulatory failures and to report to it,⁷⁴ and the FCA is also obliged to carry out investigations where it considers a failure has occurred.⁷⁵ HMT can also arrange an independent investigation.⁷⁶ A recent high-profile illustration concerned the independent investigation into the FCA's regulation and supervision of LC&F. In brief, LC&F primarily offered mini-bonds to retail investors, and went into administration in early 2019, impacting over ten thousand people who had invested approximately £237 million. The excoriating report⁷⁷ concluded the regulator had not effectively supervised and regulated LC&F and made a number of recommendations to improve the FCA's authorisation and supervision processes. The FCA faced considerable criticism over this scandal, yet from an accountability perspective, it illustrates the robust operation of constitutional checks and balances within its framework.

Parliamentary Select Committees (cross-party groups with a particular role), including the Treasury Select Committee (the 'Treasury Committee') also provide scrutiny of financial governance policy. Indeed, as discussed in section 5 below, the Treasury Committee has confirmed that it will be taking

⁷⁰ FCA, *Written Evidence to the Treasury Committee on the Future of Financial Services* (March 2021) 12.

⁷¹ HMT, *Phase II Consultation* 27.

⁷² FSMA 2000, Schedule 1ZA, para 11; FCA, *Annual Report and Accounts 2019/20* (September 2020).

⁷³ FCA, 'Reporting to Treasury and Parliament' (2020) <<https://www.fca.org.uk/about/reporting-treasury-parliament>> accessed 18 December 2020.

⁷⁴ Financial Services Act 2012, part 5, sections 77-78.

⁷⁵ *Ibid* section 73.

⁷⁶ *Ibid* section 68.

⁷⁷ Dame Elizabeth Gloster, *Report of the Independent Investigation into the Financial Conduct Authority's Regulation of London Capital & Finance Plc* (23 November 2020).

on the role of examining new regulatory proposals for financial services going forward.⁷⁸ To date, its recent work has included, for example its inquiry regarding the LC&F scandal.⁷⁹ There are also regular accountability hearings; the FCA appears before the Treasury Committee twice a year.⁸⁰ As discussed earlier in the article, the Treasury Committee also holds appointment hearings to scrutinise appointments to key leadership positions. This committee is undoubtedly an important facet of the FCA's accountability framework. However by its nature, it is also a particularly political forum. Historically, it has tended to act reactively, focusing mostly on high-profile supervisory failures. This is partly due to the fact that Members of Parliament ('MPs') will respond to issues receiving public attention. It is also partly due to the structures that have existed until now for legislative scrutiny via the EU institutions.⁸¹ Accordingly, as is discussed further in section 5, although this committee plays (and will continue to play) a key role, it is suggested that a new system of joint committee oversight could complement the existing functions which it performs.⁸²

3.2.2 Judicial Review

Regulators must exercise their functions in accordance with the law. While the FCA has statutory immunity from liability to damages,⁸³ judicial review can be used if the law has not been followed in the way that decisions are reached.⁸⁴ One relatively high-profile decision involved a former bank employee concerning his role in trading derivatives which resulted in large losses (the so-called 'London Whale trades') and who had been indicted in the US.⁸⁵ The claimant challenged the rationality of the FCA's decision to terminate its investigation into his conduct; he hoped the investigation would clear his name. The High Court upheld the established legal principle that it would only be in 'highly exceptional cases' that it would disturb decisions by an independent prosecutor or investigator whether to investigate or prosecute, and that this was not such a case.⁸⁶ The FCA was entitled to

⁷⁸ Treasury Committee, *Future Parliamentary Scrutiny of Financial Services Regulations* (Second Report of Session 2022–23, June 2022).

⁷⁹ Treasury Committee, *The Financial Conduct Authority's Regulation of London Capital & Finance Plc* (Fourth Report of 2011–22) (24 June 2021).

⁸⁰ See e.g. FCA Chief Executive, *Letter to the House of Commons Treasury Committee: The Work of the Financial Conduct Authority* (26 November 2020).

⁸¹ IRSG, *Response to Phase II Consultation* (26 March 2021) 16.

⁸² House of Lords EU Financial Affairs Sub-Committee, *Financial Services after Brexit* (27 March, 2020) para 42.

⁸³ FSMA 2000, Schedule 1ZA, para 25 (subject to exceptions if there is bad faith or illegality under human rights legislation).

⁸⁴ HMT, *Phase II Consultation* (n 4) 27.

⁸⁵ *Clyde & Co, R (Julien Grout) v Financial Conduct Authority* (2015) (April 2015).

⁸⁶ *R (on the Application of Grout) v the Financial Conduct Authority* [2015] EWHC 596 (Admin) para 34.

terminate this investigation, its decision was rational, and the trader would still have an opportunity to clear his name in the US.⁸⁷

Judicial review is an important accountability avenue, yet it is currently only utilised relatively infrequently;⁸⁸ the narrow grounds of review and the regulator's broad discretion tend to impact on its availability.⁸⁹ In addition, as well as the cost, time, and uncertainty involved, firms typically prefer not to risk any reputational risk, or to jeopardise their relationship with the regulator.⁹⁰ While it is not sensible for the regulator to be the subject of frequent judicial review, it could be useful to make the system more accessible,⁹¹ and for it to play a greater role with respect to financial regulation.

Overall, this section demonstrates that while there is considerable legislative and executive accountability, judicial review remains a relatively limited option in practice. The system is not perfect however it currently strikes a reasonable balance. As section 4 now discusses, the post-Brexit transfer of powers to the FCA requires adjustments to ensure appropriate checks and balances are in place, however any new mechanisms should operate effectively with those systems already in place.⁹² As section 4 considers, while some of the proposals are helpful, there is a risk of introducing further complexity into the system. Moreover the proposals are more geared towards enhancing the HMT/regulator linkages than developing a role for Parliament.

4 Post-Brexit Approach to the Financial Services Regulatory Framework

This section analyses particular proposals regarding the FCA, which are to be implemented by the Financial Services and Markets Bill 2022-23.⁹³ Specifically it examines the updating of the FCA's objectives; and the proposed salient mechanisms for enhanced accountability via HMT and Parliament. While conferring greater responsibilities on the regulator needs to be balanced by

⁸⁷ Ibid.

⁸⁸ See also *R (on the Application of Willford) v Financial Services Authority* [2013] EWCA Civ 677.

⁸⁹ Ben Kingsley and Selmin Hakki, 'The Role and Statutory Powers of the Prudential Regulation Authority and the Financial Conduct Authority' in Hywel Jenkins and Cat Dankos (eds), *A Practitioner's Guide to the UK Financial Services Rulebooks* (7th edn, Sweet & Maxwell 2019) section 2.2.5.

⁹⁰ IRSG, *The Architecture for Regulating Finance after Brexit: Phase II* (January 2020), para 2.3.2.

⁹¹ See e.g. Ibid para 3.3.1; for further analysis and advocating a set of high-level principles to engender confidence in an effective review process see UK Finance, *The Principles of an Effective Regulatory-Review Mechanism for Financial Services* (February 2021) section 6.

⁹² FCA, *Written Evidence to the Treasury Committee on the Future of Financial Services* (n 70) 12.

⁹³ HMT, *Financial Services and Markets Bill* (n 5).

appropriate accountability mechanisms, the suite of reforms increases the regulator's burden,⁹⁴ and could impede its independence. A particular aspect also stands out; there is considerable focus on developing the HMT/regulator relationship, and very little in the way of strengthening Parliamentary scrutiny. In this regard, section 5 suggests that focusing on a new mechanism for systematic Parliamentary oversight would be preferable to the current direction of travel.

4.1 Updating Objectives

As identified in section 2, the FCA has statutory objectives, regulatory principles, freestanding duties, and considerations of which it should take account. The government envisages retaining these but has made provision to facilitate the growth of the UK economy, including through the lens of international competitiveness.⁹⁵ In particular, reflecting on comparable jurisdictions which have growth or competitiveness woven into their frameworks,⁹⁶ it is introducing a new medium to long-term growth and competitiveness objective that will sit under the FCA's strategic objective and complement its existing operational objectives.⁹⁷ As identified earlier in the article, it should not be forgotten that the FCA's predecessor was required to consider the UK's competitiveness, however this was criticised as contributing to its light-touch approach to regulation in the years preceding the financial crisis.⁹⁸ A former regulator also expressed caution about making this a formal objective, which could risk diluting the FCA's effectiveness.⁹⁹ Accordingly it can be questioned whether reintroducing this is wise.¹⁰⁰ Indeed, although this can support a successful financial sector, it could entrench particular business models,¹⁰¹ and result in the risk being ultimately borne by customers and taxpayers.¹⁰² One mooted alternative could be to remove the notion of 'competitiveness' and to focus on the promotion of long-term economic growth.¹⁰³ This could seek to embrace the ways financial services can serve the 'real economy' (the part that produces goods and services other than financial services).¹⁰⁴ More generally,

⁹⁴ Deloitte, *HMT Introduces a New Focus on Competitiveness and Accountability as Part of Its Future Regulatory Framework Review* (17 November 2021).

⁹⁵ HMT, *Proposals for Reform* (n 1) paras 3.13 and 3.17; HMT, *Financial Services and Markets Bill* (n 5) clause 24.

⁹⁶ Jonathan Hill, *UK Listing Review* (3 March 2021) 6; 17-18.

⁹⁷ HMT, *Proposals for Reform* para 3.19; HMT, *Financial Services and Markets Bill* (n 5) clause 24.

⁹⁸ Andrew Bailey.

⁹⁹ House of Lords EU Financial Affairs Sub-Committee (n 82) para 50.

¹⁰⁰ Eilis Ferran, 'International Competitiveness and Financial Regulators' Mandates: Coming around Again' (n 19).

¹⁰¹ Andrew Bailey (n 19).

¹⁰² Clifford Chance, *Should UK Regulators Take More Regard for Competitiveness?* (January 2019); Helen Thomas, 'Pursuit of 'Competitive' Regulation Makes Unwelcome Return in UK' *Financial Times* (12 November 2021).

¹⁰³ Treasury Committee, *Future of Financial Services Regulation* (First Report of Session 2022–23, June 2022) para 72.

¹⁰⁴ *Ibid* paras 67 and 73; Eilis Ferran, 'International Competitiveness and Financial Regulators' Mandates: Coming around Again' (n 19).

however, the regulator is already armed with a plethora of objectives. There are valid concerns that a new objective further complicates the existing landscape, and that it may have a tricky juggling act regulating and supervising the financial sector whilst also ensuring its growth and competitiveness. In essence, there is a tension between the government's political aspirations¹⁰⁵ and the regulator's general temperance.¹⁰⁶

4.2 Accountability

To balance the regulator taking on new policymaking responsibilities, an appropriate structure is required regarding accountability mechanisms. This section suggests that the proposed adjustments to the HMT/FCA relationship may tilt the scales too far in favour of governmental input. At the same time, the proposals relating to Parliamentary scrutiny are relatively minor in comparison.

4.2.1 HMT Relationship

HMT Power in Relation to Rules

The government is to have the power to place obligations on the regulator to make rules in relation to certain areas of regulation.¹⁰⁷ It suggests that this could be necessary where EU law is to be repealed and the government believes it is essential that there are similar provisions in the regulators' rulebooks.¹⁰⁸ At the same time, the government recognises that it is 'generally appropriate for the regulators to make their own judgement about what rules are required'.¹⁰⁹ Accordingly it remains unclear why it is appropriate for the government to have this general power where the regulator does not judge a rule to be necessary.¹¹⁰

Matters to Consider When Making Rules

Initial proposals envisaged that the government would set out the policy approach for a particular area in legislation. This would be high-level, focusing on the overall purpose and regulatory approach

¹⁰⁵ HMT, *Proposals for Reform* (n 1) para 3.8.

¹⁰⁶ Kennedys, *UK Financial Services Future Regulatory Framework Review - a Post-Brexit Boost of Competitiveness?* (November 2021).

¹⁰⁷ HMT, *Financial Services and Markets Bill* (n 5) clause 28.

¹⁰⁸ HMT, *Proposals for Reform* paras 7.43-7.45.

¹⁰⁹ *Ibid* (n 1) para 7.41.

¹¹⁰ ISDA, *Response to HMT Consultation* (February 2022) 5.

needed for particular areas of activity.¹¹¹ The detailed requirements would then be the FCA's responsibility. In the subsequent consultation, far less emphasis was placed on such proposals. Instead, the government will have the ability to set specific 'have regards' which regulators must consider when exercising their rules in specific areas of regulation.¹¹² This acknowledges, to an extent, that a sector-based approach fails to reflect how markets and its participants operate, where sectoral boundaries can be blurred. In this regard, differential sectoral treatment could result in regulatory arbitrage, where participants structure their activities to avoid regulation. Yet, the envisaged approach will be less effective than, for instance reflecting 'have regards' requirements in cross-cutting regulatory principles that apply across all levels of regulatory activity.¹¹³ More generally, a proliferation of concepts which the regulator must take account of risks diluting its effectiveness.¹¹⁴

Review of Rules

Currently, there is no formal mechanism for the government to require the regulators to conduct reviews of their rules.¹¹⁵ Although judicial review is an available avenue, this is not utilised frequently. Accordingly, the government is introducing a power, which it expects to be only used in exceptional circumstances, to require regulators to review their rules where the government considers this to be in the public interest.¹¹⁶ If appropriate, an independent person could conduct this review.¹¹⁷ This proposal may reframe the HMT/FCA relationship in a way which places too much power with the government. Indeed, it is anticipated that this power will be one of the more controversial elements as it works through the legislative system.¹¹⁸ For instance, the process by which an independent person is appointed remains unclear, as is the precise definition of 'exceptional circumstances', which could turn out to be 'surprisingly frequent'.¹¹⁹ While it will depend in practice on how much the

¹¹¹ HMT, *Phase II Consultation* (n 4) chapter 2.

¹¹² HMT, *Proposals for Reform* para 7.40; HMT, *Financial Services and Markets Bill* (n 5) clause 29. E.g. it suggests that the government may set 'have regards' for the FCA when it makes rules in relation to uncleared derivatives.

¹¹³ FCA, *Written Evidence to the Treasury Committee on the Future of Financial Services* (n 70) 8.

¹¹⁴ Bank of England, *Written Evidence Submitted by the Bank of England* (March 2021) 4.

¹¹⁵ HMT, *Proposals for Reform* (n 1) paras 4.19 and 4.25.

¹¹⁶ HMT, *Financial Services and Markets Bill* (n 5) clause 27.

¹¹⁷ HMT, *Proposals for Reform* paras 4.22-4.23.

¹¹⁸ Freshfields Bruckhaus Deringer LLP, *Wide-Sweeping Powers: The Financial Services and Markets Bill 2022* (July 2022).

¹¹⁹ Charles Randell, *Listening up to Level up – Regulating Finance for the Whole of the UK* (June 2022); ShareAction, *Consultation Response* (9 February 2022).

government utilises this power, further clarity and transparency about how it will be used would be useful.¹²⁰ More broadly, making adjustments to judicial review could be preferable.¹²¹

At the time of writing, the government has confirmed it is also considering ‘taking further powers to intervene in financial regulation, in the public interest’.¹²² This could include vetoing or amending the regulators’ rules.¹²³ The Bank of England has cautioned against political interference; noting the importance of regulatory independence, including to the UK’s international standing and that the financial sector’s competitiveness, which the reforms are aimed at, depends on this.¹²⁴ Certainly, such interference would further chip away at the regulator’s independence making it hard to see how it could even be regarded as independent.¹²⁵

Engagement with HMT

As identified in section 2, HMT is required to make recommendations to the regulator at least once a Parliament regarding topical issues or aspects of economic policy that it wants taken into account when the FCA is considering how to advance its objectives.¹²⁶ The government is now introducing a statutory requirement that the regulator be required to respond to these recommendations.¹²⁷ This will be required on an annual basis and HMT will publish these and lay them before Parliament.¹²⁸ The aim is to increase transparency and the effectiveness of recommendations as a vehicle for setting out the aspects of economic policy the regulator should take into account.¹²⁹ Yet, in line with the above discussion, this runs up against the FCA’s regulatory independence.¹³⁰ Moreover, the FCA already works closely with the government and there is significant interaction with HMT, which happens informally as a matter of routine.¹³¹ This begs the question whether there is the need for change here.

¹²⁰ Deloitte (n 94); ShareAction (n 119); IRSG, *Proposals for Reform Consultation - Response* (n 8) 4-5.

¹²¹ Note that there are also provisions regarding the interaction of the FCA’s responsibilities with the government’s overseas arrangements and agreements; HMT, *Proposals for Reform* (n 1) para 4.26-4.33.

¹²² HMT, *Mansion House Speech by the Chancellor of the Exchequer* (July 2022); George Parker, ‘Liz Truss Backs New Powers to Override City Regulators’ *Financial Times* (9 August 2022).

¹²³ HMT, *Financial Services Bill to Unlock Growth and Investment across the UK* (July 2022).

¹²⁴ Andrew Bailey, *Letter to Treasury Committee on Future Regulatory Framework for Financial Services* (August 2022).

¹²⁵ Katherine Griffiths and Joe Mayes, ‘UK Treasury Aims to Avoid Brexit Regulation Fight with Bank of England’ *Bloomberg UK* (19 July 2022) (citing John Vickers).

¹²⁶ HMT, *Recommendations for the FCA* (n 17); HMT, *Proposals for Reform* (n 1) para 4.8.

¹²⁷ HMT, *Financial Services and Markets Bill* (n 5) clause 33.

¹²⁸ HMT, *Proposals for Reform* (n 1) paras 4.15-4.18; HMT, *Financial Services and Markets Bill* (n 5) clause 33.

¹²⁹ HMT, *Proposals for Reform* (n 1) para 4.15.

¹³⁰ Treasury Committee, *The Future Framework for Regulation of Financial Services* (n 6) para 36.

¹³¹ *Ibid* para 36.

4.2.2 Accountability to Parliament

The government considers that Parliament already has a wide range of powers to conduct effective scrutiny over the regulator, including via the select committee system.¹³² To support this, it is formalising the existing arrangements whereby the regulator provides information to Parliament.¹³³ Specifically, the regulator will be required to notify the relevant committee when they publish a consultation on any matter. Further, although the regulators currently already respond to letters and Parliamentary questions, it will be required to respond in writing to formal responses to statutory consultations from Parliamentary committees.¹³⁴ In comparison to the proposed HMT/regulator framework, these proposals are minimal; they constitute mere tweaks to the existing system.

In sum, while some of the envisaged proposals discussed above may be broadly useful, their overall thrust creates overlapping or conflicting obligations, and could risk overburdening the regulator.¹³⁵ Moreover, while adjustments to accountability mechanisms are necessary, the proposals point too far in the direction of political interference rather than, as is discussed in section 5 below, enhancing the role of Parliamentary scrutiny.

5 Developing Parliament's Oversight Role

5.1 The Creation of a Joint Parliamentary Committee

In light of the discussion above, this section examines an alternative proposal; increasing Parliamentary oversight via a new joint committee. As the article has identified, the regulator is to be placed in charge of a considerable body of regulation that can have far-reaching consequences; accordingly democratic oversight is paramount. Indeed, the earlier government consultation on the overall approach to the regulation of financial services states that 'the role of select committees...is central to the scrutiny of financial services policy by Parliament....[and an] enhanced Parliamentary focus on the key public policy issues related to financial services would improve the overall operation of the UK's regulatory framework'.¹³⁶

¹³² HMT, *Proposals for Reform* (n 1) para 5.7.

¹³³ Ibid para 21; HMT, *Financial Services and Markets Bill* (n 5) clause 36.

¹³⁴ HMT, *Proposals for Reform* para 5.15; HMT, *Financial Services and Markets Bill* (n 5) clause 36.

¹³⁵ FCA, *Written Evidence to the Treasury Committee on the Future of Financial Services* (n 70) 10.

¹³⁶ HMT, *Phase II Consultation* (n 4) paras 3.19-3.20.

There is not one ‘correct’ model of Parliamentary scrutiny, and with respect to the committee’s institutional design, options could include a standalone committee (whether in the House of Commons or House of Lords); or creating a joint committee of both Houses.¹³⁷ This section expands on these options by first examining the UK’s existing Parliamentary scrutiny arrangements for delegated legislation, and its existing specialist committees regarding the financial sector. In particular it considers the recently created House of Lords Select Committee on Regulation and Industry, and the House of Commons Treasury Committee, including its new scrutiny role as regards financial services. It then turns to permanent joint committees and considers a precedent in a different field, the permanent Joint Committee on Human Rights. Although by no means perfect, it is a proactive and highly regarded committee; it has improved the quality of legislative scrutiny and provides a key accountability mechanism for the government as regards human rights issues.¹³⁸ The section also reflects on a particular Australian model that has been mooted in the context of creating a new committee for financial regulation; the Parliamentary Joint Committee on Corporations and Financial Services. This committee has its lens directly focused on the corporate/financial arena, although can also face particular challenges, including regarding the asymmetry of information that exists between the ‘expert’ institution and the committee.

Taken together, this section suggests that there is a legitimate case for creating a new joint committee that is allocated to financial services and its regulation. Its mandate should embrace policy proposal and draft financial regulation scrutiny, as well as overseeing policy implementation and the regulator’s operational functions.¹³⁹ As discussed in section 5.3, such a committee should be cross-party and impartial; have the sufficient expertise to cover detailed aspects of financial regulation and be appropriately resourced.¹⁴⁰ Such a committee could deliver considerable benefits to the post-Brexit regulatory environment.

5.2 Existing Parliamentary Scrutiny Arrangements

5.2.1 Scrutiny of Delegated Legislation

¹³⁷ All-Party Parliamentary Group on Financial Markets & Services, *The Role of Parliament in the Future Regulatory Framework for Financial Services* (February 2021) 11.

¹³⁸ Aileen Kavanagh, ‘The Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog’ in Murray Hunt, Hayley Hooper and Paul Yowell (eds), *Parliament and Human Rights* (Bloomsbury Publishing 2015) 116.

¹³⁹ Treasury Committee, *The Future Framework for Regulation of Financial Services* (n 6) paras 85-88.

¹⁴⁰ IRSG, *Supplementary Written Evidence to the EU Financial Affairs Sub-Committee* (March 2020) 1.

In terms of the current arrangements, in general terms, there are long established scrutiny procedures, including for legislation to be debated and scrutinised according to the procedures for primary and secondary legislation.¹⁴¹ With respect to the scrutiny of delegated legislation; there is consideration of draft regulations by the House of Commons and the House of Lords. The standard procedures are known as the ‘affirmative’ and ‘negative’ procedures. In brief, around 75 per cent of secondary legislation is made via the negative procedure and becomes law unless actively voted down within a set period; and around 25 per cent is made via the affirmative procedure where both Houses must actively approve this.¹⁴²

In addition there are committees that focus on delegated legislation. These arrangements are intricate and somewhat delphic and the following discussion provides only a general overview.¹⁴³ The committee set-up includes the joint committee on statutory instruments (‘JCSI’) and the House of Lords Secondary Legislation Standing Committee (‘SLSC’). An additional House of Commons committee process for sifting drafts of Brexit statutory instruments has also been created; the European Statutory Instruments Committee (‘ESIC’), and there are various ad hoc delegated legislation committees (‘DLCs’) in the Commons that are formed to discuss new regulations.

The JCSI is a joint committee of both Houses, and the government does not have a majority on it. It has a secretariat including advisory legal counsel from both Houses,¹⁴⁴ with a focus on technical legal questions such as whether the drafting is defective or there are unjustifiable delays in publishing it or laying it before Parliament.¹⁴⁵ The SLSC is a Lords committee, on which the government does not have a majority, and is supported by a secretariat. While it has a broader remit that focuses on the policy merits of the secondary legislation,¹⁴⁶ it has been described as operating in the shadow of the JCSI.¹⁴⁷ Since 2018, the SLSC also sifts drafts of Brexit statutory instruments that are proposed to be subject to the negative procedure; the ESIC examines these in the Commons, and either committee can recommend that it be upgraded to the affirmative procedure. These recommendations are not binding although the government has to explain why it is not accepting the recommendation.¹⁴⁸ With

¹⁴¹ HMT, *Phase II Consultation* (n 4) para 3.14.

¹⁴² Institute for Government, *Secondary Legislation: How Is It Scrutinised?* (May 2020).

¹⁴³ See further e.g. Ruth Fox and Joel Blackwell, *The Devil Is in the Detail: Parliament and Delegated Legislation* (Hansard Society 2014).

¹⁴⁴ Joint Committee on Statutory Instruments, *Twenty-Ninth Report of Session 2021–22* (23 March 2022).

¹⁴⁵ House of Commons Standing Order No. 151 (2021); House of Lords Standing Order No. 74 (2021).

¹⁴⁶ House of Lords Secondary Legislation Scrutiny Committee, *34th Report of Session 2021–22* (24 March 2022).

¹⁴⁷ Adam Tucker, ‘Parliamentary Scrutiny of Delegated Legislation’ in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (2nd edn, Bloomsbury Publishing 2018) 368.

¹⁴⁸ House of Lords Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers - 16th Report of Session 2017–19* (20 November 2018) para 91.

respect to the DLCs, it has been observed that many of these do not engage in any pretence of scrutiny and meet only to pass a motion that they have met.¹⁴⁹

Be that as it may, scrutiny committees perform important functions; their 'defence of Parliament's institutional role' in the process contributes to greater transparency and democratic legitimacy.¹⁵⁰ The committees publish frequent reports and it has been argued that they positively impact the quality of regulations made by the executive.¹⁵¹ There are limits, however. The JSCI and SLSC committees do not have a power of revocation; rather, they can 'draw the attention of the House' to particular defects.¹⁵² The DLCs also only vote on a motion that the Committee has considered the instrument before it (rather than a substantive motion).¹⁵³ In any event, it has been noted that (for obvious political reasons) the House of Commons never votes against delegated legislation,¹⁵⁴ and outside the committee structures, it barely scrutinises delegated legislation at all.¹⁵⁵ Moreover, the House of Lords never exercises its power to annul instruments under the negative procedures; and is very restrained in using its power to decline to authorise instruments under the positive procedures.¹⁵⁶

With this in mind, a recent report has also suggested that there is an asymmetry between the scrutiny occurring in the Lords and the Commons. The Commons procedures were considered to be 'wholly inadequate' and that scrutiny of secondary legislation was more thoroughly undertaken in the Lords.¹⁵⁷ The Lords has also evolved elements of its procedures over the years whereas the Commons has not. In part, the inadequacy of the Commons procedures can be understood due to the multiple pressures on Members in terms of time to devote to such scrutiny, as well as the highly technical nature of the scrutiny task.¹⁵⁸ Moreover, it has been suggested that for MPs, sitting on a delegated legislation committee is regarded as a punishment where they are actively encouraged to 'turn up and do their constituency correspondence'.¹⁵⁹

¹⁴⁹ Adam Tucker (n 147) 365.

¹⁵⁰ Jack Simson Caird, *What Is the Aim of Parliamentary Scrutiny of Delegated Legislation?* (Hansard Society, April 2020).

¹⁵¹ Lorne Neudorf, 'Reassessing the Constitutional Foundation of Delegated Legislation in Canada' (2018) 41 *Dalhousie Law Journal* 520, 568.

¹⁵² E.g. House of Commons Standing Order No. 151 (2021) para 1.

¹⁵³ Adam Tucker (n 147) 366.

¹⁵⁴ Tucker is referring to 'genuine government defeat[s]' and he notes the existence of two apparent counterexamples, which involved bizarre circumstances, *ibid* (n 149) 366.

¹⁵⁵ *Ibid* 366 and 368.

¹⁵⁶ *Ibid* 369.

¹⁵⁷ House of Lords Select Committee on the Constitution (n 148) paras 95-96.

¹⁵⁸ *Ibid*.

¹⁵⁹ House of Lords Select Committee on the Constitution, *Corrected Oral Evidence: The Legislative Process* (November 2016) (Dr Ruth Fox, Question 9).

In the context of the section's broader discussion, the observations regarding the existing Parliamentary scrutiny of delegated legislation support arguments in favour of a single House of Lords approach to scrutiny. Indeed, Tucker advocates buttressing the Lords' power to scrutinise and reject delegated legislation.¹⁶⁰ Yet while this may be the case for the general arrangements which surround the oversight of delegated legislation, it is argued that a bicameral approach remains preferable regarding a specialised committee on financial services (whose mandate will embrace but also expand beyond reviewing regulatory proposals). Specifically, in line with the analysis below, the two Houses are complementary to each other, they are not in competition with each other, and a joint approach, which embraces complementary oversight procedures could improve the scrutiny process overall.¹⁶¹

5.2.2 Existing Parliamentary Scrutiny of the Financial Sector: Specialist Stand-alone Committees

5.2.2.1 House of Lords Select Committee on Industry and Regulators

As the article has identified, there are existing Parliamentary mechanisms that will continue to play important roles with respect to scrutinising the work of the FCA. In particular, select committees play a notable part. With respect to House of Lords committees (which typically do not have government majorities), the House of Lords Economic Affairs Committee has a significant body of expertise; and a relatively new House of Lords Select Committee on Industry and Regulators ('SCIR') has also recently been established. This was appointed to consider matters relating to industry, and to scrutinise the work of UK regulators and their performance (and is not limited to the financial regulators).

Focusing on the SCIR, amongst other business, it is currently examining Parliamentary scrutiny of regulators via a non-inquiry session. This is a brief package of work that can be used to, for instance, take evidence on a topical matter, and may or not result in a report.¹⁶² In this regard, during a recent session, one of the members noted that what the committee is trying to do is not to look at the high-profile issues and mistakes (where Parliament does perform well), but to 'look at the day to day' and gain a better understanding of how decisions and rules are made.¹⁶³ Further evidence which the

¹⁶⁰ Adam Tucker (n 147) 370-1.

¹⁶¹ House of Lords Select Committee on the Constitution, *Corrected Oral Evidence: The Legislative Process* (n 159) (Dr Ruth Fox, Questions 9-10).

¹⁶² House of Lords Industry and Regulators Committee, 'Non-Inquiry Work' (2022) <<https://committees.parliament.uk/committee/517/industry-and-regulators-committee/>> accessed 8 August 2022.

¹⁶³ House of Lords Industry and Regulators Committee, *Corrected Oral Evidence: (Sir Paul Tucker)* (n 50) 8.

Committee received also highlighted that the most effective committees develop effective relationships with those they are regulating; they build their expertise.¹⁶⁴ In this regard Lords committees can often have an advantage; the Lords is full of experts, and they also have a greater amount of time (compared with MPs) so they can hone in on the issues in the area they are scrutinising and ask the ‘right questions’.¹⁶⁵ Moreover, as Lords committees are less influenced by the electoral cycle than the House of Commons, they can look further forward and take the longer view.¹⁶⁶ In contrast it has been suggested that there can be sometimes more of an issue with Commons’ committees, particularly ‘if they do not appear to be focusing on what the real issues are’.¹⁶⁷

The creation of the SCIR is undoubtedly a welcome development with respect to increasing oversight regarding the work of the regulators. At the same time, the committee has a very broad mandate and its resources are likely to be too limited to engage in dedicated oversight of the financial services sector.¹⁶⁸ Indeed, the broader issue of select committees not having the time and resources to adequately oversee all the agencies has already been highlighted to the SCIR,¹⁶⁹ and Lords committees are, in general, under-resourced, particularly in relation to the policy expertise that can be drawn on.¹⁷⁰ More broadly, despite the observations that Lords committees can be effective given their expertise, it has also been suggested that many select committees require stronger incentives to do their job well. Indeed it has been posited that where a committee does a poor job overseeing an agency, it should itself come under scrutiny (such as via the financial and economic commentators in the media).¹⁷¹ While this does occur with some committees (such as the Treasury Committee overseeing the Bank of England’s monetary policy due to the impact this has on people’s mortgage and saving rates), this is not necessarily the case with other committees.¹⁷² At the same time, this could be a double-edged sword; a committee that focuses too much on its media profile could undermine both the quality and the reputation of its work.¹⁷³

¹⁶⁴ House of Lords Industry and Regulators Committee, *Corrected Oral Evidence (Dr Hannah White)* (26 April 2022) 2.

¹⁶⁵ *Ibid* 2.

¹⁶⁶ *Ibid* 22.

¹⁶⁷ *Ibid* 2.

¹⁶⁸ House of Lords European Union Committee, *Beyond Brexit: Trade in Services: 23rd Report of Session 2019–21* (24 March 2021) para 64.

¹⁶⁹ House of Lords Industry and Regulators Committee, *Corrected Oral Evidence: (Sir Paul Tucker)* (n 50) 9.

¹⁷⁰ House of Lords Industry and Regulators Committee, *Corrected Oral Evidence (Dr Hannah White)* (n 164) 10.

¹⁷¹ House of Lords Industry and Regulators Committee, *Corrected Oral Evidence: (Sir Paul Tucker)* (n 50) 21.

¹⁷² *Ibid* 7.

¹⁷³ Meghan Benton and Meg Russell, ‘Assessing the Impact of Parliamentary Oversight Committees: The Select Committees in the British House of Commons’ (2013) 66 *Parliamentary Affairs* 772, 789.

5.2.2.2 House of Commons Treasury Select Committee

As the article has discussed, the Treasury Committee is also a significant House of Commons committee with respect to scrutinising financial services, and at first glance, it appears an attractive choice as the body to engage in enhanced scrutiny of the regulators' work going forward. First, it has already taken on this new role¹⁷⁴ (with proposed commensurate increases to its capacity and resources) and is reinforcing its technical expertise in order to perform this oversight. Specifically, a new Financial Services Scrutiny Unit is being established, which is to include financial specialists, staff members, and a legal adviser from the Office of Speaker's Counsel (which provides legal advice to the Speaker, the Clerk, and all departments of the House). The Committee will also have the ability to appoint Special Advisers to provide detailed and expert knowledge.¹⁷⁵ It has also established a dedicated sub-committee to take the lead on scrutinising regulatory proposals. Indeed, arguably the Treasury Committee has an advantage over a new committee as it is not starting from scratch. Further, although it is a political forum, this charge can be levied at any Parliamentary committee.

Yet at the same time, it has been suggested that select committees can be less successful when there are 'deeply entrenched problems' and that regulators can lock down into defensiveness and not engage properly.¹⁷⁶ Moreover, even with a dedicated sub-committee on financial services (and the proposed increases to its capacity and resources), as discussed earlier in the article, concerns remain about (particularly Commons') committees having sufficient time and resources to adequately perform their scrutiny role. Indeed, there already considerable demands and pressures on MPs' time. Further, all members of the Treasury Committee have been initially appointed as members of the sub-committee (which will be chaired by the main committee's chair), and as the government has a majority on this committee (membership of Commons' select committees is, by convention, broadly proportional to party balance so if the government has a majority in the chamber it will also have a majority on each select committee)¹⁷⁷ it can be questioned whether this could risk resulting in a 'government-friendly' approach.¹⁷⁸

On the one hand, it is indisputable that the Treasury Committee should continue to play an important role in the field of financial services oversight. Specifically, as discussed earlier in the article, the

¹⁷⁴ Treasury Committee, *Future Parliamentary Scrutiny of Financial Services Regulations* (n 78).

¹⁷⁵ Ibid at 8.

¹⁷⁶ House of Lords Industry and Regulators Committee, *Corrected Oral Evidence: (Sir Paul Tucker)* (n 50) 6.

¹⁷⁷ Meg Russell and Meghan Benton, *Selective Influence: The Policy Impact of House of Commons Select Committees* (UCL, the Constitution Unit, June 2011) 11.

¹⁷⁸ Lorne Neudorf, *Response to Parliamentary Scrutiny of Delegated Legislation Inquiry* (31 January 2019) 5.

Treasury Committee can be particularly valuable when there is a problem; they can ‘help to bring salience to issues that they think ought to be salient’, and, as discussed earlier in the article, when something goes wrong, they can generate public debate and advance proposals about what should be done.¹⁷⁹ However, this section suggests that the Treasury Committee should play a complementary role to that of a new joint committee. Indeed, as sections 5.2.3 and 5.2.4 identify, a joint committee could draw on the wealth of expertise and experience from both Houses and could supplement the existing work of the Treasury Committee.¹⁸⁰ Indeed, the Treasury Committee has itself acknowledged that joint working may be the most appropriate vehicle for scrutiny (albeit limiting this to ‘some contexts’).¹⁸¹ Given this, before considering the institutional design of a new joint committee, it is pertinent to turn to examine another joint committee structure that exists in the UK system, the Joint Committee on Human Rights, as well as considering a relevant specialist comparative model, the Australian Joint Committee on Corporations and Financial Services.

5.2.3 Specialist Joint Committees

5.2.3.1 Joint Committee on Human Rights

Specialist permanent joint committees are not a new phenomenon in the UK. The Joint Committee on the National Security Strategy was first established by the 2005-2010 Parliament,¹⁸² and the Joint Committee on Human Rights (‘JCHR’) came into being in January 2001.¹⁸³ This section focuses on the JCHR and suggests that there are valuable lessons that can be drawn from this model when reflecting on the institutional design of a new joint committee in section 5.3.

The JCHR is a cross-party committee consisting of 12 members appointed by both the House of Lords and the House of Commons (a maximum of six from each House), with the membership broadly reflecting the party-political composition of each House. In this regard, Kavanagh observes that this has generally meant that there is no government majority on the committee. Moreover the Chair does

¹⁷⁹ House of Lords Industry and Regulators Committee, *Corrected Oral Evidence: (Sir Paul Tucker)* (n 50) 5.

¹⁸⁰ Barclays, *Written Evidence Submitted to the Treasury Committee* (February 2021) (also noting that this would also closely mirror the committee system for financial services that is used in the US (with both the Senate and House Banking Committees scrutinising financial regulation.)

¹⁸¹ Treasury Committee, *Future Parliamentary Scrutiny of Financial Services Regulations* (n 78) para 27.

¹⁸² UK Parliament, ‘Role - Joint Committee on the National Security Strategy’ <<https://committees.parliament.uk/committee/111/national-security-strategy-joint-committee/role/>> accessed 10 August 2022.

¹⁸³ Robert Hazell, ‘Who Is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?’ [2004] Public Law 495, 497.

not have to be a member of the governing party,¹⁸⁴ and the Lords committee has the power to agree with the Commons in the appointment of a chair.¹⁸⁵ In terms of its mandate, the committee is appointed to examine matters relating to human rights in the UK and to scrutinise every government Bill for its compatibility with human rights.¹⁸⁶ It can also conduct thematic inquiries where the JCHR chooses its own subjects of inquiry. It has the power to request the submission of written evidence and documents, to examine witnesses, to meet at any time, to appoint specialist advisers, and to make reports to both Houses.

The work is intensive, and in 2004, Hazell reported that the committee was considered to have had a 'significant impact' and that the systematic and careful approach to scrutiny by the JCHR had 'helped to focus the minds of Ministers and officials on human rights issues'.¹⁸⁷ More recent scholarship also suggests the JCHR continues to play a significant role; it improves the quality of legislative scrutiny (at least to some degree); and provides an important accountability mechanism for the government within Parliament.¹⁸⁸ Attention to the committee's reports has also increased since the JCHR's inception and these are now widely cited and discussed in the context of Parliamentary debate. Nevertheless in line with analysis earlier in this section, it has also been suggested that the quantity and possibly the quality of engagement with JCHR reports is far greater in the unelected House of Lords than in the democratically elected House of Commons.¹⁸⁹ This could be to do with the affinity between the scrutinising function of the JCHR and the Lords' role as a revising and scrutinising body; or due to the expertise available in the Lords.¹⁹⁰ A further factor could also be the less partisan nature of the Lords.¹⁹¹ Indicating the importance of the chair to the committee's effectiveness, it has also been noted that the election of the Labour MP, Harriet Harman, as the chair in 2015 resulted in notable changes to the committee. There was an increased focus on thematic inquiries and regular

¹⁸⁴ Aileen Kavanagh 117. Kavanagh also notes however that as the Committee of Selection (which allocates positions on select committees) is dominated by the party whips (who arrange the business of Parliament amongst other duties), this can create the concern that the government tries to control appointment to these key positions.

¹⁸⁵ Joint Committee on Human Rights, *Human Rights Act Reform: Thirteenth Report of Session 2021–22* (March 2022).

¹⁸⁶ UK Parliament, 'Human Rights (Joint Committee)' (2022) <<https://committees.parliament.uk/committee/93/human-rights-joint-committee/>> accessed 10 August 2022.

¹⁸⁷ Robert Hazell (n 183) 498.

¹⁸⁸ Aileen Kavanagh (n 184) 116.

¹⁸⁹ *Ibid* 133.

¹⁹⁰ *Ibid* 133.

¹⁹¹ Alexander Horne and Megan Conway, 'Parliament and Human Rights' in Alexander Horne and Gavin Drewry (eds), *Parliament and the Law* (2nd edn, Bloomsbury Publishing 2018) 246.

evidence sessions and a recognition that it was possible to combine thematic inquiries with legislative amendments.¹⁹²

While the cross-party nature of the committee can bring constraints where views are divided on the politics through which the human rights frameworks are viewed, it can also lead to compromise.¹⁹³ This is in line with observations that the JCHR generally acts in a consensual, cooperative, and non-partisan manner.¹⁹⁴ The JCHR also directly employs its own legal advice, and tends to be regarded as more independent than most Commons' committees.¹⁹⁵ Indeed, it has been opined that joint committees of both Houses tend to operate with a 'lower degree of partisanship than other select committees'.¹⁹⁶ Feldman also identifies that the high level of cross-party consensus can be partly to do with the fact that specialist committees can attract people whose interest in the subject-matter overrides (for that purpose) party allegiance, which is usually more dominant.¹⁹⁷ In contrast, as observed in section 5.2.2.2 above, by their nature, Commons select committees tend to reflect the composition of the Commons, generally resulting in a government majority for most committees.¹⁹⁸

Be that as it may, a number of constraints have been highlighted that limit the committee's effectiveness. Specifically, there can be a 'failure by some in government to take committees sufficiently seriously'.¹⁹⁹ Moreover, occasions have been identified where the whips (members appointed by each party to help organise their party's contribution to Parliamentary business)²⁰⁰ have not ensured the JCHR's membership has been maintained adequately. Indeed, maintaining the quorum necessary for a formal meeting became difficult on the Commons' side near the end of the 2010-15 Parliament and this heavily impacted on the committee's work.²⁰¹ On a theme highlighted earlier in this section, the committee is also limited by time and staff resources; its work is vast and intensive and its broad remit means its impact may be lessened.

¹⁹² Ibid 265.

¹⁹³ Ibid 263.

¹⁹⁴ Aileen Kavanagh (n 184) 118.

¹⁹⁵ Ibid 118.

¹⁹⁶ Joint Committee on Human Rights, *The Committee's Future Working Practices: Twenty-Third Report of Session 2005–06* (2006) Appendix 1, para 5.8.

¹⁹⁷ David Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] Public Law 323, 327.

¹⁹⁸ Aileen Kavanagh (n 184) 118.

¹⁹⁹ Meg Russell and Meghan Benton (n 177) 8.

²⁰⁰ UK Parliament, 'Whips' (2022) <<https://www.parliament.uk/about/mps-and-lords/principal/whips/>> accessed 10 August 2022.

²⁰¹ Alexander Horne and Megan Conway (n 191) 262.

Yet despite the various challenges, it is clear that there are many areas where the committee has provided added value. For instance, the JCHR often identifies legal difficulties in legislation that can be dealt with relatively efficiently in the House of Lords.²⁰² In addition, the committee can provide an important forum for Parliamentary debate; and while this does not always result in immediate change, it nevertheless obliges the government to enter into a dialogue with the committee.²⁰³ More broadly, it has been argued that the JCHR can act as ‘agents of political constitutionalism’, providing democratic legitimacy to human rights discourse which would otherwise only take place amongst interested non-governmental organisations and stakeholders.²⁰⁴ Finally, Kavanagh observes that while there is still a long way to go in enhancing Parliamentary scrutiny, there is now more rigorous and evidence-based Parliamentary debate than used to be the case. Moreover the JCHR engages in its work assiduously, is neither complacent nor sanguine about the nature of its task and deserves credit for helping Parliament take steps in the right direction.²⁰⁵

Taken together, there are a number of features that are pertinent to the creation of a new joint committee on financial services. In particular, the cross-party model with no government majority (and not necessarily with a governing chair) can encourage an environment of consensus, compromise, and non-partisanship. Indeed, the significance of the chair in driving forward a functional and proactive committee should not be underestimated. In addition, providing the committee with its own legal advice and expertise would be particularly valuable for a joint committee engaged in the intricate scrutiny of regulatory proposals. Specifically, the availability of detailed legal knowledge that is independent of the government would assist in helping MPs understand the legal complexities and would strengthen their ability to scrutinise proposals in a meaningful way.²⁰⁶

5.2.3.2 Australian Parliamentary Joint Committee on Corporations and Financial Services

In Australia, regulators are accountable to Parliament through the Parliamentary committee system; this allows Parliamentarians to question regulators and the government about the broad range of their activities (such as the making of policy or regulation, to administering the law and its enforcement).²⁰⁷ Bird notes that Parliamentary committees are generally specialised; this allows them

²⁰² Ibid 264.

²⁰³ Ibid 264.

²⁰⁴ Ibid 265.

²⁰⁵ Aileen Kavanagh (n 184) 139.

²⁰⁶ Ibid 129.

²⁰⁷ Joanna Bird (n 68) 750.

to be directed and informed in their scrutiny and to consider matters in detail.²⁰⁸ Accordingly, within this section's discussion of joint committees, a further useful comparative illustration is the Australian Parliamentary Joint Committee on Corporations and Financial Services (the 'JCCFS'). The JCCFS monitors and reviews activities of the Australian Securities and Investments Commission ('ASIC'), the Takeover Panel, and the operations of corporations legislation.²⁰⁹ The committee consists of ten members, five from each House (the Senate is one of the two Houses of the Federal Parliament which represents the states and territories; the other House, the House of Representatives represents the electoral divisions). The government does not have a majority on the committee although it is chaired by a government member. It is supported by a secretariat (currently comprised of two research officers, an administrative officer and a committee secretary).²¹⁰

Its duties set out in statute,²¹¹ and include examining ASIC's (and other relevant bodies') annual reports and periodically reporting to Parliament regarding such matters. It also engages in inquiries into specific policy matters (either referred by one of the Houses, or a self-referred inquiry); for instance its 2021 self-referred inquiry into mobile payment and digital wallet financial services advocated (amongst other aspects) updating legislation to ensure it was as 'technology-neutral' as possible.²¹²

Focusing on ASIC, the committee holds regular public oversight hearings (for instance, between 2019-2022, 13 oversight hearings took place).²¹³ The findings are reported to Parliament,²¹⁴ and cover issues ranging from ASIC's governance framework;²¹⁵ to audit quality; and gatekeepers in the financial services system.²¹⁶ Its February 2019 report referenced a key Royal Commission report into Misconduct in the Banking, Superannuation and Financial Services Industry ('Royal Commission') that

²⁰⁸ Ibid 751.

²⁰⁹ Parliament of Australia, 'Parliamentary Joint Committee on Corporations and Financial Services' (2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services> accessed 11 April 2022.

²¹⁰ Joint Committee on Corporations and Financial Services, *Report on the 2020–2021 Annual Reports of Bodies Established under the ASIC Act* (February 2022) at iii.

²¹¹ Australian Securities and Investments Commission Act 2001, section 243.

²¹² Joint Committee on Corporations and Financial Services, *Mobile Payment and Digital Wallet Financial Services* (October 2021).

²¹³ Joint Committee on Corporations and Financial Services, *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation: No.1 of the 46th Parliament* (March 2022), Appendix 2.

²¹⁴ E.g. Joint Committee on Corporations and Financial Services, *Statutory Oversight of ASIC, the Takeovers Panel and the Corporations Legislation: Report No. 1 of the 45th Parliament* (February 2019).

²¹⁵ Joint Committee on Corporations and Financial Services, *Oversight of ASIC, the Takeovers Panel and the Corporations Legislation: No.1 of the 46th Parliament* (n 213) chapter 2.

²¹⁶ Joint Committee on Corporations and Financial Services, *Statutory Oversight of ASIC, the Takeovers Panel and the Corporations Legislation: Report No. 1 of the 45th Parliament* (n 213) para 1.7.

documented a range of misconduct across financial services that had affected hundreds of thousands of consumers.²¹⁷ Of particular relevance to this section's analysis is the report's discussion of JCCFS as the primary external oversight body of ASIC, whilst also being mindful of the limitations of Parliamentary oversight. Indeed, in line with this section's earlier observations, these limits include the amount of time that could be devoted to a particular topic; the time available to committee members to prepare for hearings; and the training, skill and experience of members, who will sometimes need to review and assess complex information on matters of expertise.²¹⁸ It was also suggested (by the ASIC Chair) that the arrangements for Parliamentary scrutiny could be improved, including through the development of benchmarks (frameworks, metrics and methodologies) against which ASIC's performance could be measured.²¹⁹

Given the size and importance of ASIC's remit, the Royal Commission also recommended that a new independent expert oversight body be established; and this has resulted in the recent establishment of the Financial Regulator Assessment Authority ('FRAA').²²⁰ The JCCFS welcomed its establishment, and more broadly there have been very early murmurings regarding the creation of a similar body in the UK.²²¹ While detailed consideration of such a UK body is beyond the scope of this article, recent scholarship, which focuses on FRAA as regards regulatory capture concerns, suggest that its benefits should include enhanced accountability and the increased assurance of the regulator's independence.²²² Indeed, on the basis of Schmulow et al's research, the proposed central role of the Treasury in running FRAA has been removed, which is encouraging as regards FRAA's independence from government.²²³ Be that as it may, the authors also note that other deficiencies were not rectified (both as regards the legislative provisions and the way the entity is conceived) and that FRAA's success is not guaranteed.²²⁴ Certainly, the introduction of such an entity should be complementary to existing

²¹⁷ Kenneth M Hayne, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Final Report* (January 2019) volume 1.

²¹⁸ *Ibid* 472-3.

²¹⁹ *Ibid* 473.

²²⁰ Australian Government, 'Financial Regulator Assessment Authority' (2022) <<https://fraa.gov.au/>> accessed 15 August 2022.

²²¹ Transparency Task Force, *Proposal to Introduce the Financial Regulator's Supervisory Council* (June 2022), referenced in Andrew Schmulow, Paul Mazzola and Daniel de Silva, 'Twin Peaks 2.0: Avoiding Influence over an Australian Financial Regulator Assessment Authority' (2021) 4 *Federal Law Review* 505, 513.

²²² Andrew Schmulow, Paul Mazzola and Daniel de Silva (n 221) 527.

²²³ Andrew Schmulow, Paul Mazzola and Daniel de Silva, 'Combatting Regulatory Capture: Australia's New Financial Regulator Assessment Authority—a Regulator to Regulate the Regulator' (February 2022) <<https://www.law.ox.ac.uk/business-law-blog/blog/2022/02/combatting-regulatory-capture-australias-new-financial-regulator>> accessed 15 August 2022.

²²⁴ Andrew Schmulow, Paul Mazzola and Daniel de Silva, 'Twin Peaks 2.0: Avoiding Influence over an Australian Financial Regulator Assessment Authority' (n 221) 527.

accountability mechanisms; and is not a substitute for the public accountability of regulators via elected representatives.²²⁵

Taken together, the JCCFS is a useful model to reflect on; it is a specialist joint committee drawn from both Houses, although compared with the oversight role that will be required of a future UK oversight committee, the JCCFS's mandate is more confined. Bird suggests that the knowledge that actions will be subject to intense public scrutiny through the Parliamentary committee system generates incentives for the regulator to ensure its actions are 'justifiable and explicable'.²²⁶ Moreover, as discussed above, Parliamentary committees can question regulators about all activities across their mandate (rather than simply in relation to ensuring accountability for particular decisions).²²⁷ Nonetheless, the same drawbacks discussed earlier in this section, including as regards time, resources and relevant expertise have been identified. Indeed, there are clear challenges regarding asymmetric information; the expert regulators possess more knowledge than the oversight committee. Certainly, although Parliamentary committees tend to be specialised and can develop a level of technical knowledge and expertise, they are rarely able to develop the same level of expertise as the regulator itself.²²⁸

In this regard, there is relevant cognate scholarship examining the EU's supranational Committee on Economic and Monetary Affairs' ('ECON') ability to hold the European Central Bank ('ECB') accountable for decisions regarding the Eurozone's Single Supervisory Mechanism ('SSM'). In brief, ECON is a dedicated European Parliament standing committee for financial services. It was designed taking account of the specific circumstances of the EU's framework that has to take account of, and balance the interests of, the Member States and is built on compromise.²²⁹ While it is not proposed to replicate the ECON model at the UK level where there a materially different system in operation, the scholarship relating to ECON's ability to hold the ECB accountable contains informative aspects with respect to a future committee's design.

In general terms, the SSM creates prudential supervision arrangements for the Eurozone area and is overseen by the ECB.²³⁰ Recent analysis, examining Parliamentary questions and answers between the

²²⁵ Hansard Transcript, *Oversight of ASIC and the Takeovers Panel* (September 2019) 2.

²²⁶ Joanna Bird (n 68) 751.

²²⁷ Ibid 751.

²²⁸ Ibid 751.

²²⁹ Treasury Committee, *The Future Framework for Regulation of Financial Services* (n 6) 19-20.

²³⁰ E.g. Fabian Amttenbrink and Menelaos Markakis, 'Towards a Meaningful Prudential Supervision Dialogue in the Euro Area? A Study of the Interaction between the European Parliament and the European Central Bank in the Single Supervisory Mechanism' (2019) 44 *European Law Review* 3.

ECB and ECON during 2013 to 2018 found that Members of the European Parliament ('MEPs') asked many questions but that, due to the ECB legal framework (which imposes confidentiality requirements regarding decisions on supervised banks), the oversight was focused predominantly on requests for information and the justification of conduct. It also found that the ECB was open to explaining its decisions and justifying its conduct but rarely agreed to policy changes.²³¹ Essentially there is an imbalance exists between the committee's expertise and the institution they are supposed to hold accountable.²³² Be that as it may, the continuity of membership of ECON tempers this to an extent; a former chair of the committee suggests that the 'amount of knowledge among the committee members, not just the advisors, is phenomenal'.²³³ Moreover, policy recommendations that have been advocated to improve the European Parliament's accountability performance include ensuring the MEPs receive expert guidance on policy issues relevant to legislative oversight.²³⁴

5.3 Design Choices

The consideration of these various models offers useful guidance for the institutional choices involved in creating such a committee in the UK. No framework will be perfect and, as witnessed with the illustrations explored above, the broader political and legal environment may also affect a committee in practice, including regarding the informal interactions with those they are overseeing.²³⁵ In this regard, an important aspect will be the relationship that the scrutiny body manages to develop with the regulator over time. In particular, where there is respect and understanding for each other's roles (rather than this being a combative association), the Parliamentary oversight model has the potential to have a significant effect on the scrutinised body.²³⁶

In relation to creating a joint Parliamentary committee that has a mandate focused on financial services and its regulation, the article suggests that there are considerable merits to a joint committee structure with expertise drawn from both Houses. As witnessed with the JCHR, this format has been utilised successfully in the past in the UK and is also adopted in specialist comparative models. Ideally, it would be valuable for there to be a degree of permanence of the committee; this facilitates the building up of expertise; and enables there to be consistency in what the committee does over time.²³⁷

²³¹ Adina Akbik, *The European Parliament as an Accountability Forum* (Cambridge University Press 2022), chapter 4, 71.

²³² Ibid 96.

²³³ House of Lords Industry and Regulators Committee, *Corrected Oral Evidence (Dr Hannah White)* (n 164) 9.

²³⁴ Adina Akbik (n 231) 191-2.

²³⁵ Lorne Neudorf, *Response to Parliamentary Scrutiny of Delegated Legislation Inquiry* (n 178) 9.

²³⁶ House of Lords Industry and Regulators Committee, *Corrected Oral Evidence (Dr Hannah White)* (n 164) 2.

²³⁷ Ibid 8-9.

It would also be preferable for the committee's membership to be cross-party and apolitical in its mandate and operation.²³⁸ These aims could be furthered by it not having a governmental majority. While to be politically acceptable, it may be that a government member chairs the committee, in line with the JCHR, it would be beneficial for the Lords to have the power to agree with the Commons on the chair's appointment. Scrutiny of regulation would be both *ex ante* with respect to draft texts, drawing on expert analysis, and the input of stakeholders, as well as there being *ex post* reviews regarding the impact of regulations.²³⁹ With respect to holding the regulator accountable, in line with the recommendations regarding improving the JCCFS's oversight of ASIC, establishing a set of benchmarks against which the FCA's work could be objectively measured would be valuable. Committees that are pro-active and effective in their work also meet frequently and provide strong levels of transparency. This includes publishing communications with those they are overseeing; holding regular public hearings and inquires; and publishing reports to Parliament. Committees that are effective in their accountability work also seek to evaluate their own work and to learn from their successes and failures.²⁴⁰

With respect to a specialist financial services committee, one particular challenge is to tackle the problem of asymmetric information. In addition to providing for a degree of permanence regarding the committee membership, it will be necessary to ensure it receives sufficient expert guidance to act as an effective accountability forum in a dynamic and technically complex field.²⁴¹ This connects to ensuring that the committee is sufficiently resourced with an expert core staff in relation to financial regulation. In this regard, drawing on the JCHR as a precedent, providing the committee with its own legal advice would be sensible, not least when reflecting on the complex nature of the proposals the committee will be examining. While this is an aspect with notable cost implications, evidence submitted to the House of Lords suggests that the budget it takes to run Parliament is the same as administering a mid-sized government department; accordingly, it is not unreasonable for there to be greater resources allocated to aid Parliamentary scrutiny.²⁴² Certainly, such a committee will fail to operate constructively without appropriate expertise and support, and this should include developing a network of independent experts to be consulted in relation to specific questions or projects.²⁴³ At

²³⁸ IRSG, *Supplementary Written Evidence to the EU Financial Affairs Sub-Committee* (n 140) 1.

²³⁹ Treasury Committee, *The Future Framework for Regulation of Financial Services* (n 6) 23.

²⁴⁰ Lorne Neudorf, 'Strengthening the Parliamentary Scrutiny of Delegated Legislation: Lessons from Australia' (2019) 42 *Canadian Parliamentary Review* 25, 29.

²⁴¹ Adina Akbik (n 231) 190-192.

²⁴² House of Lords Industry and Regulators Committee, *Corrected Oral Evidence (Dr Hannah White)* (n 164) 10.

²⁴³ IRSG, *Supplementary Written Evidence to the EU Financial Affairs Sub-Committee* (n 140) 4.

the same time, an important balance must be found; staff expertise and continuity is vital but the regulator must be confident that there is democratic legitimacy behind the scrutiny.²⁴⁴

6 Conclusion

The UK's exit from the EU results in greater powers being transferred from Brussels to the UK's regulators and this needs to be accompanied by an appropriate set of checks and balances on the FCA. It is not a straightforward task to pin down a 'correct' accountability framework and it is also unlikely that there is one 'right account' of the FCA.²⁴⁵ Indeed, as this article has illustrated, the regulator already operates in a multiple-principal environment and is subject to a range of oversight mechanisms, including constitutional and legal avenues, as well as broader accountability to the supervised industry and the public at large. Although the current system is not perfect, it likely strikes a sensible balance between independence and accountability. Moreover, the current governmental proposals are complex and could risk overburdening the regulator. In terms of accountability measures, they may also shift the dial too far in favour of the HMT/regulator relationship, which could risk further impeding on the regulator's relative independence.

The article argues that, rather than developing the HMT/FCA relationship, additional accountability mechanisms should enhance Parliament's role in scrutinising the unelected regulator. Specifically, Parliament should be a key part of the checks and balances on the FCA going forward. In order for there to be permanent oversight of the FCA's work, and via reflections on existing models, it advocates a permanent joint committee drawn from both Houses of Parliament with a mandate focused on financial services and its regulation. For such a committee to operate successfully, it will require a high level of technical support via an expert core staff to assist in tackling the challenges of asymmetric information. This could include the committee drawing on specialist advisory networks where required. Overall, strengthening Parliament's institutional capabilities could deliver significant benefits to the UK's new regulatory environment; particularly if a new joint committee seeks to build an effective relationship with the regulator, whilst not being afraid to flex its muscle.

²⁴⁴ House of Lords Industry and Regulators Committee, *Corrected Oral Evidence (Dr Hannah White)* (n 164) 10.

²⁴⁵ LSE Systemic Risk Centre, *Rebooting UK Financial Regulation for a Post-Brexit World* (9 February 2021).