

International Competitiveness and Financial Regulators' Mandates: Coming Around Again in the UK

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ABSTRACT

Using post-Brexit regulatory freedom to strengthen the financial sector has been seen as a priority for the UK government under the Conservative Party following the 2017 general election. The laying before Parliament of the Financial Services and Markets Bill (July 2022) marked the start of a multi-year process aiming to transform the regulatory framework. Adding a competitiveness and growth secondary objective to regulatory mandates was an important part of the reform agenda set out in the Bill.

This article draws on theory (regulatory competition, regulatory procyclicality, and regulatory design) and recent history (post 2008-crisis regulatory reform) to question the wisdom of reinstating international competitiveness in regulatory mandates in this way. The key concern is that this change risks opening the door to an excessively deregulatory agenda and the undermining of regulatory independence. That the new competitiveness and growth objective will be used to advance deregulatory agenda was already becoming evident during 2022 as the UK debated the adaptation and evolution of EU-derived prudential and capital market laws to suit its new situation.

Since the competitiveness and growth objective bandwagon may have become unstoppable, the article directs attention to the role of accountability in protecting regulatory independence. Regulators need to be able to resist pressure to lower standards unduly, and an effective system of accountability can support them in doing so.

KEYWORDS: financial regulation; Brexit; international competitiveness; Financial Services and Markets Act (2000) and Bill (2022); competitiveness and growth objective; supervisory independence/accountability

I. INTRODUCTION

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In 2006 the then Director of Enforcement of the UK financial regulator gave a speech at Fordham Law School under the title 'Nobody Does it Better?'.¹ The interrogation mark at the end was the speaker's addition to the title of a song by singer-songwriter Carly Simon and the speaker went on to answer the question with an emphatic affirmative: the UK was indeed leading the world in financial regulation by following a philosophy of 'light touch' regulation and not being enforcement-led. The timing of the speech was unfortunate given the scale of the crisis to come in 2008 and the extent to which the UK's approach to financial regulation was implicated in that failure. It may be tempting fate therefore to return to the Carly Simon songbook but another of her classics 'Coming Around Again' is irresistible because recent pronouncements seem to take us back to what was the mainstream way of thinking, before the 2008 financial crisis, about the relationship between regulation and international competitiveness. Lightening the regulatory burden² and cutting red tape,³ shaping regulation by reference to industry's input and advice,⁴ and leaving higher than baseline standards to the markets to negotiate⁵ are all back in vogue.

Against the backdrop of the worst cost of living crisis in living memory, the worthy political aspiration to maintain and grow a strong financial sector that serves as the engine of a vibrant economy in the interests of communities and citizens assumes greater salience.⁶ In such circumstances, we might briefly be tempted to tolerate policymakers throwing caution to the winds in pursuit of critical societal benefits. In such circumstances, doing 'whatever it takes' to boost a key business sector has obvious appeal; against such a dire economic and fiscal background and in the absence of immediate warning signs, who could object to asking regulators to assume an objective giving them some direct responsibility for international competitiveness? However, reflection should remind us that choices made now could have ramifications for decades to come and that regulatory design is always at risk of being distorted to fit short-term political agenda.⁷ As Calomiris and Haber have observed, the design of financial regulation involves 'choices made by politicians, and in making those choices they are generally motivated by maximizing what is good for their own short-run political futures, not what is socially desirable in the long run'.⁸

The central focus for the concern explored in this article is clause 24 of the Financial Services and Markets Bill 2022 (FSM Bill), introduced into Parliament in July 2022. This clause aims to add a competitiveness and growth objective to the objectives of the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA): ie facilitating the international competitiveness and growth in the medium to long term of the UK economy subject to alignment with international standards. Clause 24 will not just reverse a change made after the financial crisis but will bring international competitiveness back into the regulatory mandate in a stronger form by making it an objective rather than a mere principle to which regulators are expected to have regard. Driving the return of international competitiveness in this strong form

¹ Margaret Cole, 'The U.K. FSA: Nobody Does It Better?' (2007) 12 *Fordham Journal of Corporate & Financial Law* 259.

² Prime Minister's Office, 'The Queen's Speech 2022: Background Briefing Notes' (10 May 2022) 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1074113/Lobby_Pack_10_May_2022.pdf>.

³ *Ibid* 55.

⁴ John Glen MP, 'Keynote' (Speech by Economic Secretary to the Treasury, Innovate Finance Global Summit, 4 April 2022) <www.gov.uk/government/speeches/keynote-speech-by-john-glen-economic-secretary-to-the-treasury-at-the-innovate-finance-global-summit>.

⁵ Clare Cole, 'The FCA's Second Phase of Reform of the Listing Rules: Increasing Transparency and Encouraging More Market Participation' (Speech by FCA Director of Market Oversight, Regulation of Listed Companies Summit, 15 June 2022) <www.fca.org.uk/news/speeches/listing-rules-increasing-transparency-encouraging-market-participation>.

⁶ HM Treasury, 'A New Chapter for Financial Services' (July 2021) 2. City of London and HM Treasury, 'State of the Sector: Annual Review of UK Financial Services 2022' (July 2022) 10 provides some key statistics: 2.3 million jobs, £100 billion total tax contribution; £10 of every £100 of UK economic output <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092788/State_of_the_sector_annual_review_of_UK_financial_services_2022.pdf>.

⁷ George J Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics and Management* 3.

⁸ Charles W Calomiris and Stephen H Haber, *Fragile by Design* (Princeton University Press 2015) 483.

are two forces coming from opposite directions: on the one hand, anxiety that the UK is losing ground in this sector internationally and needs to try harder to attract financial market business and, on the other, optimism that there are great opportunities to be gained provided the UK adopts the right mindset. These forces have brought the two main political parties on either side of the house in the Westminster Parliament to a broad consensus that enabling the financial services sector to thrive is key to surviving a difficult period⁹ and that making Brexit work by using regulatory freedoms to redesign financial regulation is in the UK's best interests.¹⁰ While it is normally the currently governing Conservative party that is associated with pro-business policies, the Conservative leadership travails during 2022 gave the opposition Labour Party an opportunity to burnish its own business credentials that it did not hesitate to exploit.¹¹

The groundswell of political opinion in favour of clause 24 was evident in the parliamentary scrutiny of the FSM Bill in the House of Commons, which was concluding at the time of finalization of this article (end November 2022). This scrutiny process revealed significant cross-party support for clause 24 as drafted.¹² To the extent that there was disagreement, it came mostly from Conservative Members of Parliament and expert witnesses from the financial services sector who would have liked clause 24 to go even further—that is, for it to be a *primary* (rather than secondary) objective to *promote* (rather than merely facilitate) competitiveness.¹³ A slightly more diverse range of political views may emerge when scrutiny process moves to the House of Lords but it is very unlikely that further parliamentary discussion will materially impede clause 24's progress onto the statute books.

This article thus swims against the tide of prevailing opinion among politicians and the industry about making international competitiveness a regulatory objective, but the view presented here is not wholly idiosyncratic. From the scholarly community, distinguished economists have questioned the wisdom of what is now clause 24,¹⁴ their views being encapsulated in the invocation of Paul Krugman's pithy warning that 'a government wedded to the ideology of competitiveness is as unlikely to make good economic policy as a government committed to creationism is to make good science policy'.¹⁵ Civil society groups have also expressed concern that a new competitiveness objective could lead to a lowering of standards, an erosion of regulatory independence and even a potential threat to climate transition.¹⁶ UK regulators have charted a careful course between advising against ideas that they consider unwise and not holding out against the clear view of democratically elected politicians. In 2019, when he was

⁹ This broad consensus is evident from statements by the Labour Shadow Treasury Minister, Tulip Siddiq MP in the FSM Bill parliamentary scrutiny process: Public Bill Committee, PBC (Bill 146) 2022–23, 87 <https://publications.parliament.uk/pa/bills/cbill/58-03/0146/PBC146_FinServMarketsBill_1st10th_Compilation_04_11_2022.pdf>.

¹⁰ Ibid.

¹¹ For example, the Labour leader describing Labour as 'Not just a pro-business party but a party that is proud of being pro-business' in a prominent speech to business leaders: Keir Starmer MP, 'Speech' (Confederation of British Industry Conference 2022, 22 November 2022) <<https://labour.org.uk/press/keir-starmer-speech-to-the-confederation-of-british-industry-conference-2022>>.

¹² Siddiq (n 9) 155.

¹³ eg Craig Tracey MP (Conservative Party), 'PBC (Bill 146)' (n 9) 154; Charlotte Clark (Director of Regulation at the Association of British Insurers) ibid 27. This idea had also surfaced in previous parliamentary scrutiny processes: House of Lords European Affairs Committee, 'The UK–EU Relationship in Financial Services' (1st Report of Session 2022–23, HL Paper 21) para 148, quoting Michael Dobson (Schroders) and Lord Hill (former European Commissioner for Financial Services). However, there was also powerful opposition to the idea of a primary objective, eg House of Commons Treasury Committee, 'Future of Financial Services Regulation' (1st Report of Session 2022–23, HC 141, June 2022) para 74. Sentiment has settled on a secondary objective.

¹⁴ Letter to HM Treasury <<https://financeinnovationlab.org/wp-content/uploads/2022/05/Economists-Competitiveness-Letter-16-May-22-Final.pdf>>. The signatories included Professors Anat R Admati, Martin Hellwig, Sir John Kay, Joseph E Stiglitz, and Adam Tooze.

¹⁵ Paul Krugman, 'Competitiveness: A Dangerous Obsession' (1994) 73(2) *Foreign Affairs* 28.

¹⁶ Civil Society Joint Statement, 'Future Regulatory Framework for Finance' <<https://financeinnovationlab.org/wp-content/uploads/2022/02/FRF-CSO-Joint-Statement-2022.pdf>>. Signatories included Greenpeace, New Economics Foundation, and Transparency International UK.

the head of the Financial Conduct Authority (FCA), Andrew Bailey, now Governor of the Bank of England, famously recalled that international competitiveness had been in the regulatory mandate before the 2008 financial crisis 'and it didn't end well, for anyone'.¹⁷ However, with clause 24 clearly commanding cross-party parliamentary support, the official regulatory position has shifted: regulators, who cannot ultimately resist the will of Parliament, have accepted that they have to be ready to use powers conferred on them but they have stressed that they will still take care to avoid taking steps that might support short-term economic activity at the expense of financial stability and long-term economic prosperity.¹⁸ Speaking of what was to become clause 24, Charles Randall, the outgoing head of the FCA, emphasized the importance of the *secondariness* of the objective and noted that:

I don't think that we can achieve long term economic growth if we put the interests of the financial services industry ahead of the interests of other people in our society—producing an island of prosperous financial services professionals in a sea of inequality. That type of growth would be the opposite of levelling up. We saw that type of growth in Ireland and Iceland before the financial crisis—and to only a somewhat lesser extent here in the UK. It leads to economic and social instability and damage. The damage is often borne by those least able to bear it, not by those who inflict it.¹⁹

It is striking that a senior regulator should see the need to speak in such stark terms about the danger of adverse unintended consequences if a secondary objective on competitiveness were not to be kept within bounds. The danger of clause 24 becoming a tool that over time will be (mis-)used to put (undue) pressure on regulators is a theme that will run through the analysis in this article.

In understanding clause 24's relatively easy passage towards the statute books in spite of some significant concerns about its longer term impact, it is also relevant to note that in the febrile political atmosphere of the Johnson–Truss–Sunak prime ministerial succession drama between July and October 2022 there was a more immediate threat to regulatory independence: namely a proposal by the government to amend the FSM Bill by adding an intervention power that would allow the government to overrule regulators. This idea was said to have originated with Prime Minister Rishi Sunak during the time when he had been Chancellor of the Exchequer, hence the seriousness with which it was taken, and the possibility that it could be added to the FSM Bill sparked fierce debate, both inside and outside Parliament. A sense of the intensity of the reactions it provoked can be gleaned from the evidence given in the parliamentary scrutiny process by Martin Taylor, a former adviser to both Conservative and Labour Chancellors and member of the Bank of England's Financial Policy Committee, who described the potential addition of a new intervention power as a 'shockingly bad idea . . . major erosion of the institutional framework . . . corruption of the framework'.²⁰ In major public speeches the heads of both the PRA and the FCA also expressed strong reservations.²¹ Pertinently, Sam Woods (PRA) warned that 'Some might think that such a power would boost competitiveness. My

¹⁷ A Bailey, 'The Future of Financial Conduct Regulation' (Speech, 23 April 2019) <<https://www.fca.org.uk/news/speeches/s/future-financial-conduct-regulation>>.

¹⁸ PRA, 'The Prudential Regulation Authority's Approach to Policy' (DP4/22 September 2022) 25–30.

¹⁹ Charles Randall, 'Listening Up to Level Up—Regulating Finance for the Whole of the UK' (Speech at CCLS Queen Mary University of London, 20 May 2022) <<https://www.fca.org.uk/news/speeches/listening-up-level-up-regulating-finance-uk>>.

²⁰ Martin Taylor, 'PBC (Bill 146)' (n 9) 74.

²¹ Nikhil Rathi, 'The Role of the FCA in a Changing Regulatory Landscape' (Mansion House Speech, 27 October 2022) <<https://www.fca.org.uk/news/speeches/role-fca-changing-regulatory-landscape>>; Sam Woods, 'Growth and Competitiveness' (Mansion House Speech, 27 October 2022) <<https://www.bankofengland.co.uk/speech/2022/october/sam-woods-speech-at-mansion-house>>.

view is that through time it would do precisely the opposite, by undermining our international credibility and creating a system in which financial regulation blew much more with the political wind'.²² The Sunak government eventually buckled in the face of this sustained opposition and in late November 2022 announced that the proposal would be dropped. Yet while the successful resistance to the introduction of the intervention power was important, it could, in time, acquire some pyrrhic victory qualities if the international competitiveness objective, despite its (relatively) more innocuous character in the short term, eventually proves to be an alternative channel for the same independence-eroding pressures to be applied.

The article proceeds as follows. After this introduction, section II outlines market challenges that the UK faces as it begins the process of properly getting to grips with what its post-Brexit regulatory freedom means for financial regulation through the enactment of FSM Bill. Section III notes the necessity of a review of the UK financial regulatory framework to ensure its fitness for purpose in a post-Brexit world and acknowledges that the intention is not to embark on a bonfire of regulation. Nevertheless, section IV argues that there is a danger of excessive deregulation and draws on research on regulatory competition, regulatory procyclicality, and regulatory design to support this claim. Section V reviews the discouraging history of including international competitiveness in regulatory mandates in the UK. Section VI considers the pervasiveness of objectives in shaping what regulators do—the idea that everything comes back to them. Sections V and VI pave the way for section VII, which directly interrogates the case for bringing international competitiveness back into regulatory mandates in the form of a (secondary) objective and explains why, notwithstanding that they are now unlikely to arrest the momentum behind the enactment of the new objective, concerns about associated risks should continue to receive attention. The need for a system of accountability that appropriately supports regulatory independence is outlined: the accountability system must be able to protect regulators that have resisted pressure to change their position on competitiveness grounds where they have judged this to be incompatible with their other objectives; put another way, so far as the new competitiveness and growth objective is concerned, 'secondary' really must mean secondary. Reasons why from a regulatory design perspective the FSM Bill's insertion of extra clutter into regulatory mandates (including the new objective itself) complicates the task of ensuring effective accountability are explained. Section VIII concludes.

II. SETTING THE SCENE--POST-BREXIT REGULATORY FREEDOM IN A CHANGING FINANCIAL WORLD

Finance ministries, central banks and supervisors in countries that are, or want to be, leading international financial centres aspire to have a financial regulatory framework that simultaneously ensures safety, soundness, market integrity, and investor protection and facilitates innovation, experimentation, entrepreneurial risk-taking, and advances in technology that promote diverse and efficient market practices. This perfect equilibrium always remains tantalizingly out of reach and reality invariably involves constantly assessing and reassessing regulatory policy options so as not to be too out of kilter. Put another way, the process of designing financial regulation always involves some trial and error.²³ While robust safety-enhancing measures and innovative ideas for regulatory modernization are ultimately mutually reinforcing elements of the same regulatory ecosystem system—they all sit along the same resilience–efficiency continuum—at any given moment protective elements may weigh more (or less) heavily in policy thinking than facilitative elements depending on the most pressing problems at that time.

²² Woods (*ibid*).

²³ Franklin Allen and Douglas Gale, *Understanding Financial Crises* (OUP 2007) 190.

With the FSM Bill the UK is embarking on major redesign of its system of financial regulation. It has what a paper co-authored by the City of London Corporation and HM Treasury has described as a 'once-in-a-generation opportunity to become more nimble, agile and proportionate'.²⁴ While the substantive changes made directly by the FSM Bill itself will be limited and in places quite technical (covering, among other things, oversight of financial market infrastructures, cryptoassets, continued access to cash, and targeted amendments to wholesale market regulation), in setting out the overarching structure and process for the transition from a system based on EU retained law to a genuinely homegrown, rethought regime, and also providing for new regulatory powers and accountability mechanisms, the Bill has the potential to be transformative in the longer term.²⁵ The process of revocation and replacement is expected to take a number of years²⁶—'a marathon rather than a sprint'.²⁷

However, the UK begins this process of properly getting to grips with what post-Brexit regulatory freedom means for financial regulation at a time when the broader financial landscape is unsettled and difficult. Against the Brexit gain of a freer hand to design a financial regulatory and supervisory system that is more calibrated to the UK's domestic needs and its foreign trade policy agenda is the offsetting Brexit loss of the arrival of new barriers to trade with the EU. No longer being able to serve as a convenient entry point for international firms to passport financial services into the EU and being increasingly constrained by EU policy measures from acting as an off-shore location for euro-denominated business represent direct hits to the attractiveness of the UK as an international financial centre (colloquially known as 'the City' or 'City of London'²⁸). Through its own capital markets union plan, a package of regulatory reforms which it presents as having the potential to make Europe's economy more innovative and globally competitive,²⁹ the EU is seeking both to respond to the loss of the City of London as the investment banker of its domestic businesses³⁰ and to position itself to compete more effectively with the UK to attract global business.

While the City's performance has been largely resilient thus far,³¹ longer term prospects are uncertain. Paris has recently (November 2022) overtaken London as the largest European stock market by value of companies listed and clearing, which is one of the key current areas of strength for London, could see fierce competition between the EU and the UK in the next decade.³² One London-headquartered central counterparty (CCP), LCH, clears about 95 per cent of

²⁴ City of London and HM Treasury, 'State of the Sector' (n 6) 27.

²⁵ FSM Bill Pt 1 Ch 1 (regulatory framework—revocation of retained EU law). All direct principal EU legislation (such as Regulations), domestic secondary legislation, and all EU tertiary legislation relating to financial services are to be repealed. Some parts of primary legislation are also to be repealed but the revocation will not extend to primary legislation generally.

²⁶ FSM Bill Explanatory Notes para 31.

²⁷ Ashurst, 'MiFID II UK Shake Up—More Marathon Than Sprint' (7 March 2022) <[https://www.ashurst.com/en/news-and-insights/legal-updates/mifid-ii-uk-shake-up---more-marathon-than-sprint?protect\\$relax](https://www.ashurst.com/en/news-and-insights/legal-updates/mifid-ii-uk-shake-up---more-marathon-than-sprint?protect$relax)>\$. The enormity of the task and how long it takes will depend on how far the UK takes a largely 'lift and shift approach' and how far it goes for significant reshaping: House of Commons Treasury Committee, 'Future Parliamentary Scrutiny of Financial Services Regulations (2nd Report of Session 2022-23, HC 394) para 10.

²⁸ Best understood these days as a concept rather than a physical location. London-based financial services activity has long since expanded beyond the boundaries of the physical City of London to Canary Wharf and the West End, and there is also significant financial services activity based in Edinburgh and other centres around the UK.

²⁹ European Commission, 'A Capital Markets Union for People and Businesses—New Action Plan' COM (2020) 590, 6.

³⁰ The description of the City of London as Europe's 'investment banker' was coined by Mark Carney when governor of the Bank of England: Jill Ward, 'Inside Mark Carney's Brexit Adventure' *Bloomberg Economics* (26 February 2020) <www.bloomberg.com/news/features/2020-02-26/mark-carney-inside-his-brexite-adventure-at-the-bank-of-england>.

³¹ Manolis Kalaitzake, 'Resilience in the City of London: The Fate of UK Financial Services after Brexit' (2022) 27 *New Political Economy* 610. See also City of London and HM Treasury, 'State of the Sector' (n 6) 7 and 17, noting that the UK remains the most globally connected banking hub, the world's largest centre for international debt issuance, commercial insurance and reinsurance and foreign exchange trading, and a leading centre for asset management.

³² Chris Flood, 'France Challenges UK for Title of Europe's Biggest Equities Market', *Financial Times* (17 November 2022) <<https://www.ft.com/content/db5d516a-4b35-4e85-8b02-4ddd73b48e0b>>.

euro-denominated interest rate derivatives and around 30 percent of euro-denominated repos. LCH's position is vulnerable, however, because of the threat that the European Commission will eventually withdraw the temporary (but now in place until 2025) equivalence decision in favour of UK CCPs, which underpins its euro-denominated business.³³ The EU needs a viable practical alternative to LCH before it can take this step. Key to the emergence of a practical alternative of suitable scale is likely to be how successful Euronext, the European financial market infrastructure group, is in achieving its strategic goal of moving from dependency on LCH for clearing of its cash and derivatives trading flows to direct management of its clearing activity through Euronext Clearing (formerly the Italian clearer CC&G, which Euronext acquired from the London Stock Exchange Group).³⁴

The UK's global competitiveness is also threatened by the rise of financial markets outside Europe, especially in Asia. Much of this competitive pressure pre-dates Brexit but could now be further exacerbated. For instance, if international firms can access more favourable EU third country equivalence status via their home country than is available via a UK hub, the logic of servicing EU clients from London will further erode. While it is true that London remains ranked second only to New York in the influential Global Financial Centres Index (GFCI), as a full-scale global financial hub there is slippage.³⁵

Initial public offerings (IPOs) and international listings is one area where London's relative decline has been noticeable (although with a uptick in IPOs in 2021³⁶ that may or may not be sustained). During the mid-2000s and right up to the 2008 financial crisis, London appeared to be posing a serious threat to New York in the competition to attract foreign issuers but this is now a distant memory.³⁷ US exchanges have remained broadly secure in the top spot among the leading exchanges, and Asian exchanges have gained ground. While the London Stock Exchange Group (LSEG) still has more foreign issuers listed than the Singapore Exchange (SGX) and the Hong Kong Stock Exchange (HKEX), its nearest rivals among the leading financial centres,³⁸ there is a downward trend.³⁹ In 2006 the UK hosted 10 per cent of global IPOs but by 2018 this had halved.⁴⁰ Arguably more worrisome given that the bulk of all listed companies globally is domestic (93 per cent) and only 7 per cent is foreign,⁴¹ listing in London

³³ Commission Implementing Decision (EU) 2022/174 of 8 February 2022 determining, for a limited period of time, that the regulatory framework applicable to central counterparties in the United Kingdom of Great Britain and Northern Ireland is equivalent, in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council [2022] OJ L28/40. The European Commission is due to publish before the end of 2022 a package of proposed new measures that are expected to require more derivatives business to be moved to clearing venues located in the EU: Sam Fleming and Philip Stafford, 'Brussels Demands Share of London Derivatives Clearing' *Financial Times* (23 November 2022) <<https://www.ft.com/content/da41d878-2e60-42ca-9b34-945efbef8af4>>.

³⁴ Euronext, 'Euronext Announces its New Strategic Plan, Growth for Impact 2024' (Press Release, 8 November 2021) <www.euronext.com/en/about/media/euronext-press-releases/growth-for-impact-2024>.

³⁵ Z/Yen and CDI, 'The Global Financial Centres Index 31' (March 2022) <www.zyen.com/publications/public-reports/global-financial-centres-index-31>. This reports that London continued to lead in Western Europe but had dropped 14 points in the ratings, the biggest drop in the ratings among the top 20 centres. However, balancing this out to some extent Glasgow had improved more than 10 rank places.

³⁶ City of London and HM Treasury, 'State of the Sector' (n 6) 23.

³⁷ Michael R Bloomberg and Charles E Schumer, 'Sustaining New York's and the US' Global Financial Services Leadership' (2007) <www.nyc.gov/html/om/pdf/ny_report_final.pdf>. This report found that the declining position of the US capital markets went beyond natural erosion caused by other markets taking steps to become more competitive and was in part due to more intrinsic and controllable factors—such as immigration policy and the legal and regulatory environment—where the US was considered to be moving in the wrong direction. The report warned of the US/New York increasingly being at a competitive disadvantage to the UK/London, which it attributed in large part to the stringency of US regulation, supervision, and enforcement. London, on the other hand, was lauded for its 'more amenable and collaborative regulatory environment, its open dialogue between practitioners and regulators, its single regulator-led, and its principles-based regulatory philosophy and measured approach to enforcement'.

³⁸ Number of foreign listed companies as at September 2021: Nasdaq: 749; NYSE: 586; LSEG: 353; Moscow Exchange: 269; SGX: 230; HKEX 185 (World Federation of Exchanges data).

³⁹ City of London, 'Our Global Offer to Businesses: London and the UK's Competitive Strengths in a Changing World' (2021) <www.theglobalcity.uk/PositiveWebsite/media/Research-reports/CoL-Our-global-offer-to-business.pdf>.

⁴⁰ FCA, 'Primary Market Effectiveness Review' (CP21/21, 2021) 8.

is no longer *de rigueur* for homegrown companies. The number of listed companies in the UK has fallen by about 40 per cent since 2008.⁴² UK tech businesses in particular are increasingly looking to list in New York rather than London because New York is considered to offer a more receptive environment for high-growth companies, with higher valuations and trading volumes, lower minimum free float requirements, dual class shares, and the availability of the innovative SPAC (special purpose acquisition company) listing structure.⁴³ The UK has already made certain changes to its listing regime with a view to removing barriers to high-growth company listings on its markets, and more change is on the way.⁴⁴ There is scepticism, however, whether regulatory reform alone will suffice to change market views on London as a listing venue. There are suggestions that London is at risk of becoming a 'global backwater' as an equity listing venue for high growth tech companies and other 'new' businesses because of other factors, including the perception that its domestic investor base is dominated by funds that prioritize dividends over future growth.⁴⁵ Brian Cheffins and Bobby Reddy point to a decline in London's position measured by aggregate market capitalization, relative both to the size of the UK economy and to the stock markets elsewhere, which they say is attributable to a substantial extent to mediocre share price.⁴⁶ Cheffins and Reddy argue that regulatory reforms are unlikely to make more than a marginal difference to the level of IPO activity in the UK unless deeper-seated factors deterring IPOs, such as the 'over-regulation' of companies already publicly traded and depressed share valuations are tackled.⁴⁷ They note that substantial private capital available via venture capital and private equity funds means that companies may still shun the public markets irrespective of how IPO rules are configured.⁴⁸ The July 2022 decision by the Cambridge (UK) biotech company Abcam to drop its listing on AIM, the LSEG's second tier market, in favour of NASDAQ was a setback for advocates of the City as an attractive listing location. Abcam came from the same Cambridge innovation culture as the chip manufacturer ARM, whose listing location has become a test case of London's international standing. It is hard not to view Abcam's decision as in some way portentous of what it is come for ARM (which, though owned by Softbank, remains operationally based in Cambridge). At the time of writing the ARM listing was on hold due to the political turmoil around the leadership of the governing Conservative Party.

Signs of the UK's status as a top financial centre being under threat could be taken as reasons to argue for elevating the facilitation of international competitiveness to the very centre of financial regulation, including by making this part of the 'day job' of financial regulators as an objective against which they can be held accountable. It has been suggested that the FCA has been too tentative thus far in seeking to improve the attractiveness of listing in London, that the root cause of this is the nature of the FCA's role as regulator, and that what may be needed is 'a review of the FCA's *raison d'être*, with perhaps a shift to the regulator bearing some accountability

⁴¹ World Federation of Exchanges, 'Analysing Trends in the Number of Listing, Listed Companies and Investment Flows' (June 2021) <<https://focus.world-exchanges.org/statistics/articles/analysing-trends-number-listings-listed-companies-and-investment-flows>>.

⁴² J Hill, 'UK Listing Review' (March 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966133/UK_Listing_Review_3_March.pdf>.

⁴³ FCA (n 40) 8–9; R Kalifa, 'Review of UK Fintech' (2020) 12 and 61–63 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/978396/KalifaReviewofUKFintech01.pdf>.

⁴⁴ FCA, 'Primary Markets Effectiveness Review: Feedback to the Discussion of the Purposes of the Listing Regime and Further Discussion' (DP22/2 May 2022).

⁴⁵ Paul Marshall, 'London is becoming the Jurassic Park of Stock Exchanges' *Financial Times* (1 December 2021) <<https://www.ft.com/content/847b0335-7835-4b4f-9dc6-39ba944baadc>>. See also Kalifa (n 43) 61–63.

⁴⁶ Brian R Cheffins and Bobby V Reddy, 'Will Listing Rule Reform Deliver Strong Public Markets for the UK?' (2023) 86 *Modern Law Review* 176.

⁴⁷ Ibid. Cheffins and Reddy also touch briefly on the debate as to whether/to what extent regulatory reform *ever* drives markets (causality questions), on which there is a rich body of 'law and finance' literature.

⁴⁸ Ibid.

for the health, competitiveness and success of the UK economy alongside its watchdog role in protecting consumers and the integrity of the financial markets'.⁴⁹ However, whether a new objective is the right solution to the perceived problem of insufficient boldness by the FCA is questionable. The next sections elaborate.

III. THE CASE FOR REFORM

The current debate about the future of financial regulation in the UK includes careful nods to lessons from past experience: the new agenda on international competitiveness is not about pursuing short-term competitive advantage via a 'race to the bottom' of low regulatory standards and/or lax supervision and enforcement, as robust standards will be maintained;⁵⁰ the UK will continue to promote high international standards to support global cross-border markets;⁵¹ dynamic regulatory evolution is inevitable but deviation from the regulatory requirements carried over from EU membership (retained EU law) will not be pursued purely for the sake of it;⁵² it is only within these important constraints that steps will be taken to tailor high standards to suit local conditions and perhaps give the UK a competitive edge.⁵³ One important manifestation of this caution is that the FSM Bill explicitly provides that the competitiveness and growth objective is subject to aligning with relevant international standards.⁵⁴

These moderate words provide reassurance that the UK is not intentionally embarking on a reckless bonfire of regulation. The recognition of the importance of remaining in step with international standards is not an absolute guarantee that quality will be maintained, since international standards are themselves prone to being lowered to meet the preferences of major countries but it is an important safeguard nonetheless.⁵⁵ In the decade after the 2008 financial crisis, the UK successfully repositioned itself as a champion of stringent regulatory standards, especially with respect to bank capital and liquidity.⁵⁶ The heavy lifting in rewriting the post-crisis prudential rulebook was done at the international level by the Basel Committee, and the UK exerted considerable interest (especially in the early stages of the reforms) in both the Basel process itself and in ensuring the faithful implementation of revised standards by the EU.⁵⁷ This investment in leading on international standard-setting is unlikely to be squandered lightly, not only because of the UK's interest in retaining influence in global standard-setting fora but also because significant local divergence would be unlikely to be appreciated by those major market players that gain more from the efficiencies of following more or less the same standards in all the jurisdictions in which they do business, than they do from navigating multiple very different regulatory regimes. For firms that have already incurred significant costs in ensuring compliance with EU-derived legislation based on international standards, change for the sake of change could represent an unwelcome additional burden.

⁴⁹ Bobby V Reddy, 'Up the Hill and Down Again: Constraining Dual-Class Shares' (2021) 80 *Cambridge Law Journal* 515.

⁵⁰ HM Treasury (n 6) 3 (Andrew Bailey, Governor of the Bank of England) and 4 (Nikhil Rathi, CEO, FCA).

⁵¹ *Ibid.*

⁵² HM Treasury, 'Financial Services Future Regulatory Framework Review: Proposals for Reform' (CP 548, November 2021) 6.

⁵³ *Ibid.*

⁵⁴ FSM Bill cl 24(3).

⁵⁵ These observations draw on Singer's analysis of regulators' preferences for global standards as a means of addressing domestic pressures and to retain autonomy: David A Singer, *Regulating Capital: Setting Standards for the International Financial System* (Cornell University Press 2015). On ways in which international standards can provide 'political cover' for domestic regulators, see also Mark Copelovitch and David A Singer, *Banks on the Brink: Global Capital, Securities Markets, and the Political Roots of Financial Crises* (CUP 2020) 192.

⁵⁶ Scott James and Lucia Quaglia, *The UK and Multi-Level Financial Regulation: From Post-Crisis to Brexit* (OUP 2020) ch 4.

⁵⁷ *Ibid.*

However, the levelling effect of international standards is correlated to how advanced they are. The detailed nature of the Basel framework is unusual and many other sets of international standards are much more open-textured. High-level principles, such as, for example, those developed by the Financial Stability Board (FSB) for stablecoins,⁵⁸ are unlikely to act as a significant constraint on divergent policy views on the right balance between facilitating innovation and addressing new risks to financial stability.⁵⁹ In a progress report on the implementation of its standards for stablecoins, the FSB itself has warned of increasing differences among regulatory approaches and classifications at jurisdictional level that could give rise to the risk of regulatory arbitrage and harmful market fragmentation.⁶⁰

Giving due weight to there being significant safeguards against a headlong rush to deregulatory excess, there are, in fact, many reasons to welcome systematic reform of UK financial regulation. The rather awkward domestication of EU financial regulation that is now in operation in the UK was never meant to be a permanent solution.⁶¹ The rigid and very prescriptive style of EU regulatory requirements reflects both restrictions in EU constitutional law on delegation to regulatory agencies, and the challenge of trying to ensure consistency in the application of 'single rulebook' regulatory requirements across multiple markets and by numerous different national regulators; these considerations are inapplicable to the UK in its new circumstances.⁶² Structures that are based on EU concepts should be reconsidered: for instance, the FCA is right to point out that in so far as the existing two-tier structure of the listing regime reflects EU law, its rationale has disappeared.⁶³ Uneasy juxtapositions of harmonized requirements and unharmonized national laws, for example in the area of civil liabilities, should be simplified.⁶⁴

Creating a system of financial regulation that, shorn of ill-fitting parts of the EU legacy, is fit for purpose for the UK outside the EU does not imply an inevitable decline in substantive standards. As its track record with respect to the implementation of the Basel prudential framework indicates, as a member state of the EU the UK was often among the most vocal and effective proponents of higher standards, and that attitude will not simply evaporate. In the current debate around reform of the MiFIDII/MiFIR⁶⁵ framework, for example, the important role that the UK played as an EU Member State in designing the framework, and the extent to which firms are now reconciled to living with that framework because of the implementation sunk costs are freely

⁵⁸ Financial Stability Board, 'Regulation, Supervision and Oversight of "Global Stablecoin" Arrangements: Final Report and High-Level Recommendations' (FSB October 2020).

⁵⁹ FSM Bill cls 21–22 make provision for the introduction of a regulatory regime for stablecoins ('digital settlement assets').

⁶⁰ Financial Stability Board, 'Regulation, Supervision and Oversight of "Global Stablecoin" Arrangements Progress Report on the implementation of the FSB High-Level Recommendations' (FSB October 2021).

⁶¹ FSM Bill Explanatory Notes para 11.

⁶² House of Commons Treasury Committee, 'Future of Financial Services Regulation' (1st Report of Session 2022–23, HC 141, June 2022) para 20.

⁶³ FCA (n 44) 12.

⁶⁴ The complex framework governing the civil liability of rating agencies is a pertinent example. There is an elaborate statutory framework (Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies [2009] OJ L302/1, art 4(3)–(5) amended by the Credit Rating Agencies (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/266) and currently applicable in the UK as retained EU law; Technical Standards (Credit Ratings Agencies Regulation (EU Exit) Instrument 2019 (FCA 2019/39); and the Credit Rating Agencies (Civil Liability) Regulations 2013 (SI 2013/1637)) but the already high barriers to a successful civil liability claim against a credit rating agency by an investor were arguably made more, rather than less, daunting by the introduction of a partially harmonized dedicated regime across the EU: Eilis Ferran, 'Liability of Credit Rating Agencies—UK' (unpublished working paper, on file with author).

⁶⁵ MiFIDII/MiFIR is a compendium term covering a package of measures including two major legislative instruments: Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 [2014] OJ L173/84; and Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L173/349.

acknowledged.⁶⁶ While MiFIDII/MiFIR is among the areas that will be directly amended by transitional measures in the FSM Bill itself rather than waiting for the general revocation and replacement exercise, there is to be no hasty outright disowning of its conceptual approach. The prioritization of targeted changes to the MiFIDII/MiFIR framework is driven by practical experience that has revealed areas where the existing requirements are not working as their designers anticipated. The European Commission has acknowledged that certain provisions have created legal uncertainty for market participants and that these need to be addressed to maintain the competitiveness of EU financial markets.⁶⁷ It has singled out the notorious ‘double volume cap’ that seeks to improve the price formation process by putting an upper limit (cap) on the amount of shares that market participants can trade under transparency waivers as ‘being resource-intensive to administer on the part of the regulators’ and noted that these rules ‘have proven to be rigid and collectively introduce unnecessary complexity in the operation of equity markets’.⁶⁸ For its part, the UK’s Wholesale Markets Review, while wrapped in the language of Brexit freedom and improving the competitiveness of the UK’s financial services sector, was also a serious examination of the problems created by the MiFIDII/MiFIR framework and the changes proposed in the FSM Bill are part of a considered response to that review.⁶⁹ The UK is in agreement with the European Commission in identifying the double volume cap as an attention point. Yet while the double volume cap is a shared concern, the UK intends to remove the cap whereas the EU proposes to retain the cap but to adjust the limit.⁷⁰ This can be viewed as an example of what has been described as ‘parallel divergence’, where both sides diagnose broadly similar problems but differ in their proposed solutions.⁷¹

Learning from experience and carefully adjusting regulation in response to changing circumstances is a necessary and desirable part of any well-functioning system: where, either because they went too far in the first place or because they have become outdated, regulatory requirements are inadvertently impeding economically worthwhile activity, stifling beneficial financial innovation and/or liable to leave regulators blindsided by new risks, they should be changed.⁷² Whether an existing framework provides sufficient space for creative responses to new developments is a legitimate issue for reformers to pursue. The UK has a positive recent track record in using regulation to support innovation and it is an appropriate use of ‘Brexit freedom’ to explore the scope to do more of the same. The pertinent example here is the FCA’s pioneering regulatory sandbox concept—tools that enable firms to test new products and ideas in a controlled environment with specially-adapted authorization and supervisory requirements supported by intensive firm-regulator interaction spanning both monitoring and the provision of assistance to firms in navigating the regulatory landscape—which has become a global regulatory phenomenon, enabling both market experimentation and regulatory learning.⁷³ New

⁶⁶ FSM Bill Explanatory Notes paras 57–61; House of Lords European Affairs Committee, ‘The UK–EU Relationship in Financial Services’ (1st Report of Session 2022–23, HL Paper 21) paras 184 and 188. But note also House of Commons Treasury Committee (n 13) para 30 (short-term adaptation costs should not limit the scale of the ambition to genuinely simplify regulation where this can be done without sacrificing resilience).

⁶⁷ European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 600/2014 as regards enhancing market data transparency, removing obstacles to the emergence of a consolidated tape, optimising the trading obligations and prohibiting receiving payments for forwarding client orders’ COM (2021) 727, 3.

⁶⁸ Ibid 4.

⁶⁹ HM Treasury, ‘Wholesale Market Review: Consultation Response (HMT March 2022).

⁷⁰ BNY Mellon Pershing, ‘MiFID II and MiFIR Reviews’ (16 May 2022) provides a clear overview of the state of play on MiFID II/MiFIR reform in the EU and the UK, and the extent to which divergence is already occurring <www.pershing.com/uk/en/news/what-is-big-in-our-world/regulation/mifid-ii-and-mifir>.

⁷¹ House of Lords European Affairs Committee (n 13) para 176 citing written evidence by New Financial submitted to the inquiry.

⁷² Deirdre Ahern, ‘Regulatory Lag, Regulatory Friction and Regulatory Transition as FinTech Disenablers: Calibrating an EU Response to the Regulatory Sandbox Phenomenon’ (2021) 22 *European Business Organization Law Review* 395.

⁷³ Ibid.

'piloting powers' for financial market infrastructures (FMI sandboxes) are included in the FSM Bill.⁷⁴ There is also the consideration that scholarly understanding of what constitutes high quality regulation can change, in which case research-informed reformers should take note. A case in point here is the re-evaluation of the pros and cons of listed dual class shares. Not that long ago, lack of proportionality—ie departures from one share, one vote—was widely considered to be a corporate governance taboo but this has given way to a much more nuanced position.⁷⁵

So, in view of the many arguments that support both the introduction of the FSM Bill and the expectation that it will lead to significant positive change, why the concern that in proposing to reintroduce international competitiveness into the regulatory mandate things may be going too far? The following section turns to the academic literature to help unpack this concern.

IV. LOCATING OPPORTUNITIES AND RISKS THAT ARE INHERENT IN FINANCIAL REGULATORY REFORM IN THE ACADEMIC LITERATURE

There are three important broad financial regulation research themes that are especially relevant to this discussion. The first is regulatory competition. Corporate and financial regulation scholars have been researching the 'law market' for many decades, with a surge of interest in the 1980s and 1990s on the competition between US states for corporate charters, followed in the 2000s by close examination of regulatory competition in international capital markets and financial regulation.⁷⁶ Regulatory competition characterizes states or countries as being in competition with each other to supply a product—regulation—to physically or legally mobile market actors that can pick and choose which regulatory product they want to consume.⁷⁷ When politicians and officials talk about, for example, changing their listing rules to be more attractive to international issuers they are manifesting a belief in the power of regulatory competition at the international level.

There are some doubts in the literature as to the degree of influence regulation really exerts over the choices of internationally mobile actors but the extreme version of this argument—that regulatory competition does not exist at all—is countered by empirical studies in different fields that support the view that it is a real phenomenon.⁷⁸ Reference can be made, for instance, to regulatory arbitrage, real or credibly threatened, as evidence that regulatory policymakers are on the right lines in thinking that their choices do matter.⁷⁹ Moreover, attracting inward business is not the only relevant success measure: policymakers may well consider paying attention to the international competitiveness of the regulatory framework to have been a success if it stops homegrown businesses from developing itchy feet. The efforts of the Chinese authorities to reform their capital market regulation to reverse the trend of large Chinese tech

⁷⁴ FSM Bill cls 13–17.

⁷⁵ Erik Lidman and Rolf Skog, 'London Allowing Dual Class Premium Listings: A Swedish Comment' (2022) 22 *Journal of Corporate Law Studies* 83; Bobby V Reddy, *Founders Without Limits: Dual-Class Stock and the Premium Tier of the London Stock Exchange* (CUP 2021).

⁷⁶ The blueprint for modern thinking on the topic remains Charles M Tiebout, 'A Pure Theory of Local Expenditure' (1956) 64 *Journal of Political Economy* 416. There is now an enormous literature on regulatory competition in corporate law, financial regulation and related areas, which is well served by a recent excellent monograph examining the topic from a philosophical perspective: Johanna Stark, *Law for Sale: A Philosophical Critique of Regulatory Competition* (OUP 2019). Chapter 1 provides an excellent introduction to the seminal literature on the topic. In this chapter, Stark does not discuss international financial regulation as a specific regulatory competition case study. On that sub-topic: Roberta Romano, 'Empowering Investors: A Market Approach to Securities Regulation' in Klaus J Hopt and others (eds), *Comparative Corporate Governance* (Clarendon Press 1998).

⁷⁷ Roberta Romano, 'Law as a Product: Some Pieces of the Incorporation Puzzle' (1985) 1 *Journal of Law, Economics and Organization* 225.

⁷⁸ Stark (n 76) 31–55.

⁷⁹ Wolf-Georg Ringe, 'Regulatory Competition in Global Financial Markets—the Case for a Special Resolution Regime' (2016) 1 *Annals of Corporate Governance* 175.

companies seeking listings abroad fit with this perspective on why countries engage in regulatory competition.⁸⁰

The old chestnut as to whether regulatory competition drives a race to the top or to the bottom never goes away completely, but the argument that some countries may compete by offering very high standards to which market actors can choose to bond themselves as a sign of quality while other countries compete for a different segment of the market by offering different standards is persuasive.⁸¹ Since well-functioning competitive markets offer a range of choice to consumers rather than uniformity,⁸² there is nothing inherently problematic about policymakers having a particular target market for their regulatory offering in mind and framing their regulatory design choices accordingly.⁸³ However, setting a target is one issue, actually hitting it is another. When under pressure to defend market share, the temptation to compete by lowering standards may be considerable. The trade-offs are complex and judgments are fallible.

This brings into focus the second key research theme: while policymakers may aspire to position the UK in a regulatory sweet spot that in some respects is deregulatory compared to EU law but still of a high standard, literature on the tendency of regulatory policy towards excessive procyclicality reminds us to take seriously the risk of the UK using its now-found Brexit freedom to engage in regulatory competition that eventually goes too far in a downward direction. As a member state of the EU, the UK operated in the shadow of the Brussels legislative machinery.⁸⁴ 'Cyclicality' has a distinctive quality in this context: escaping the shadow of Brussels and being free to chart its own course marks the start of a new cycle in financial regulation for the UK.

The body of EU law that the UK has brought onshore is still substantially the product of the regulatory aftermath to the financial and eurozone crises around the turn of the last decade.⁸⁵ Literature on financial crises teaches us that crises reveal the latent self-destructive tendencies of lightly regulated markets and for those who are often elbowed out of influential policymaking fora by powerful industry lobby groups they provide windows of opportunity to promote public interest-oriented reforms.⁸⁶ However, as time passes and the established order is gradually rehabilitated, crisis-driven reforms tend to get watered down, partly to correct excessive over-regulation resulting from having acted too quickly in circumstances of considerable uncertainty,⁸⁷ but also partly to realign with the preferences of well-funded industry lobbies.⁸⁸ The rise and fall of financial regulation, sometimes described as the regulatory 'sine curve', has been attributed to a collective 'social amnesia' once crises fade from the headlines, which opens doors for those with large resources and lobbying capacity to resist further regulation.⁸⁹ The

⁸⁰ Fa Chen, 'Reshaping the Chinese Stock Market to Accommodate Red-Chips: Practice, Balance and Consequence' PhD thesis, University of Cambridge (2022).

⁸¹ John C Coffee, 'Racing towards the Top: The Impact of Cross-Listing and Stock Market Competition on International Corporate Governance' (2002) 102 *Columbia Law Review* 1757.

⁸² *Ibid.*

⁸³ Stark (n 76) 19 ('Unless there is legal diversity—a plurality of rules or regimes for legal subjects to choose from—the basis of regulatory competition is missing'). The reference to nothing 'inherently problematic' presupposes that competitive markets—if well-designed—are a force for social good. Examining important scholarly inquiry debating the role of markets in correcting inequalities is beyond the scope of this article but for a helpful entry point see Ioannis Lianos, 'Competition Law as a Form of Social Regulation' (2020) 65 *The Anti-Trust Bulletin* 3.

⁸⁴ Similar in some respects to the relationship between US states and the federal government: Mark Roe, 'Delaware's Competition' (2003) 117 *Harvard Law Review* 591.

⁸⁵ Eilis Ferran and others, *The Regulatory Aftermath of the Global Financial Crisis* (CUP 2012).

⁸⁶ Karl Polanyi, *The Great Transformation* (Octagon Books 1975 reprint (1944)); Hyman P Minsky, *Stabilizing an Unstable Economy* (Yale University Press 1986); Walter Mattli and Ngaire Woods, *The Politics of Global Regulation* (Princeton University Press 2009).

⁸⁷ Roberta Romano, 'The Sarbanes-Oxley Act and the Making of Quack Corporate Governance' (2005) 114 *Yale Law Journal* 1521.

⁸⁸ Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1971 (1994 printing)).

⁸⁹ John C Coffee, 'The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated' (2012) 97 *Cornell Law Review* 1019.

result is pervasive under-regulation of large swathes of financial market activity over extended periods.⁹⁰

How Brexit played out for financial services does not fit entirely comfortably into a narrative of public policy being captured most of the time by a powerful, well-funded industry. Both the leave decision itself and the UK's failure to secure exit terms including a special EU-UK mutual-recognition-based reciprocal market access arrangements for financial services or even blanket EU equivalence badging for what was (more or less) a carbon copy of EU financial regulation onshored by the UK, arguably align more easily with a narrative of an industry out in the cold politically. However, it is important to recall that the industry itself was divided on the remain/leave question, and that populist support for Brexit served as a powerful counterbalance to 'elitist' anti-Brexit opinion across many sectors. Research analysing the City's surprising lack of success in shaping the UK government's Brexit policy posed questions about how long political imperatives around a hard Brexit would exclude business lobbies from access to policy process.⁹¹ 'Not long' is the answer suggested by more recent events. HM Treasury's embrace of the mantra of international competitiveness and growth, seen in its 2021 recommendations to the PRA and FCA on aspects of economic policy to which they should have regard,⁹² and then in its full backing for restoring international competitiveness to the regulators' mandates via clause 24 of the FSM Bill, was a significant sign of a fast-warming relationship. The rehabilitation of industry preferences into mainstream politics was further confirmed by the increasingly pro-business stance adopted by the opposition Labour leadership in 2022 as it saw its election prospects rising in the face of its opponents' leadership problems.⁹³ The cross-party support for clause 24 discussed in section I of this article represents a significant victory for the sector: the decision to drop international competitiveness from the regulatory mandate after the financial crisis had been strongly opposed by the City establishment and they had lobbied hard for its restoration ever since.⁹⁴ The passage of time, the emergence of different problems from those that shaped policy thinking in the aftermath of the global financial crisis and shifting political calculations on the impact of pro-business policies on voting choices combined to provide the necessary window of opportunity for the industry to regain influence and soft power.

The final research theme concerns regulatory design. 'What works' in financial regulatory design is a huge question but for the purposes of this inquiry, the most relevant sub-strand concerns the organizational set up and governance of supervisory agencies because this goes directly to the content of regulatory mandates.⁹⁵ Supervision may be organized along functional (lines of business) or institutional (legal status of the regulated entities) lines, or it may be integrated (consolidated in a single supervisor) or be designed around objectives (typically a 'twin peaks' model involving a prudential supervisor and a conduct of business supervisor).⁹⁶

⁹⁰ Ibid.

⁹¹ Scott James and Lucia Quaglia, 'Brexit, the City and the Contingent Power of Finance' (2019) 24 *New Political Economy* 258.

⁹² The relevant letters are at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972443/CX_Letter_-_PRC_Remmit_230321.pdf> and <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972445/CX_Letter_-_FCA_Remmit_230321.pdf>.

⁹³ Starmer (n 11).

⁹⁴ See eg discussion in Joint Committee on the draft Financial Services Bill Evidence, Hansard, House of Lords, 20 November 2012: Cols 1775–1777 <https://old.parliament.uk/documents/joint-committees/Draft-Financial-Services-Bill/WE_BWRITTENEVIDENCE.pdf>. Quoting leading industry players acknowledging the multi-year campaign to restore international competitiveness to the regulatory mandate: T Kokoulas, 'UK Government Publishes Financial Services and Markets Bill' *Insurance Times* (22 July 2022) <www.insurancetimes.co.uk/news/uk-government-publishes-financial-services-and-markets-bill/1441849.article>.

⁹⁵ Charles Goodhart and others, *Financial Regulation: Why, How and Where Now?* (Routledge 1998); Eddy Wymeersch, 'The Structure of Financial Supervision in Europe: About Single, Twin Peaks and Multiple Financial Supervisors' (2007) 8 *European Business Organization Law Review* 237.

Literature comparing the integrated model unfavourably to the objectives model makes the point that the integrated approach can ask too much of a single agency and that it can lead to certain objectives being prioritized over others, whereas the objectives model is clearer and more focused.⁹⁷ The leading proponent of the objectives-based model has repeatedly stressed that its success depends on each supervisory agency having ‘a clear and unambiguous mandate’ and ‘a specific objective for which it can be held accountable’.⁹⁸ Countries like the UK that have adopted an objectives-based model of supervision should therefore pay close attention to the risk of the advantages of the objectives-based model being eroded over time by the adding of additional objectives or other matters to which a supervisor must have regard. Having a multiplicity of considerations in play makes the trade-offs more complicated and may increase the risk of poor decisions.⁹⁹

The next section provides a high-level review of the evolution of regulatory mandates since the original enactment of the Financial Services and Markets Act 2000. The purpose of this review is to underline further the importance of paying close attention to the risks around the intention to add international competitiveness to the regulatory objectives for the PRA and FCA.

V. INTERNATIONAL COMPETITIVENESS AND THE REGULATORY MANDATE--IN AND THEN OUT

The Financial Services and Markets Act 2000 (FSMA) provides the framework for the organization of financial regulation and supervision in the UK. FSMA is a dynamic legislative instrument that is frequently updated. The major institutional changes that were made after the global financial crisis of 2008 were introduced into FSMA principally by the Financial Services Act 2012.¹⁰⁰ The FSM Bill will significantly amend FSMA.

When FSMA was first enacted, the newly established financial regulator, the Financial Services Authority (FSA), had four objectives: market confidence; public awareness; protection of consumers; and reduction of financial crime. The FSA was required in discharging its general functions to have regard to, among other things, the international character of financial services and markets and the desirability of maintaining the competitive position of the UK.¹⁰¹ The received wisdom that emerged after the financial crisis was that the integrated supervisory model had failed, that it had asked too much of a single organization to have objectives spanning both prudential and consumer-facing conduct of business matters, and that insufficient specialist focus had meant that conduct issues had crowded out prudential concerns. The chosen replacement was a ‘twin peaks’ objectives-based model, with one regulator (the PRA) being responsible for prudential and insurance regulation and the other (the FCA) for conduct of business regulation. As noted in section IV above, organizing regulatory agencies along these lines is meant to be about establishing clear and specific objectives that allow for proper focus and stronger accountability.

⁹⁶ Eilis Ferran, ‘Institutional Design: The Choices for National Systems’ in Niamh Moloney, Eilis Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (OUP 2015).

⁹⁷ Michael W Taylor, ‘Twin Peaks’ A Regulatory Structure for the New Century (Centre for the Study of Financial Innovation 1995); Michael W Taylor, ‘The Road From “Twin Peaks”—And The Way Back’ (2009) 16 Connecticut Insurance Law Journal 61.

⁹⁸ Michael W Taylor, ‘Twin Peaks’ Revisited...A Second Chance for Regulatory Reform (Centre for the Study of Financial Innovation 2009).

⁹⁹ Iris HY Chiu, ‘A Rational Regulatory Strategy for Governing Financial Innovation’ (2017) 8 European Journal of Risk Regulation 743.

¹⁰⁰ Noted but not discussed in the main body of the text is the Financial Services Act 2010 which with respect to the FSA added a stability objective, omitted the public awareness objective, and provided for the establishment of a separate body corporate with responsibility for consumer financial education.

¹⁰¹ FSMA (original version) s 2(3)(e).

The inclusion of international competitiveness in the regulatory mandate was a casualty of the post-crisis new thinking. The international competitiveness 'have regard' requirement came in for particularly heavy criticism and took a lot of the blame for what had come to be seen as the UK's excessively light touch and discredited system of regulation. HM Treasury was unequivocal about its decision to find no place for international competitiveness in the mandates of the new regulators:

In particular, the Government considers that the case for making global competitiveness and innovation in financial services part of the responsibility of a regulator charged with ensuring the safety and soundness of risk-taking financial firms needs to be reconsidered. There is a strong argument that one of the reasons for regulatory failure leading up to the crisis was excessive concern for competitiveness leading to a generalised acceptance of a 'light-touch' orthodoxy, and that lack of sufficient consideration or understanding of the impact of complex new financial transactions and products was facilitated by the view that financial innovation should be supported at all costs.¹⁰²

And:

While clearly recognising the importance of the financial services industry to the UK economy, the Government is of the view that financial stability, supported by a rigorous and effective regulatory framework, provides a strong platform for the financial services industry's sustainable growth and success. As such, specific statutory principles relating to the competitiveness of the sector are not, in the Government's view, required in the regulatory system.¹⁰³

This was, it should be noted, the thinking of a Conservative government but one operating in quite different times from the present and whose core message on financial regulation was that lax regulation and supervision under the previous Labour government had contributed significantly to the severity of the global financial crisis for the UK. Key Conservative figures from that era, including the then prime minister (David Cameron) and chancellor (George Osborne), are no longer in Parliament.

With the benefit of hindsight, it may seem somewhat implausible to load so much of the blame onto just one of the many requirements under which the FSA operated (and even at the time some commentators did argue that the FSA was serving as a convenient fall guy for faults on many levels¹⁰⁴) but the best way to understand the fierceness of the criticisms levelled against the older competitiveness principle may be to recognize that it came to be seen as emblematic of a larger problem involving institutional culture and practice. Should we not be concerned that the same could happen again? As noted in the introductory section, this article is not a lone voice in fearing that a competitiveness objective could be a recipe for excessive risk-taking and a race to the bottom, is incoherent, and could unintentionally harm the real economy/reduce economic growth. A large group of distinguished international economists wrote to HM Treasury to make exactly those points.¹⁰⁵ But such arguments have largely failed to break through.¹⁰⁶ Why is government, broadly with the support of the opposition,

¹⁰² HM Treasury, 'A New Approach to Financial Regulation: Judgement, Focus and Stability' (CM 7874, July 2010) para 3.9.

¹⁰³ HM Treasury, 'A New Approach to Financial Regulation: The Blueprint for Reform' (CM 8083, 2011) para 2.51.

¹⁰⁴ Eilís Ferran, 'The Break-up of the Financial Services Authority' (2011) 31 *Oxford Journal of Legal Studies* 455.

¹⁰⁵ Letter (n 14).

¹⁰⁶ Save that the divergence of views has attracted the attention of influential parliamentary committees that can be expected to keep this issue on their radar. House of Commons Treasury Committee (n 13) para 72 backed the idea of a secondary objective for the PRA and FCA to promote long-term economic growth but stressed that the legislative wording would be crucial as would the need to maintain high international standards; House of Lords European Affairs Committee (n 13)

nevertheless pressing on with the proposal? Does the historical experience have nothing to teach us?

Before proceeding to address these questions, the next section outlines the current regulatory objectives and related regulatory principles, and considers how pervasive the objectives are in framing both the activities of the PRA and FCA and the mechanisms by which they are held accountable. This high-level overview is intended to serve as the background against which to assess the significance of adding an additional regulatory objective relating to international competitiveness.

VI. REGULATORY OBJECTIVES AND THEIR PERVASIVE INFLUENCE

The PRA currently has two main objectives, a general one with respect to microprudential regulation (safety and soundness of PRA-authorized persons) and a more specific one with respect to insurance.¹⁰⁷ It also has a secondary objective with respect to the facilitation of effective competition.¹⁰⁸ The FCA currently has a strategic objective to ensure that markets function well and three operational objectives with respect to safeguarding consumer protection, protecting integrity and promoting (rather than simply ‘facilitating’) effective and healthy competition.¹⁰⁹ The emphasis on competition as a force for good is further reinforced by a duty on the FCA to promote effective competition in addition to its objective in that regard.¹¹⁰ Giving a financial regulator a proactive role to promote competition was an innovation in UK financial regulation.¹¹¹

Both the PRA and the FCA are required to have regard to eight regulatory principles in the discharge of their general functions.¹¹² The FCA is also required to have regard to the importance of taking action to minimize opportunities for financial crime.¹¹³ There are, additionally, various must/may ‘have regard’ requirements that apply in specific contexts, including with regard to individual operational objectives.¹¹⁴ The Financial Services Act 2021 added new activity-specific ‘have regard’ requirements when giving the FCA and PRA rule-making powers with respect to the prudential regulation of investment firms and credit institutions: in this context the authorities are required to have regard to: (a) any relevant standards set by an international standard-setting body; (b) the likely effect of the rules on the relative standing of the UK as a place for internationally active investment firms to be based or to carry on activities; (c) the carbon target for 2050; and (d) any other matter specified by the Treasury by regulations.¹¹⁵ For the purposes of (b), it is the UK’s standing relative to other countries

para 152 called on the government in its response to the report to provide further detail on how a secondary competitiveness objective would be applied and how success will be measured.

¹⁰⁷ FSMA s 2B and s 2C.

¹⁰⁸ FSMA s 2H(1).

¹⁰⁹ FSMA s 1B.

¹¹⁰ FSMA s 1B(4). Imposing a duty as well as a statutory objective was intended to make clear that ‘in pursuing *any* of its operational objectives—not just the competition objective—the FCA should use competition as a means of achieving them wherever possible’: Independent Commission on Banking, ‘Final Report and Recommendations’ (September 2011) para 8.86.

¹¹¹ HM Treasury and Department for Business, Innovation and Skills, ‘The Government Response to the Parliamentary Commission on Banking Standards’ (CM 8661, 2013) para 4.15. Under the original FSMA, the FSA was subject to the weaker obligations to have regard to the need to minimize the adverse impact on competition arising from anything done in the discharge of its general functions, and to the desirability of facilitating competition between regulated businesses.

¹¹² FSMA s 3B; s 1B(S)(a) (FCA); s 2H(2) (PRA). The regulatory principles relate to efficiency and economy; proportionality of burdens/restrictions; desirability of sustainable growth; consumer responsibility; senior management responsibility; recognizing differences in business; openness and disclosure; and transparency.

¹¹³ FSMA s 1B(S)(b).

¹¹⁴ For example, FSMA s 1C(2) (‘must’ have regard for the consumer protection objective), and s 1E(2) (‘may’ have regard for the competition objective).

and territories which, in the authority's opinion, internationally active firms are most likely to choose, that is to be considered.¹¹⁶ Both regulators are also required to have regard to such generally accepted principles of good governance as it is reasonable to regard as applicable.¹¹⁷

The wider framework within which the PRA and FCA operate includes the power for HM Treasury to make recommendations to them about aspects of the government's economic policy to which they should have regard.¹¹⁸ HM Treasury is also empowered at any time to make recommendations to the Financial Policy Committee (FPC) about its responsibility to support economic growth¹¹⁹ and the FPC can, in turn, make recommendations to the PRA and FCA.¹²⁰ Political economic imperatives are thus not wholly disregarded in the current FSMA framework but, in a system of inter-related responsibilities between government, parliament and regulators, recommendations to have regard to government policy are not as weighty as a positive objective with respect to competitiveness and growth. There is, currently, no power whereby the government can specifically require the regulators to review their rules but this will be added by the FSM Bill.¹²¹ As discussed in section I, the government has dropped the idea also to insert a new intervention power for government to override regulators in the public interest.

Under FSMA, objectives frame the authorities' 'general functions', which are the functions of making rules; making technical standards; preparing and issuing codes; giving general guidance; and determining the general policy and principles by reference to which they perform particular functions.¹²² In discharging these general functions, the PRA must, so far as reasonably practicable, act in a way that advances its general objective with respect to safety and soundness, and in the insurance context in a way that so far as reasonably practicable is compatible with its general objective and its insurance objective, and which the PRA considers most appropriate for the purposes of advancing those objectives.¹²³ Additionally, so far as is reasonably possible, the PRA is required to act in a way which, as a secondary objective, facilitates effective competition.¹²⁴ In discharging its general functions, the FCA is required so far as is reasonably practicable to act in a way that is compatible with its strategic objective and that advances one or more of its operational objectives.¹²⁵

Objectives also feature prominently in the authorities' obligations with respect to strategy-setting, governance, reporting and transparency; as such, they represent an important part of the accountability framework. The PRA is required to publish and review annually a strategy for achieving its objectives.¹²⁶ It is also required to publish and periodically review guidance about how it intends to achieve its objectives.¹²⁷ The PRA's annual report to the Chancellor of the Exchequer must comment on the extent to which, in its opinion, its objectives have been advanced¹²⁸ and how in discharging its general functions in a way that advances its objectives it has acted so far as is reasonably possible in a way which facilitates its secondary objective with

¹¹⁵ FSMA s 143G(1) (FCA) and s 144(1) (PRA).

¹¹⁶ FSMA s 143G(2) (FCA) and s 144(2) (PRA).

¹¹⁷ FSMA s 3C. FSM Bill cl 29 proposes to empower HM Treasury to specify further activity-specific principles and 'have regard' requirements.

¹¹⁸ Bank of England Act 1988 s 30B; FSMA s 1JA. FSM Bill cl 33 will add the obligation to respond formally to recommendations.

¹¹⁹ Bank of England Act 1998 s 9E(1)(c).

¹²⁰ Bank of England Act 1998 s 9Q.

¹²¹ FSM Bill cl 27.

¹²² FSMA s 1B(6) (FCA) and s 2J(1) (PRA).

¹²³ FSMA s 2B and s 2C.

¹²⁴ FSMA s 2H.

¹²⁵ FSMA s 1B.

¹²⁶ FSMA s 2E.

¹²⁷ FSMA s 2I. PRA, 'The Prudential Regulation Authority's Approach to Banking Supervision' (October 2018); PRA, 'The Prudential Regulation Authority's Approach to Insurance Supervision' (October 2018).

¹²⁸ FSMA sch 1ZB para 19(1)(b).

respect to effective competition.¹²⁹ The statutory objectives also frame the FCA's reporting obligations to Parliament and to the public: it must publish and maintain guidance on how it intends to advance its operational objectives¹³⁰ and in its annual report it must comment on the extent to which, in its opinion, its operational objectives have been advanced and it has acted compatibly with its strategic objective.¹³¹ The FCA's board looks to the statutory objectives in discharging its responsibilities to hold the FCA accountable for the way it works,¹³² and they are embedded in the terms of reference of board committees that oversee the FCA's performance.¹³³

A striking recent example of objectives-based accountability at work is provided by the highly-critical report on the FCA by independent investigator Dame Elizabeth Gloster, which was instigated by HM Treasury after the collapse of mini-bond issuer London Capital & Finance (LCF) and published in 2020. The primary question that Dame Elizabeth was asked to consider, and on which she found serious deficiencies in both policies and supervisory practices, was whether the FCA had discharged its functions with respect to LCF in a manner which enabled it to *effectively fulfil its statutory objectives* (emphasis added).¹³⁴

Objectives also exert powerful influence over institutional culture. 'Culture' is an elusive, multi-layered concept¹³⁵ but its importance as a determinant of behaviour was one of the key reflections from the 2008 financial crisis¹³⁶ and in the years since then, financial regulators have made it a priority to look at how they can use their powers to influence culture within regulated firms.¹³⁷ What goes for firms is (or should be¹³⁸) just as relevant for their regulators as well. From a cultural perspective, objectives are certainly not merely 'symbolic'. There was extensive discussion in Parliament and elsewhere about the importance of statutory objectives at the time of transition from the FSA single regulator to the PRA/FCA twin peaks model.¹³⁹ Unsurprisingly so, given that putting in place sharper, more focused objectives was at the heart of the institutional reordering. A senior, experienced regulator testified to the significance of statutory objectives in the following terms: 'I worked for the FSA and I know how important the objectives are in terms of driving culture . . . Everything comes back to them, so they are extremely powerful and critically important'.¹⁴⁰ The then (and last) CEO of the FSA spoke of the critical need for supervisors to identify and focus on the big risks to their statutory objectives, and to make the right judgement as to the course of action to reduce the probability of risks to their statutory objectives.¹⁴¹ Times change but only to a certain extent: while the FCA's

¹²⁹ FSMA sch 1ZB para 19(1)(ba).

¹³⁰ FSMA s 1K. See further FCA Handbook, SUP 1A (The FCA's approach to supervision); The FCA's Approach to Advancing its Objectives 2015 (general guidance).

¹³¹ FSMA sch 1ZA para 11(1)(b)–(c).

¹³² FCA Annual Report and Accounts 2021, 58.

¹³³ FCA, 'Corporate Governance of the Financial Conduct Authority' (January 2020).

¹³⁴ Elizabeth Gloster, 'Report of the Independent Investigation into the Financial Conduct Authority's Regulation of London Capital & Finance plc' (23 November 2020, revised on 10 December 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945247/Gloster_Report_FINAL.pdf>.

¹³⁵ A good entry point to the rich scholarship on firm culture is provided by Anat Keller and Andreas Kokkinis, 'The Senior Managers and Certification Regime in Financial Firms: An Organisational Culture Analysis' (2022) 22 *Journal of Corporate Law Studies* 299, section 2.

¹³⁶ Dan Awrey, William Blair and David Kershaw, 'Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation' (2013) 38 *Delaware Journal of Corporate Law* 191.

¹³⁷ FCA, 'Transforming Culture in Financial Services' (FCA Discussion Paper 18/2, 2018).

¹³⁸ But see Eleanor Hickman, 'Is the Senior Managers and Certification Regime changing banking for good?' (2022) 85 *Modern Law Review* 1440 suggesting that the FCA may be guilty of double standards, relying heavily on individual accountability as a culture-improving tool for banks but deflecting individual responsibility for its own shortcomings.

¹³⁹ Reviewed in depth in Eilis Ferran, 'The New Mandate for the Supervision of Financial Services Conduct' (2012) 65 *Current Legal Problems* 411.

¹⁴⁰ Christine Farnish, one time director of consumer relations giving evidence to the Joint Committee on the draft Financial Services Bill, quoted in Ferran (ibid).

¹⁴¹ Hector Sants, quoted in Ferran (ibid).

2021/22 business plan talks a lot more about strategic overarching outcomes and metrics to demonstrate impact than it does about statutory objectives, it nevertheless leaves no doubt as to the constancy of the objectives as the goals against which its delivery is to be judged. They are a key part of any system of accountability.

This, then, is the background for considering the questions posed earlier in this article: why is international competitiveness staging a return to the regulatory mandate and coming back in the enhanced form of a regulatory objective? And why should we view this with some concern?

VII. PUTTING INTERNATIONAL COMPETITIVENESS BACK INTO REGULATORY MANDATES ... AND IN A STRONGER POSITION THAN BEFORE: WHY? AND WHY SHOULD WE CONTINUE TO WORRY ABOUT THE CONSEQUENCES?

Macroeconomic conditions provide one answer to the question why inclusion of international competitiveness in regulatory mandates has gone from being a pariah to an option of near-talismanic quality that commands significant cross-party political support as well as strong industry backing. Some of the populist pre-occupations of the past decade such as the 'bank bashing' of the immediate post-financial crisis era and the anti-elitism around the time of the Brexit vote have given ground to more immediately pressing worries about widespread deprivation and hardship resulting from grim economic and fiscal conditions. As a post-Brexit UK seeks to find its new place in such an uncertain world, policy changes that have the potential to make a positive difference carry obvious appeal; at least superficially, making international competitiveness and growth a regulatory objective fits the bill rather well.

There is also a more technical answer to the 'why' question. HM Treasury has explained that the facilitation of international competitiveness and growth is to return, not as a mere regulatory principle to which the FCA and PRA must have regard—because, in HM Treasury's view, that would be too weak to enable regulators to support competitiveness in line with the government's vision for the sector¹⁴²—but as a full-blown objective, albeit a secondary objective, which for the PRA would sit alongside its existing secondary objective with respect to competition, and for the FCA would complement its three existing operational objectives. Clause 24 of the FSM Bill gives effect to this intention. The absence of differentiation between the PRA and FCA in this regard merits comment. For a prudential regulator to have a responsibility for facilitating international competitiveness could be considered especially worrisome given the delicate balance that needs to be maintained between stability and competitiveness. Much may depend on how the safeguard of alignment with international standards plays out in practice: in effect, the operation of clause 24 could become a fascinating testing ground for theories about the cover such standards give to prudential regulators to resist domestic pressures for laxer requirements.¹⁴³ Yet, while impact on the PRA may stand out as the most pressing concern, it does not follow that there is no cause for concern in relation to the FCA: its conduct and investor protection-focused remit includes areas of responsibility—such as operational resilience—where lowering standards with a view to being more internationally competitive could also cause widespread harm; and there is scope for investor protection failures resulting from weak regulation to trigger chain reactions across markets that eventually become systemically significant.¹⁴⁴

The justification for bringing international competitiveness back with the elevated status of a statutory objective has been linked to the proposed post-Brexit conferral on the FCA and PRA

¹⁴² HM Treasury (n 52) 33.

¹⁴³ Singer (n 55); Copelovitch and Singer (n 55).

¹⁴⁴ Q Zhou, 'Crisis-Driven Regulation: Evidence from Engineering China's Banking Wealth Management Market' (2022) 22 *Journal of Corporate Law Studies* 535.

of a much-expanded rule-making responsibility, which is the heart of HM Treasury's vision of the future of financial regulation in the UK¹⁴⁵ and which is reflected in the FSM Bill.¹⁴⁶ In broad terms, this vision goes back to the original FSMA model, in which the primary legislation set the parameters, there was limited use of delegated legislation, and the bulk of the detailed regulatory requirements was made by the regulator. That model sought to harness regulatory expertise, proximity to the market, and ability to respond to changing circumstances in a more agile way than Parliament and government departments can achieve. However, over time, and especially after the 2008 financial crisis, more and more of the rules governing financial market activity came to be made by EU legislative bodies and the space for regulator-made rules became smaller.

The fact that the FCA and PRA are intended to take rule-making powers back from politicians and civil servants provides important framing for the issues discussed in this article. HM Treasury has explained that when the UK was a member of the EU, the government was able to ensure that matters of public policy such as growth and international competitiveness were considered as part of the negotiations to agree regulations at the EU level; HM Treasury considers it right, therefore, that these important public policy considerations should be reflected in the regulators' mandate.¹⁴⁷ This argument has some appeal but it starts to break down on closer examination. One problem is that the proposal is not just about rule-making functions. The statutory objectives are the delivery goals for the regulators' general functions, which go well beyond the making of the regulatory rules and extend into supervisory and enforcement policies as well. As seen in the preceding section, everything—regulation, supervisory policy, oversight, and enforcement—comes back to them.

Since objectives clearly matter a lot, it is not plausible to dismiss the new objective as simply 'symbolic' (with the implication that there is nothing to worry about). If it were nothing other than symbolic, why would the sector have lobbied hard for it over an extended period? Even as a secondary objective subject to qualifications, it will have the potential to exert pervasive influence over how the regulators conduct their activities. In any case, it is rather easier to make the 'mere symbolism' argument in the direction of the likely positive impact of the change than its propensity to lead to harm. Notwithstanding that a senior FCA official has described the prospect of the new competitiveness and growth objective as 'quite empowering',¹⁴⁸ it is hard to find convincing examples of socially worthwhile, innovative financial market activity having been held back because of the inability of the UK's financial regulators (even during the period when they were subject to the constraints of EU membership) to fashion appropriately facilitative regulation within their existing objectives. On the contrary, regulatory sandboxes, green fintech initiatives, digital sandboxes, and innovation pathways¹⁴⁹ stand out as areas where in pursuit of its competition and consumer benefit objectives, the FCA has led the way globally in designing innovation-friendly regulation.¹⁵⁰ Even in its role as market regulator, where recent steps to make the listing regime more attractive to high-growth companies have been criticized for being too tentative,¹⁵¹ the FCA's appetite for reform appears to be growing and it has

¹⁴⁵ HM Treasury (n 52) ch 3.

¹⁴⁶ FSM Bill Explanatory Notes, paras 8–16 outline the 'FSMA model' (detailed regulatory requirements should generally be in regulators' rules) and why it is appropriate for the UK to return to it. This proposed way forward has the support of the influential Treasury Select Committee: House of Commons Treasury Committee, 'The Future Framework for Regulation of Financial Services' (5th Report of Session 2021–22, HC 147, July 2021) para 27.

¹⁴⁷ FSM Bill Explanatory Notes paras 50–51.

¹⁴⁸ House of Commons Treasury Committee (n 13) para 60 quoting Edwin Schooling Latter, FCA Director of Markets and Wholesale Policy.

¹⁴⁹ See generally <www.fca.org.uk/firms/innovation/our-innovation-services>.

¹⁵⁰ Harry Armstrong, Imre Bárd and Ebba Engström, 'Regulator Approaches to Facilitate, Support and Enable Innovation: Final Report (BEIS Research Paper Series No 2020/003)' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/861078/regulator-approaches-facilitate-support-enable-innovation.pdf>.

¹⁵¹ Reddy (n 49).

given no indication of being held back by its existing objectives from pursuing that goal.¹⁵² It seem unlikely therefore that the adoption of a high-level competitiveness objective will address the concerns of critics of the FCA's recent track record in delivering capital market reforms that are attractive to innovative, high-growth companies. For those calling for improvements in the quality of the FCA's regulatory initiatives, the proposals in the FSM Bill to put the Listing Authority Advisory Panel on a statutory footing¹⁵³ and to increase the transparency of regulators' engagement with their panels¹⁵⁴ may hold considerably more promise. The FCA's CEO has said that, already, 'critical support for innovation is written into the legislative DNA of the FCA. It is there in how we balance our objectives and in the remit set for us by government.'¹⁵⁵ Why risk upsetting a delicate balance?

Any argument to the effect that once account is taken of the secondary nature of the proposed new objective and the qualifications to which it will be subject, in substance it will amount to little more than a 'have regard' requirement would be similarly unpersuasive. Form should follow substance, especially when there is a ready precedent to hand on how to empower the FCA and PRA to take account of broader growth and competitiveness considerations when exercising rule-making powers: the new 'have regard' requirements inserted by the Financial Services Act 2021 already cater for this. As mentioned in section III, these new 'have regard' requirements in the context of prudential requirements include the likely effect of the rules on the relative standing of the UK as a place for internationally active firms to be based or carry on activities. By expressly directing attention to the relative standing of the UK vis-à-vis other countries or territories likely to be chosen by internationally active firms, this formulation even has an inbuilt safeguard against standards slipping too far. In fact the FSM Bill does include clauses giving the government (HM Treasury) powers to extend further the matters to which regulators must have regard when making activity-specific rules as well as to oblige the regulators to make rules in relation to specific areas of regulation and to require regulators to review existing rules;¹⁵⁶ but these additional powers, a stated purpose of which is to ensure that more specific public policy priorities can be reflected in regulator rule-making where the government considers that appropriate,¹⁵⁷ are intended to apply on top of the competitiveness and growth secondary objective, rather than being instead of it.

This takes us to another concern. As discussed earlier, the FSM Bill adds a new secondary objective for the PRA and FCA and new activity-specific 'have regard' requirements; also in the Bill, but beyond the scope of this article, is a new secondary objective for the Bank of England in its role with respect to central counterparties and central securities depositories and various other detailed requirements as well.¹⁵⁸ In short, there is an ever-growing plethora of regulatory objectives, principles, and 'have regard' requirements. Not unreasonably, these various requirements seek to ensure that, in a framework where rule-making power is largely located with regulators, the government of the day still has sufficient say over the direction of financial regulation to discharge its responsibilities for public policies it has been elected to deliver.¹⁵⁹ Unelected regulatory power comes with a significant legitimacy deficit and it needs to

¹⁵² Cole (n 5).

¹⁵³ FSM Bill cl 38.

¹⁵⁴ FSM Bill cl 272.

¹⁵⁵ Nikhil Rathi, 'Levelling the Playing Field—Innovation in the Service of Consumers and the Market' (Speech to FinTech Week, 20 April 2021) <www.fca.org.uk/news/speeches/levelling-playing-field-innovation-service-consumers-and-market>.

¹⁵⁶ FSM Bill cls 27–29.

¹⁵⁷ FSM Bill Explanatory Notes para 54.

¹⁵⁸ FSM Bill cl 43.

¹⁵⁹ Sharon Bowles, 'Who Thought of That—is it Legal? A Journey Through Financial Regulation' (Keynote Speech by Baroness Sharon Bowles, UCL Conference on Financial Law and Regulation, 30 June 2022, unpublished, on file with author).

be appropriately contained.¹⁶⁰ But there are dangers in this proliferation from an accountability perspective.

Cluttered mandates are not conducive to effective accountability. As discussed earlier, mandate clarity is one of the key arguments in favour of the objectives-based regulatory model in the first place. Julia Black has wisely queried the wisdom of a ‘highly complex decision matrix’ on the grounds that ‘multiple decision making criteria can create confusion and may well conflict with each other’.¹⁶¹ The House of Commons Treasury Committee has urged caution in adding to regulatory mandates that are already bulging with strategic and operational objectives, combined with principles and ‘have regard’ requirements that are numerous and expanding, to the point where regulators have to choose which to prioritize on a regular basis when drafting new policy proposals.¹⁶² A senior ECB official has also stressed the importance of being able to measure performance against clear objectives and has argued that where there are competing or even conflicting objectives, regulatory/supervisory actions may become harder to explain, which could, lead to situations where ‘the credibility of the independent function itself may be ultimately undermined’.¹⁶³

While accountability and regulatory independence are sometimes seen as opposing forces, they can also be understood as complements that are mutually reinforcing.¹⁶⁴ This insight about the interrelationship between regulatory independence and accountability is critical to the argument in this section. This article argues that the better choice would have been not to adopt the competitiveness and growth objective. However, as the momentum for adoption of clause 24 appears to be unstoppable, the focus for the concerns raised by its adoption shifts instead to the accompanying system of accountability. The accountability system for the new financial regulatory framework will fail at a fundamental level if it is not able to protect regulators that have resisted pressure to change their position on competitiveness grounds where they have judged this to be incompatible with their other objectives.¹⁶⁵ The secondary status of the objective needs to be a practical reality and not just words on paper. The influential House of Commons Treasury Committee has already declared its intention to remain alert for any evidence that regulators are coming under pressure from HM Treasury to inappropriately weaken regulatory standards.¹⁶⁶ This is a good start, but the need for vigilance will remain strong. Again quoting the House of Commons Treasury Committee: ‘The independence of regulators to be free from political interference is one of the key aspects of UK financial services regulation, and it is, arguably, one of the reasons why the UK is a world-leading financial centre.’¹⁶⁷

¹⁶⁰ Paul Tucker, *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State* (Princeton University Press 2018).

¹⁶¹ Julia Black, ‘Accountability and UK Financial Regulators’ in Anamika Ahir and Kevin R James, ‘Rebooting UK Financial Regulation for a Post-Brexit World’ (LSE Policy Briefing 45, June 2021) <www.systemicrisk.ac.uk/sites/default/files/2021-06/21127%20Policy%20Briefing%20%2345%20Rebooting%20UK%20Financial%20Regulations_short_v4.pdf>.

¹⁶² House of Commons Treasury Committee (n 146) para 50.

¹⁶³ Kerstin af Jochnick, ‘Supervisory Independence and Accountability’ (Speech by Kerstin af Jochnick, Member of the Supervisory Board of the ECB, at the IMF High-Level Regional Seminar in Sub-Saharan Africa, 1 March 2022) <www.bankingsupervision.europa.eu/press/speeches/date/2022/html/ssm.sp220301~66eb4805eb.en.html>.

¹⁶⁴ *Ibid.*

¹⁶⁵ In the corporate governance context, some scholars (eg Lucian A Bebchuk and Roberto Tallarita, ‘The Illusory Promise of Stakeholder Governance’ (2020) 106 *Cornell Law Review* 91) question moving from shareholder value to stakeholderism as the basis for managerial accountability because of concern that this would allow corporate leaders to evade effective scrutiny and accountability by playing different stakeholder constituencies off against each other. This corporate governance ‘too many masters’ problem is the opposite of the problem envisaged by the text—that certain powerful stakeholders (eg government, industry) could seek to disproportionately elevate a single (and secondary) objective to put pressure on regulators to lower standards. The differences in delegator/delegate power dynamics and institutional settings that result in different areas of concern about the implications of multiple objectives etc merit further study.

¹⁶⁶ House of Commons Treasury Committee (n 13) para 23.

¹⁶⁷ House of Commons Treasury Committee (n 146) para 36.

Signs of the independence-eroding risk presented by the competitiveness and growth objective are already starting to emerge. Even before it reaches the statute books, there is speculation that the new competitiveness objective could 'nudge' the PRA not to implement outstanding Basel rules in full.¹⁶⁸ The recent evolution of insurance regulation in the UK could be a harbinger of what is to come. The Bank of England/PRA strongly resisted a 'cherry picking' approach to the reform of EU insurance rules that would involve deleting disliked elements of EU law without consideration of the need for strengthened regulation in other areas to maintain a balanced approach overall.¹⁶⁹ This met with resistance from certain segments of the industry industry, who pressed for lower capital charges that would facilitate infrastructure investments. In the end, HM Treasury announced that 'to help spur an internationally competitive insurance sector, while retaining high standards of policyholder protection' it would not include changes advocated by the PRA in the reform of Solvency II and instead would give the PRA certain additional powers and supervisory tools, including with respect to stress-testing exercises and the operation of the senior managers' regime.¹⁷⁰

The next, and concluding, section draws the strands of the argument together.

VIII. CONCLUDING OBSERVATIONS

The British government has announced a worthy political aspiration to maintain and grow a strong financial sector that serves as the engine of a vibrant economy in the interests of communities and citizens. It has embarked on a review of financial regulation with a view to ensuring that its regulatory system is aligned with economic objectives. The FSM Bill is the legislative start of a multi-year process that will dismantle EU-derived rules and replace them with rules that are more suited to the UK's post-Brexit circumstances. This necessary exercise presents both opportunities and risks.

The central focus of the concern explored in this article has been the intention to add 'facilitating the international competitiveness and growth in the medium to long term of the UK economy' to the objectives of the PRA and the FCA. Clause 24 of the FSM Bill will not just reverse a change made after the financial crisis but will bring international competitiveness back into the regulatory mandate in a strengthened form by making it an objective rather than a mere principle to which regulators are expected to have regard. This article has presented both theoretical and historical evidence in support of treating this as a troubling development.

Deregulation does not have to mean a race to the bottom. This article has made the point that there are many reasons to welcome the FSM Bill and to expect that in due course there will much to laud rather than condemn in the dismantling of existing requirements, for example because they have become outdated and are getting in the way of socially beneficial market innovation, or because they went too far in the first place, or because our understanding of what 'good' regulation looks like has matured. At a quite basic level, much of the style and some of the content of the rules currently in place reflect EU considerations that no longer apply to the UK

¹⁶⁸ Laura Noonan, 'UK Faces Unintended Consequences of Post-Brexit Financial Regulation' *Financial Times* (26 January 2022) <<https://www.ft.com/content/bebc1162-55f5-4be8-af8b-4c66d422510e>>. This point relates to the implementation of the final part of the Basel III post-crisis reforms (also known as Basel IV) where the European Commission has promised 'faithful' implementation but also adjustments to the specificities of the European context where the international standards would result in unintended or disproportionate effects: European Commission Questions and Answers on the Banking Package 2021 <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_5386>. The Commission is also proposing to start applying the new requirements from 2025 rather than 2023, the deadline set by the Basel Committee. In March 2022 the Bank of England/PRA announced that it would also delay implementation to January 2025 and that it would consult on the content of implementation in Q4 2022. This consultation was not published by the date of finalization of this article (27 November 2022).

¹⁶⁹ Sam Woods, 'Solvency II: Striking the Balance' (Speech, 8 July 2022)

¹⁷⁰ HM Treasury, 'Review of Solvency II: Consultation Response' (November 2022) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1118359/Consultation_Response_-_Review_of_Solvency_II_.pdf>.

and should be removed. The desirability of paying attention to international competitiveness and growth has not been questioned by this article. These are matters that should concern elected politicians and civil servants and as such, be part of the broader context in which financial regulation operates.

What this article has questioned, however, is the need to make thinking about international competitiveness and growth part of the day job of the UK's financial regulators particularly in the form of a (secondary) statutory objective rather than a (mere) regulatory principle. The upside of going this far seems to be rather limited—UK regulators are already able to be innovative and to adapt their rules to changing circumstances—while the potential downsides are considerable given the pervasive influence of the statutory objectives on everything that the regulators do. The argument that this is needed because the regulators are taking back control of rule-making powers that had passed to politicians and civil servants during the era of EU membership is not wholly convincing because objectives affect more than just rule-making powers.

The mere prospect of an international competitiveness objective has provided leverage for those advocating a deregulatory agenda, and this trend seems likely to continue. Based on the scholarly analysis and historical experience reviewed in this article, there is a danger that the new framework will ratchet up the pressure on the authorities to pursue a deregulatory agenda that goes further than cautious, independent assessment would deem advisable. Since reversal of the decision to add the competitiveness and growth objective is not likely, attention must therefore turn to ensuring that the system of accountability that is put in place to support the new regulatory framework will provide sufficient space for regulators to defend their independent position where they have resisted calls for competitiveness-enhancing changes that they have deemed to be incompatible with their other objectives. Secondary must mean secondary in practice as well as on paper. The challenge in designing such a system is exacerbated by the extent to the FSM Bill is likely to move the UK even further away from the 'ideal' design of a objectives-based institutional model, a hallmark of which is uncluttered mandates that facilitate clear accountability.