



Financial Services and Markets Act 2023

2023 CHAPTER 29

PART 1

REGULATORY FRAMEWORK

CHAPTER 2

NEW REGULATORY POWERS

Powers in relation to critical third parties

18 Critical third parties: designation and powers

- (1) FSMA 2000 is amended as follows.
- (2) In the heading to Part 18, for “and CSDs” substitute “, CSDs and other parties”.
- (3) After section 312K (statement of policy: procedure) insert—

“CHAPTER 3C

CRITICAL THIRD PARTIES

312L Critical third parties

- (1) The Treasury may by regulations designate a person who provides services to one or more authorised persons, relevant service providers or FMI entities as a “critical third party”.
- (2) The Treasury may designate a person under subsection (1) only if in the Treasury’s opinion a failure in, or disruption to, the provision of those services (either individually or, where more than one service is provided, taken

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together) could threaten the stability of, or confidence in, the UK financial system.

- (3) The Treasury must have regard to the following factors when forming an opinion for the purposes of subsection (2)—
- (a) the materiality of the services provided to the delivery, by any person, of essential activities, services or operations (wherever carried out);
 - (b) the number and type of authorised persons, relevant service providers or FMI entities to which the person provides services.
- (4) Before making regulations under subsection (1) the Treasury must—
- (a) consult each of the relevant regulators and such other persons as the Treasury consider appropriate,
 - (b) give notice in writing to the person to be designated specifying a reasonable period within which that person may make representations in writing about the proposal to the Treasury, and
 - (c) have regard to any representations made to them in accordance with paragraph (b).
- (5) The Treasury may not designate the Bank of England under subsection (1).
- (6) Each of the following is a relevant regulator for the purposes of this Chapter—
- (a) the FCA,
 - (b) the PRA, and
 - (c) the Bank of England.
- (7) Activities, services or operations are “essential” for the purposes of subsection (3) if they are essential to—
- (a) the economy of the United Kingdom, or
 - (b) the stability of, or confidence in, the UK financial system.
- (8) In this Chapter—
- “critical third party” means a person designated under subsection (1);
- “FMI entity” means—
- (a) a recognised clearing house;
 - (b) a recognised CSD;
 - (c) a recognised investment exchange which is not an overseas investment exchange;
 - (d) a recognised payment system under section 184 of the Banking Act 2009;
 - (e) a person specified as a service provider in relation to a recognised payment system under section 206A of the Banking Act 2009;
- “relevant service provider” means—
- (a) an electronic money institution as defined by regulation 2(1) of the Electronic Money Regulations 2011 ([S.I. 2011/99](#));
 - (b) an authorised payment institution, small payment institution or registered account information services provider as defined by regulation 2(1) of the Payment Services Regulations 2017 ([S.I. 2017/752](#));

“service” includes facility.

312M Power to make rules

- (1) A relevant regulator may make such rules imposing duties on critical third parties in connection with the provision of services to authorised persons, relevant service providers and FMI entities as appear to the regulator to be necessary or expedient for the purpose of advancing any of its objectives.
- (2) The reference in subsection (1) to a relevant regulator’s objectives is a reference to—
 - (a) where the regulator is the FCA, one or more of its operational objectives;
 - (b) where the regulator is the PRA, one or more of its objectives;
 - (c) where the regulator is the Bank, the Bank’s Financial Stability Objective.
- (3) In the application of Part 9A to rules made by the FCA or the PRA under this section, the following provisions apply with the modifications specified in this subsection—
 - (a) section 137T (general supplementary powers) applies as if—
 - (i) the reference in paragraph (a) to “authorised persons, activity or investment” were a reference to “critical third parties or services”, and
 - (ii) in paragraph (b) for the words from “as” to the end there were substituted “or the Bank, or standards issued by any other person, as those rules or standards have effect from time to time.”;
 - (b) section 138B (publication of directions) applies as if subsection (4) were omitted;
 - (c) section 138F (notification of rules) applies as if subsections (1A) and (2) were omitted;
 - (d) section 138I (consultation) applies as if the reference in subsection (1) (a) to the “PRA” were a reference to the “PRA and the Bank”;
 - (e) section 138J (consultation) applies as if the reference in subsection (1) (a) to the “FCA” were a reference to the “FCA and the Bank”.

312N Power of direction

- (1) A relevant regulator may, if it appears to the regulator to be necessary or expedient for the purpose of advancing any of its objectives, direct a critical third party to—
 - (a) do anything specified in the direction, or
 - (b) refrain from doing anything specified in the direction.
- (2) A direction under this section—
 - (a) must be given by notice in writing,
 - (b) may be expressed to have effect during a specified period or until revoked, and
 - (c) may specify the way in which, and the time by which, a thing is to be done.

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- (3) Subsection (4) applies if a direction is given to a critical third party for the purpose of resolving or reducing a threat to the stability or integrity of the UK financial system.
- (4) The critical third party (including the critical third party’s officers and staff) has immunity from liability in damages in respect of action or inaction in accordance with the direction.
- (5) A direction given for the purpose mentioned in subsection (3) must—
 - (a) include a statement that it is given for that purpose, and
 - (b) inform the critical third party of the effect of subsection (4).
- (6) An immunity conferred by this section does not extend to action or inaction—
 - (a) in bad faith, or
 - (b) in contravention of section 6(1) of the Human Rights Act 1998.
- (7) A relevant regulator may at any time revoke a direction under this section by giving notice in writing to the critical third party to which the direction relates.
- (8) The revocation of the direction does not affect the validity of anything previously done in accordance with it.
- (9) For the purposes of this section the objectives of a relevant regulator are as described in section 312M(2).

312O Directions: procedure

- (1) If a relevant regulator proposes to give a direction under section 312N, or gives such a direction with immediate effect, it must give written notice to the critical third party to which the direction is given (or is to be given) (the “relevant critical third party”).
- (2) A direction under section 312N takes effect—
 - (a) immediately, if the notice under subsection (1) states that this is the case,
 - (b) on such other date as may be specified in the notice, or
 - (c) if neither paragraph (a) or (b) applies, when the matter to which the notice relates is no longer open to review.
- (3) A direction may be expressed to take effect immediately, or on a specified date, only if the relevant regulator reasonably considers that it is necessary for the direction to take effect immediately or on that date.
- (4) The notice under subsection (1) must—
 - (a) give details of the direction,
 - (b) state the relevant regulator’s reasons for the direction and for its determination as to when the direction takes effect,
 - (c) inform the relevant critical third party that it may make representations to the regulator within such period as may be specified in the notice (whether or not the critical third party has referred the matter to the Tribunal), and

- (d) inform the relevant critical third party of its right to refer the matter to the Tribunal (including giving an indication of the procedure on such a reference).
- (5) The relevant regulator may extend the period allowed under the notice for making representations.
- (6) If, having considered any representations made by the relevant critical third party, the regulator decides—
 - (a) to give the direction proposed, or
 - (b) if the direction has been given, not to revoke the direction,it must give the critical third party written notice.
- (7) If, having considered any representations made by the relevant critical third party, the regulator decides—
 - (a) not to give the direction proposed,
 - (b) to give a different direction, or
 - (c) to revoke a direction which has effect,it must give the critical third party written notice.
- (8) A notice given under subsection (6) must inform the relevant critical third party of its right to refer the matter to the Tribunal (including giving an indication of the procedure on such a reference).
- (9) A notice under subsection (7)(b) must comply with subsection (4).
- (10) For the purposes of subsection (2)(c), whether a matter is open to review is to be determined in accordance with section 391(8).

312P Information gathering and investigations

- (1) The provisions of Part 11 (information gathering and investigations) mentioned in this section are to apply in relation to this Chapter in accordance with the provision made by this section.
- (2) In any case where subsection (1) applies—
 - (a) any reference in Part 11 to the FCA or PRA which is contained in, or relates to, any of those provisions (however expressed) is to be read as a reference to a relevant regulator, and
 - (b) Part 11 has effect with any other necessary modifications.
- (3) The powers conferred by section 165(1) and (3) (power to require information) are exercisable by a relevant regulator or (as the case may be) a relevant regulator's officers to impose requirements on a critical third party or a person connected with a critical third party.
- (4) The information or documents that a relevant regulator may require to be produced or provided in accordance with subsection (3) are limited to information and documents reasonably required in connection with the exercise by the relevant regulator of functions conferred on it by or under this Chapter (and accordingly section 165(4) does not apply).

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- (5) The power conferred by section 166 (reports by skilled person) is exercisable by a relevant regulator in relation to a critical third party or a person connected with a critical third party.
- (6) The power conferred by section 166A (appointment of skilled person) is exercisable by a relevant regulator in relation to a critical third party.
- (7) The power conferred by section 168(5) (appointment of persons to carry out investigations in particular cases) is exercisable by a relevant regulator if it appears to the relevant regulator that there are circumstances suggesting that a person may have contravened any requirement imposed by or under this Chapter.
- (8) In addition to the powers conferred by section 171, a person conducting an investigation under section 168(5) as a result of subsection (7) is to have the powers conferred by sections 172 and 173 (and for this purpose any references in those sections to an investigator are to be read accordingly).
- (9) The power under section 176(1) (entry of premises under warrant) is exercisable on information on oath given by or on behalf of a relevant regulator, or an investigator appointed by a relevant regulator, as if the reference to the third set of conditions were omitted.
- (10) For the purposes of this section a person is connected with a critical third party if that person is or has at any relevant time been—
 - (a) a member of the critical third party’s group,
 - (b) a controller of the critical third party, or
 - (c) in relation to the critical third party, a person mentioned in Part 1 of Schedule 15 (reading references in that Part to the authorised person as references to the critical third party).

312Q Power of censure

If a relevant regulator considers that a critical third party has contravened a requirement imposed by or under this Chapter the regulator may publish a statement to that effect.

312R Disciplinary measures

- (1) This section applies if a relevant regulator considers that a critical third party has contravened a requirement imposed by or under this Chapter.
- (2) The relevant regulator may publish a notice—
 - (a) prohibiting the critical third party from entering into arrangements, or continuing, to provide services to authorised persons, relevant service providers or FMI entities;
 - (b) prohibiting authorised persons, relevant service providers or FMI entities who receive services from the critical third party from continuing to receive those services from that party;
 - (c) prohibiting authorised persons, relevant service providers or FMI entities from entering into arrangements for receipt of services from the critical third party;

- (d) providing for the provision of any services by the critical third party to be subject to such conditions or limitations as are specified in the notice;
 - (e) providing for any receipt of services by authorised persons, relevant service providers or FMI entities from the critical third party to be subject to such conditions or limitations as are specified in the notice.
- (3) A notice under subsection (2) may make different provision for different cases and may in particular make different provision in respect of different descriptions of services, authorised persons, FMI entities or relevant service providers.
- (4) A relevant regulator may only exercise the powers under subsection (2) if the regulator is satisfied that—
- (a) it is appropriate in the circumstances to take action against the critical third party,
 - (b) the exercise of the power will not threaten the stability of, or confidence in, the UK financial system, and
 - (c) it is desirable to exercise the power in order to advance one or more of the regulator’s objectives.
- (5) A relevant regulator may either on its own initiative or on an application by the critical third party concerned withdraw or vary a notice given by it under subsection (2) by publishing a further notice.
- (6) Publication under this section is to be made in such manner as the relevant regulator considers best designed to bring the publication to the attention of the public.
- (7) Where a notice includes a prohibition, condition or limitation imposed under subsection (2), publication of a notice under this section must in particular be made in a manner appearing to the relevant regulator to be best designed to bring the notice to the attention of the persons to whom the prohibition, condition or limitation applies.
- (8) A person who breaches a prohibition, condition or limitation imposed by a notice under this section is to be taken to have contravened a requirement imposed on the person under this Act.
- (9) For the purposes of this section the objectives of a relevant regulator are as described in section 312M(2).

312S Procedure and right to refer to Tribunal

- (1) If a relevant regulator proposes to publish a statement or notice under section 312Q or 312R, it must give the critical third party, authorised persons, relevant service providers or FMI entities to whom the statement or notice would relate a warning notice.
- (2) A warning notice must set out the terms of the proposed statement or notice.
- (3) If a relevant regulator decides to publish a statement or notice under section 312Q or 312R it must give the critical third party, authorised persons, relevant service providers or FMI entities to whom the statement or notice relates a decision notice.

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- (4) A decision notice must set out the terms of the statement or notice.
- (5) If a relevant regulator decides to act under section 312N or 312Q a critical third party who is aggrieved may refer the matter to the Tribunal.
- (6) If a relevant regulator decides to act under section 312R a critical third party, authorised person, relevant service provider or FMI entity who is aggrieved may refer the matter to the Tribunal.

312T Statement of policy relating to disciplinary measures

- (1) The relevant regulators must prepare and publish a statement of policy with respect to the exercise of powers under section 312Q and section 312R.
- (2) The relevant regulators may alter or replace a statement published under this section.
- (3) The relevant regulators must publish a statement as altered or replaced under subsection (2).
- (4) Publication under this section is to be made in such manner as the relevant regulators consider best designed to bring the publication to the attention of the public.

312U Duty to ensure co-ordinated exercise of functions etc

- (1) The relevant regulators must co-ordinate the exercise of their respective functions conferred by or under this Chapter.
- (2) In complying with the duty in subsection (1) each relevant regulator must obtain information and advice from any of the other relevant regulators who may be expected to have relevant information or relevant expertise.
- (3) The duty in subsection (1) applies only to the extent that compliance with the duty does not impose a burden on the relevant regulators that is disproportionate to the benefits of compliance.
- (4) Before exercising any power conferred by or under this Chapter a relevant regulator must consult each of the other relevant regulators (where not otherwise required to do so).

312V Memorandum of understanding

- (1) The relevant regulators must prepare and maintain a memorandum which describes in general terms—
 - (a) the role of the relevant regulators in relation to the exercise of functions conferred by or under this Chapter, and
 - (b) how they intend to comply with section 312U in relation to the exercise of such functions.
- (2) The relevant regulators must review the memorandum at least once in each calendar year.
- (3) The relevant regulators may revise a memorandum under this section.

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- (4) The relevant regulators must give the Treasury a copy of the memorandum and any revised memorandum.
- (5) The Treasury must lay before Parliament a copy of any document received by them under this section.
- (6) The relevant regulators must ensure that the memorandum as in force for the time being is published in the way appearing to them to be best calculated to bring it to the attention of the public.
- (7) The memorandum need not relate to any aspect of compliance with section 312U if the relevant regulators consider—
 - (a) that publication of information about that aspect would be against the public interest, or
 - (b) that aspect is a technical or operational matter not affecting the public.

312W Application of provisions of this Act to this Chapter

The following provisions do not apply for the purposes of this Chapter—

- (a) section 3D (duty to ensure co-ordinated exercise of functions);
- (b) section 3E (memorandum of understanding);
- (c) section 138D (actions for damages).”

19 Critical third parties: related amendments

- (1) FSMA 2000 is amended as follows.
- (2) In section 313 (interpretation of Part 18), in subsection (1), at the appropriate place insert—

““critical third party” has the same meaning as in Chapter 3C (see section 312L(8));”.
- (3) In section 380 (injunctions), in subsection (11) after “requirement” insert “, other than a case falling within paragraph 26 of Schedule 17A”.
- (4) In section 391 (publication), in subsection (1ZB) after paragraph (l) insert—

“(la) section 312S;”.
- (5) In section 392 (third party rights and access to evidence)—
 - (a) in paragraph (a), after “312(G)(1),” insert “312S(1),” and
 - (b) in paragraph (b) after “312H(1),” insert “312S(3),”.
- (6) In section 429 (Parliamentary control of statutory instruments), in subsection (8), in the list of sections beginning with “3G(1),” insert at the appropriate place “, 312L”.
- (7) The following amendments are to Schedule 17A (application of provisions to Bank).
- (8) In paragraph 10 (rules), after sub-paragraph (4) insert—

“(4A) Sub-paragraphs (1) to (4) do not apply in relation to rules made by the Bank under section 312M (in relation to which see paragraph 10A).”
- (9) After paragraph 10 insert—

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- “10A The following provisions of Part 9A of this Act are to apply in relation to rules made by the Bank under section 312M, subject to the modifications specified in this subsection—
- (a) section 137T (general supplementary powers) as if—
 - (i) the reference in paragraph (a) to “authorised persons, activity or investment” were a reference to “critical third parties or services”, and
 - (ii) for paragraph (b) there were substituted—
 - “(b) may make provision by reference to rules made by the FCA or PRA or standards issued by any other person, as those rules or standards have effect from time to time.”;
 - (b) sections 138A and 138B (modification or waiver of rules) as if—
 - (i) the reference in subsection (4)(b) of section 138A to any of regulator’s objectives were a reference to the Bank’s Financial Stability Objective,
 - (ii) subsection (5) of section 138A were omitted, and
 - (iii) subsection (4) of section 138B were omitted;
 - (c) section 138BA (disapplication or modification of rules in individual cases) as if subsection (3)(b) and (c) were omitted;
 - (d) section 138C (evidential provisions);
 - (e) section 138E (limits on effect of contravening rules);
 - (f) section 138EA (matters to consider when making rules) as if, for paragraphs (a) and (b) of subsection (5), there were substituted “complying with a recommendation of the Financial Policy Committee of the Bank of England under section 90 of the Bank of England Act 1998 (making of recommendations within the Bank).”;
 - (g) section 138F (notification of rules) as if subsections (1A) and (2) were omitted;
 - (h) section 138G (rule-making instruments);
 - (i) section 138H (verification of rules);
 - (j) section 138J (consultation) as if—
 - (i) the reference in subsection (1)(a) to the “FCA” were a reference to the “FCA and the PRA”;
 - (ii) the reference in subsection (2)(d) to the compatibility of the proposed rules with the provisions mentioned in that subsection were a reference to their compatibility with the Bank’s Financial Stability Objective; and
 - (iii) in subsection (8A), in paragraph (a), for sub-paragraphs (i) and (ii) there were substituted “be prejudicial to advancing the Financial Stability Objective, or”;
 - (k) section 138JA(2), (3) (4), (10) and (11) (duty to consult PRA Cost Benefit Analysis Panel);
 - (l) section 138JB (statement of policy in relation to cost benefit analyses);
 - (m) section 138L (consultation: general exemptions) as if—

- (i) subsection (1) were omitted, and
 - (ii) in subsection (2) for paragraphs (a) and (b) there were substituted “be prejudicial to financial stability.”;
- (n) section 141A (power to make consequential amendments of references to rules);
- (o) section 141B (power to consequentially amend enactments).”
- (10) In paragraph 23(1) (public record and disclosure of information), after “discharge of,” insert “any of its functions under Chapter 3C of Part 18 of this Act.”.
- (11) In paragraph 26(2) (injunctions), after paragraph (a) insert—
 - “(aa) a requirement that is imposed on a critical third party by the Bank by or under any provision of Chapter 3C of this Part of this Act;”.
- (12) In paragraph 28 (restitution)—
 - (a) in sub-paragraph (2), in the words before paragraph (a), for “or a recognised CSD” substitute “, a recognised CSD or a critical third party”;
 - (b) in sub-paragraph (2)(a) for “or the recognised CSD” substitute “, the recognised CSD or the critical third party”;
 - (c) in sub-paragraph (4)(a) for “or the recognised CSD” substitute “, the recognised CSD or the critical third party”.
- (13) In paragraph 29 (notices) for “or 312H” substitute “, 312H or 312S”.
- (14) In paragraph 30 (offences), after sub-paragraph (a) insert—
 - “(aa) a requirement that is imposed by or under any provision of Chapter 3C of Part 18 of this Act that relates to critical third parties;”.
- (15) In paragraph 32 (records) after “recognised CSDs” insert “, critical third parties”.
- (16) In paragraph 33(a) (annual report), in the substituted paragraph (a), after “recognised CSDs” insert “, critical third parties”.
- (17) See also Part 6 of Schedule 2.