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DRAFT STATUTORY INSTRUMENTS

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**2019 No.**

**The Electronic Commerce and Solvency 2  
(Amendment etc.) (EU Exit) Regulations 2019**

**PART 4**

Transitional provisions: temporary exclusion from general prohibition

*Exclusion of information society services*

**Exclusion of information society services from the 2001 Order**

**11.** Despite the revocation of article 72A of the 2001 Order by these Regulations, any activity to which this regulation applies is excluded from—

- (a) Part 2 of that Order, and
- (b) articles 89A and 89B of that Order.

**Application of regulation 11**

**12.—**(1) Regulation 11 applies to an activity—

- (a) consisting of the provision of an information society service from an EEA State by a relevant incoming provider,
- (b) which is necessary—
  - (i) for the performance of a contract entered into before commencement day (a “pre-existing contract”) and carried on for the purposes of performing the contract,
  - (ii) in order to transfer property, rights or liabilities under a pre-existing contract to a person authorised to carry on a regulated activity by virtue of section 31(1)(a) of the 2000 Act (other than by virtue of the 2018 Regulations), or
  - (iii) in order to comply with a requirement imposed by or under an enactment, and
- (c) which is carried on during the period determined in accordance with regulation 25.

(2) But regulation 11 does not apply to—

- (a) any activity which a relevant incoming provider is permitted to carry on by virtue of regulation 8, 11, 28, 34 or 47 of the 2018 Regulations;
- (b) the activity of the carrying out a contract of insurance as principal, where the insurance falls within the scope of the Solvency 2 Directive;
- (c) any activity carried on by a relevant incoming provider where—
  - (i) before commencement day, the FCA had given a notice to that provider under section 390 of the 2000 Act, as applied by regulation 11C(5)(a) of the 2002 Regulations, in relation to that activity, and
  - (ii) a determination made by that notice was in effect immediately before that day.

(3) For the purposes of paragraph (1)(b)(i), the performance of a pre-existing contract includes the performance of an obligation under the contract which is contingent or conditional.

(4) In this regulation—

“information society service” has the meaning given by section 417(1) of the 2000 Act as it had effect immediately before commencement day;

“the solvency 2 Directive” has the meaning given in Schedule 3 to the 2000 Act (see paragraph 3 of that Schedule)(1).

*Procedure, etc.*

### **Notification by a person carrying on activities to which regulation 11 applies**

**13.**—(1) A relevant incoming provider who is carrying on any activity to which regulation 11 applies must, as soon as reasonably practicable following commencement day, notify the FCA that the provider is carrying on that activity.

(2) A notification under paragraph (1) must—

(a) be made in such manner, and

(b) contain, or be accompanied by, such information,

as the FCA may direct.

### **Information to be supplied by a relevant incoming provider**

**14.**—(1) A relevant incoming provider who is carrying on an activity to which regulation 11 applies must notify the FCA—

(a) where the provider is authorised, under the law of the provider’s home state, to carry on an activity which is regulated by the provider’s home state regulator, if—

(i) an authorisation by that regulator is varied, or is to be varied;

(ii) an authorisation by that regulator is cancelled;

(b) if the provider becomes the subject of a criminal investigation or criminal proceedings;

(c) if the provider is one in relation to whom an insolvency event occurs.

(2) A notification under paragraph (1) must be made as soon as reasonably practicable following the day on which it comes to the provider’s attention that an event referred to in that paragraph has occurred.

(3) The notification must—

(a) be made in such manner, and during such period, and

(b) contain, or be accompanied by, such information,

as the FCA may direct.

(4) In this regulation “insolvency event” has the meaning given in regulation 54 of the 2018 Regulations.

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(1) Paragraph 3 was substituted by [S.I. 2015/575](#).

## Regulation

### **Cancellation or variation of the exclusion under regulation 11**

- 15.**—(1) The FCA may determine that the exclusion in regulation 11—
- (a) does not apply to a particular activity carried on by a relevant incoming provider;
  - (b) no longer applies to any of the activities carried on by a relevant incoming provider.
- (2) The FCA may only exercise the power in paragraph (1), if it considers that the exercise of the power is necessary—
- (a) for the prevention, detection, investigation or prosecution of a criminal offence;
  - (b) for the protection of consumers;
  - (c) in order for the FCA to advance its objectives under Part 1A of the 2000 Act.

### **Cancellation or variation: procedure**

- 16.**—(1) In an urgent case, if the FCA decides to exercise the power under regulation 15(1), it must give a decision notice to the relevant incoming provider to whom the decision relates.
- (2) A decision notice under paragraph (1) must state when the decision takes effect (and this may be immediately upon receipt).
- (3) In any other case—
- (a) if the FCA proposes to exercise the power under regulation 15(1), it must give the provider a warning notice specifying the activity;
  - (b) if the FCA decides to exercise the power under regulation 15(1), it must give the provider a decision notice specifying the activity.
- (4) Part 26 of the 2000 Act (notices) applies to a notice under paragraph (3) as it applies to a notice given under that Act.
- (5) For the purposes of this regulation, an urgent case is one in which the FCA reasonably considers it necessary for the decision to take effect as stated in the decision notice.

### **Cancellation or variation: appeal**

- 17.**—(1) A relevant incoming provider in respect of whom the power in regulation 15(1) is exercised may refer the decision to exercise the power to the Upper Tribunal.
- (2) Part 9 of the 2000 Act (hearings and appeals) applies to a reference under paragraph (1) as it applies to a reference under the 2000 Act.

### **Restriction on Financial Promotion**

- 18.** In respect of a relevant incoming provider carrying on any activity to which regulation 11 applies, section 21 of the 2000 Act (restrictions on financial promotion) has effect as if—
- (a) in subsection (2), for paragraph (a) there were substituted—
    - “(a) A is a relevant incoming provider carrying on an activity to which regulation 11 of the 2019 Regulations applies;”;
  - (b) in that subsection, paragraph (b) were omitted;
  - (c) after that subsection there were inserted—

“(2A) Subsection (2)(a) only applies to a person in so far as the communication is necessary for the performance of a pre-existing contract (within the meaning of regulation 12 of the 2019 Regulations).

(2B) For the purpose of subsections (2)(a) and (2A)—

“the 2019 Regulations” means the Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019;

“relevant incoming provider” has the meaning given in regulation 28 of the 2019 Regulations.”

### **Product intervention rules**

**19.**—(1) Product intervention rules (within the meaning of section 137D of the 2000 Act) apply to a relevant incoming provider carrying on activity to which regulation 11 applies as they apply to an authorised person.

(2) A prohibition or restriction under Article 42 of Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments applies to a relevant incoming provider carrying on an activity to which regulation 11 applies as it applies to a person to whom that Regulation applies.

(3) A prohibition or restriction under Article 17 of Regulation (EU) No. 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products applies to a relevant incoming provider carrying on an activity to which regulation 11 applies as it applies to a person to whom that Regulation applies

### **Information gathering**

**20.** The following provisions of the 2000 Act apply in respect of a relevant incoming provider carrying on an activity to which regulation 11 applies, as they apply to an authorised person (within the meaning of section 31 of the 2000 Act)—

- (a) section 165;
- (b) section 166;
- (c) section 175;
- (d) section 177.

### **Publication of information provided under regulation 13 or 14**

**21.**—(1) The FCA may, if it considers it is appropriate to do so, publish information that it receives under regulation 13 or 14.

(2) Publication under this regulation is to be in such manner as the FCA considers appropriate.

### **Public censure**

**22.**—(1) If the FCA considers that a relevant incoming provider—

- (a) has not notified it in accordance with regulation 13 or 14, or
- (b) has acted in a manner which it considers contrary to the advancement of its objectives under Part 1A of the 2000 Act,

the FCA may publish a statement to that effect.

(2) If the FCA proposes to publish a statement under paragraph (1), it must give the provider a warning notice.

(3) The warning notice must—

- (a) set out the terms of the proposed statement;
- (b) state that the relevant incoming provider may make representations in response to the notice.

(4) If, having considered any representations made in response to a warning notice, the FCA decides to publish a statement under paragraph (1) (whether or not in the terms proposed), it must without delay give the person a decision notice.

(5) The decision notice must set out the terms of the statement.

(6) Section 393 of the 2000 Act (third party rights) applies in respect of giving notices under this regulation as it applies in respect of giving notices under the 2000 Act.

#### *Fees*

#### **Power to charge fees**

**23.**—(1) The FCA may make rules providing for the payment to it of fees in connection with the discharge of a function under this Part.

(2) Rules under paragraph (1) may not provide for the payment of a fee greater than an amount equal to the expenses incurred, or expected to be incurred, in the discharge of the function.

(3) Sections 138F to 138O of the 2000 Act (procedural provisions) apply to rules made by the FCA under paragraph (1) as they apply to rules made by it under that Act.

#### *FCA functions*

#### **Disapplication of supervision, etc. requirements**

**24.** Section 1L(2) and (3) of the 2000 Act does not apply in respect of a relevant incoming provider who is carrying on an activity to which regulation 11 applies.

#### *Duration of temporary exclusion*

#### **Period during which regulation 11 is to apply**

**25.**—(1) For the purposes of regulation 12(1)(c), the period is one that begins with commencement day and ends—

- (a) after five years, or
- (b) if earlier—
  - (i) with the day on which the relevant incoming provider is given a decision notice in respect of a decision under regulation 15(1)(b);
  - (ii) if the FCA makes a determination under section 55V of the 2000 Act to grant an application by the relevant incoming provider for a permission under Part 4A of that Act, with the day before the date stated in the written notice (issued in accordance with section 55V(5) of that Act) as that from which permission has effect;

- (iii) if the relevant incoming provider is home state authorised immediately before commencement day, with the day before the day on which the person ceases to be so authorised;
- (iv) if the relevant incoming provider is an authorised incoming provider immediately before commencement day, with the day before the day on which the person ceases to be an authorised person (within the meaning of the 2000 Act).

(2) For the purposes of this regulation, a person is home state authorised if, immediately before commencement day, the person is authorised, under the law of the person’s home state, to carry on an activity which is regulated by the person’s home state regulator.

### *General*

#### **Directions**

- 26.** A power to give directions under this Part includes the power—
- (a) to give different directions in relation to different persons or categories of person;
  - (b) to vary or revoke a previous direction.

#### **Exclusion of the Electronic Commerce (EC Directive) Regulations 2002**

**27.** Regulation 4(3) of the Electronic Commerce (EC Directive) Regulations 2002<sup>(2)</sup> does not apply to the FCA in respect of its responsibility in relation to a requirement imposed by or under this Part.

### *Interpretation*

#### **Interpretation**

**28.—(1)** In this Part—

“the 2018 Regulations” means the EEA Passport (Amendment etc., and Transitional Provisions) (EU Exit) Regulations 2018<sup>(3)</sup>;

“authorised incoming provider” and “unauthorised incoming provider” have the meanings given in regulation 2(1) of the 2002 Regulations as it had effect immediately before commencement day;

“commencement day” means the day on which these Regulations come into force;

“the FCA” means the Financial Conduct Authority;

“home state regulator” means a competent authority of an EEA state in relation to the person concerned; and “competent authority” is to be construed in accordance with the EU instrument by virtue of which, immediately before commencement day, the person derived authorisation to carry on an activity regulated in that EEA state.

(2) For the purposes of this Part, “relevant incoming provider” means a person who, immediately before commencement day—

- (a) is an authorised incoming provider or an unauthorised incoming provider, and
- (b) if the person carries on any activity which is regulated by the person’s home state regulator, is authorised, under the law of that state, to carry on that activity.

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(2) [S.I. 2002/2013](#), as amended by [S.I. 2019/87](#).

(3) [S.I. 2018/1149](#), as amended by [S.I. 2019/\[xxxx\]](#).

