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## STATUTORY INSTRUMENTS

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# 2017 No. 752

## The Payment Services Regulations 2017

### PART 3

#### Authorised Payment Institutions

##### Capital requirements

**22.**—(1) An authorised payment institution must maintain at all times own funds equal to or in excess of the greater of—

- (a) the amount of initial capital specified in Part 1 of Schedule 3 (capital requirements), or
  - (b) in the case of an authorised payment institution which does not fall within paragraph (2), the amount of own funds calculated in accordance with Part 2 of Schedule 3.
- (2) An authorised payment institution falls within this paragraph if—
- (a) it does not offer payment services specified in paragraph 1(a) to (f) of Schedule 1 (payment services other than payment initiation services or account information services); or
  - (b) (i) it is included in the consolidated supervision of a parent credit institution pursuant to the capital requirements directive; and  
(ii) all of the conditions specified in Article 7(1) of the capital requirements regulation are met in respect of it.
- (3) The own funds maintained must meet the following requirements—
- (a) the amount of Tier 2 capital must be equal to or less than one third of the amount of Tier 1 capital;
  - (b) at least 75% of the amount of Tier 1 capital must be in the form of Common Equity Tier 1 capital.
- (4) An authorised payment institution must not include in its own funds calculation any item—
- (a) used in an equivalent calculation by an authorised payment institution, credit institution, investment firm, asset management company or insurance undertaking in the same group; or
  - (b) in the case of an authorised payment institution which carries out activities other than providing payment services, is used in carrying out those activities.

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##### Modifications etc. (not altering text)

- C1** Reg. 22 excluded (20.11.2018) by [The Electronic Money, Payment Services and Payment Systems \(Amendment and Transitional Provisions\) \(EU Exit\) Regulations 2018 \(S.I. 2018/1201\)](#), reg. 1(2), [Sch. 3 para. 19\(1\)\(c\)](#) (with reg. 4)

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## Safeguarding requirements

- 23.—(1) For the purposes of this regulation “relevant funds” comprise the following—
- (a) sums received from, or for the benefit of, a payment service user for the execution of a payment transaction; and
  - (b) sums received from a payment service provider for the execution of a payment transaction on behalf of a payment service user.

(2) Where—

- (a) only a portion of the sums referred to in paragraph (1)(a) or (b) is to be used for the execution of a payment transaction (with the remainder being used for non-payment services); and
- (b) the precise portion attributable to the execution of the payment transaction is variable or unknown in advance,

the relevant funds are such amount as may be reasonably estimated, on the basis of historical data and to the satisfaction of the FCA, to be representative of the portion attributable to the execution of the payment transaction.

(3) An authorised payment institution must safeguard relevant funds in accordance with either—

- (a) paragraphs (5) to (11); or
- (b) paragraphs (12) and (13).

(4) An authorised payment institution may safeguard certain relevant funds in accordance with paragraphs (5) to (11) and the remaining relevant funds in accordance with paragraphs (12) and (13).

(5) An authorised payment institution must keep relevant funds segregated from any other funds that it holds.

(6) Where the authorised payment institution continues to hold the relevant funds at the end of the business day following the day on which they were received it must—

- (a) place them in a separate account that it holds with an authorised credit institution or the Bank of England; or
- (b) invest the relevant funds in such secure, liquid assets as the FCA may approve (“relevant assets”) and place those assets in a separate account with an authorised custodian.

(7) An account in which relevant funds or relevant assets are placed under paragraph (6) must—

- (a) be designated in such a way as to show that it is an account which is held for the purpose of safeguarding relevant funds or relevant assets in accordance with this regulation; and
- (b) be used only for holding those funds or assets [<sup>F1</sup>, or for holding those funds or assets together with proceeds of an insurance policy or guarantee held in accordance with paragraph (12)(b)].

(8) No person other than the authorised payment institution may have any interest in or right over the relevant funds or relevant assets placed in an account in accordance with paragraph (6)(a) or (b) except as provided by this regulation.

(9) Notwithstanding paragraphs (5), (6), (7)(b) and (8), where an authorised payment institution is a participant in a designated system and the institution holds an account at the Bank of England for the purposes of completing the settlement of transfer orders that have been entered into the designated system on behalf of payment service users—

- (a) funds held in the account pending settlement in accordance with the rules or default arrangements of the designated system, in respect of transfer orders that have been entered into the designated system on behalf of payment service users, may continue to be held in the account with relevant funds;

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- (b) the account, or a specified amount of funds in the account, may be subject to an interest or right in favour of the Bank of England in order to ensure the availability of funds to complete the settlement of transfer orders in accordance with the rules or default arrangements of the designated system;
  - (c) subject to paragraph (10), funds received into the account by the authorised payment institution upon settlement are to be considered as having been appropriately safeguarded in accordance with this regulation from the time of receipt in the designated system until the time of receipt into the account.
- (10) The FCA may direct that paragraph (9)(c) does not apply in relation to a designated system if, in the FCA's view, the rules and default arrangements of that system do not adequately insulate the funds of payment service users from the claims of other creditors of authorised payment institutions which are participants in the system.
- (11) The authorised payment institution must keep a record of—
- (a) any relevant funds segregated in accordance with paragraph (5);
  - (b) any relevant funds placed in an account in accordance with paragraph (6)(a);
  - (c) any relevant assets placed in an account in accordance with paragraph (6)(b);
  - (d) any funds held in an account as permitted by paragraph (9)(a);
  - (e) any funds expected to be received into an account as described in paragraph (9)(c) in respect of transfer orders that have been entered into the designated system;
  - (f) any funds received into an account as described in paragraph (9)(c).
- (12) The authorised payment institution must ensure that—
- (a) any relevant funds are covered by—
    - (i) an insurance policy with an authorised insurer;
    - (ii) a comparable guarantee given by an authorised insurer; or
    - (iii) a comparable guarantee given by an authorised credit institution; and
  - (b) the proceeds of any such insurance policy or guarantee are payable upon an insolvency event into a separate account held by the authorised payment institution which must—
    - (i) be designated in such a way as to show that it is an account which is held for the purpose of safeguarding relevant funds in accordance with this regulation; and
    - (ii) be used only for holding such proceeds [<sup>F2</sup>, or for holding those proceeds together with funds or assets held in accordance with paragraph (7)].
- (13) No person other than the authorised payment institution may have any interest in or right over the proceeds placed in an account in accordance with paragraph (12)(b) except as provided by this regulation.
- (14) Subject to paragraph (15), where there is an insolvency event—
- (a) the claims of payment service users are to be paid from the asset pool in priority to all other creditors; and
  - (b) until all the claims of payment service users have been paid, no right of set-off or security right may be exercised in respect of the asset pool except to the extent that the right of set-off relates to fees and expenses in relation to operating an account held in accordance with paragraph (6)(a) or (b), (9) or (12)(b).
- (15) The claims referred to in paragraph (14)(a) shall not be subject to the priority of expenses of an insolvency proceeding except in respect of the costs of distributing the asset pool.
- (16) Paragraphs (14) and (15) apply to any relevant funds which a small payment institution voluntarily safeguards in accordance with either paragraphs (5) to (11) or paragraphs (12) and (13).

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(17) An authorised payment institution (and any small payment institution which voluntarily safeguards relevant funds) must maintain organisational arrangements sufficient to minimise the risk of the loss or diminution of relevant funds or relevant assets through fraud, misuse, negligence or poor administration.

(18) In this regulation—

“asset pool” means—

- (a) any relevant funds segregated in accordance with paragraph (5);
- (b) any relevant funds held in an account in accordance with paragraph (6)(a);
- (c) where paragraph (9) applies, any funds that are received into the account held at the Bank of England upon settlement in respect of transfer orders that have been entered into the designated system on behalf of payment service users, whether settlement occurs before or after the insolvency event;
- (d) any relevant assets held in an account in accordance with paragraph (6)(b); and
- (e) any proceeds of an insurance policy or guarantee held in an account in accordance with paragraph (12)(b);

“authorised insurer” means a person authorised for the purposes of the 2000 Act to effect and carry out a contract of general insurance as principal or otherwise authorised in accordance with Article 14 of Directive [2009/138/EC](#) of the European Parliament and of the Council of 25th November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) <sup>M1</sup> to carry out non-life insurance activities as referred to in Article 2(2) of that Directive, other than a person in the same group as the authorised payment institution;

“authorised credit institution” means a person authorised for the purposes of the 2000 Act to accept deposits or otherwise authorised as a credit institution in accordance with Article 8 of the capital requirements directive other than a person in the same group as the authorised payment institution;

“authorised custodian” means a person authorised for the purposes of the 2000 Act to safeguard and administer investments or authorised as an investment firm under Article 5 of Directive [2014/65/EU](#) of 15th May 2014 on markets in financial instruments and amending Directive [2002/92/EC](#) and Directive [2011/61/EU](#) <sup>M2</sup> which holds those investments under regulatory standards at least equivalent to those set out under Article 16 of that Directive;

“default arrangements” has the meaning given in regulation 2(1) of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 <sup>M3</sup> (interpretation);

“insolvency event” means any of the following procedures in relation to an authorised payment institution or small payment institution—

- (a) the making of a winding-up order;
- (b) the passing of a resolution for voluntary winding-up;
- (c) the entry of the institution into administration;
- (d) the appointment of a receiver or manager of the institution's property;
- (e) the approval of a proposed voluntary arrangement (being a composition in satisfaction of debts or a scheme of arrangement);
- (f) the making of a bankruptcy order;
- (g) in Scotland, the award of sequestration;
- (h) the making of any deed of arrangement for the benefit of creditors or, in Scotland, the execution of a trust deed for creditors;
- (i) the conclusion of any composition contract with creditors; or

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- (j) the making of an insolvency administration order or, in Scotland, sequestration, in respect of the estate of a deceased person;

“insolvency proceeding” means—

- (a) winding-up, administration, receivership, bankruptcy or, in Scotland, sequestration;
- (b) a voluntary arrangement, deed of arrangement or trust deed for the benefit of creditors; or
- (c) the administration of the insolvent estate of a deceased person;

“rules” has the meaning given in regulation 2(1) of the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (interpretation);

“security right” means—

- (a) security for a debt owed by an authorised payment institution or a small payment institution and includes any charge, lien, mortgage or other security over the asset pool or any part of the asset pool; and
- (b) any charge arising in respect of the expenses of a voluntary arrangement;

“settlement” and “system” have the same meanings as in the Financial Markets and Insolvency (Settlement Finality) Regulations 1999.

#### Textual Amendments

- F1** Words in reg. 23(7)(b) inserted (13.1.2018) by [The Payment Systems and Services and Electronic Money \(Miscellaneous Amendments\) Regulations 2017 \(S.I. 2017/1173\)](#), regs. 1(4), **7(b)(i)**
- F2** Words in reg. 23(12)(b)(ii) inserted (13.1.2018) by [The Payment Systems and Services and Electronic Money \(Miscellaneous Amendments\) Regulations 2017 \(S.I. 2017/1173\)](#), regs. 1(4), **7(b)(ii)**

#### Modifications etc. (not altering text)

- C2** Reg. 23 excluded (20.11.2018) by [The Electronic Money, Payment Services and Payment Systems \(Amendment and Transitional Provisions\) \(EU Exit\) Regulations 2018 \(S.I. 2018/1201\)](#), reg. 1(2), **Sch. 3 para. 19(1)(d)** (with reg. 4)

#### Marginal Citations

- M1** OJ L 335, 17.12.2009, p.1.
- M2** OJ L 173, 12.6.2014, p.349.
- M3** [S.I. 1999/2979](#). The definition of “default arrangements” was amended by [S.I. 2006/50](#), 2010/2993 and 2013/504.

### Accounting and statutory audit

**24.—**(1) Where an authorised payment institution carries on activities other than the provision of payment services, it must provide to the FCA separate accounting information in respect of its provision of payment services.

(2) Such accounting information must be subject, where relevant, to an auditor's report prepared by the institution's statutory auditors or an audit firm (within the meaning of Directive [2006/43/EC](#) of the European Parliament and of the Council of 17th May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives [78/660/EEC](#) and [83/349/EEC](#) and repealing Council Directive [84/253/EEC](#)<sup>M4</sup>).

(3) A statutory auditor or audit firm (“the auditor”) must, in any of the circumstances referred to in paragraph (4), communicate to the FCA information on, or its opinion on, matters—

- (a) of which it has become aware in its capacity as auditor of an authorised payment institution or of a person with close links to an authorised payment institution; and

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- (b) which relate to payment services provided by that institution.
- (4) The circumstances are that—
- (a) the auditor reasonably believes that—
- (i) there is or has been, or may be or may have been, a contravention of any requirement imposed on the authorised payment institution by or under these Regulations; and
  - (ii) the contravention may be of material significance to the FCA in determining whether to exercise, in relation to that institution, any functions conferred on the FCA by these Regulations;
- (b) the auditor reasonably believes that the information on, or his opinion on, those matters may be of material significance to the FCA in determining whether the institution meets or will continue to meet the conditions set out in regulation 6(4) to (9) (conditions for authorisation) and, if applicable, the requirement in regulation 22(1) (capital requirements) to maintain own funds;
- (c) the auditor reasonably believes that the institution is not, may not be or may cease to be, a going concern;
- (d) the auditor is precluded from stating in his report that the annual accounts have been properly prepared in accordance with the Companies Act 2006;
- (e) the auditor is precluded from stating in his report, where applicable, that the annual accounts give a true and fair view of the matters referred to in section 495 of the Companies Act 2006 (auditor's report on company's annual accounts)<sup>M5</sup> including as it is applied and modified by regulation 39 of the Limited Liability Partnerships (Accounts and Audit) (Application of Companies Act 2006) Regulations 2008 (“the LLP Regulations”) (auditor's report)<sup>M6</sup>; or
- (f) the auditor is required to state in his report in relation to the person concerned any of the facts referred to in subsection (2), (3) or (5) of section 498 of the Companies Act 2006 (duties of auditor) or, in the case of limited liability partnerships, subsection (2), (3) or (4) of section 498 as applied and modified by regulation 40 of the LLP Regulations (duties and rights of auditors).
- (5) In this regulation a person has close links with an authorised payment institution (“A”) if that person is—
- (a) a parent undertaking of A;
  - (b) a subsidiary undertaking of A;
  - (c) a parent undertaking of a subsidiary undertaking of A; or
  - (d) a subsidiary undertaking of a parent undertaking of A.

**Modifications etc. (not altering text)**

- C3** Reg. 24 excluded (20.11.2018) by [The Electronic Money, Payment Services and Payment Systems \(Amendment and Transitional Provisions\) \(EU Exit\) Regulations 2018 \(S.I. 2018/1201\)](#), reg. 1(2), [Sch. 3 para. 19\(1\)\(e\)](#) (with reg. 4)

**Marginal Citations**

- M4** OJ L 157, 9.6.2006, p.87.
- M5** 2006 c. 46. Section 495 was amended by [S.I. 2013/3008](#), 2016/649 and 2017/516. Section 498 was amended by [S.I. 2008/393](#), 2013/1970 and 2016/649.
- M6** [S.I. 2008/1911](#). Regulation 39 was amended by [S.I. 2016/575](#). Regulation 40 was amended by [S.I. 2009/1804](#).

## **Outsourcing**

**25.**—(1) An authorised payment institution must notify the FCA of its intention to enter into a contract with another person under which that other person will carry out any operational function relating to its provision of payment services (“outsourcing”).

(2) Where an authorised payment institution intends to outsource any important operational function, including the provision of an information technology system, all of the following conditions must be met—

- (a) the outsourcing is not undertaken in such a way as to impair—
  - (i) the quality of the authorised payment institution's internal control; or
  - (ii) the ability of the FCA to monitor and retrace the authorised payment institution's compliance with these Regulations;
- (b) the outsourcing does not result in any delegation by the senior management of the authorised payment institution of responsibility for complying with the requirements imposed by or under these Regulations;
- (c) the relationship and obligations of the authorised payment institution towards its payment service users under these Regulations is not substantially altered;
- (d) compliance with the conditions which the authorised payment institution must observe in order to be authorised and remain so is not adversely affected; and
- (e) none of the conditions of the payment institution's authorisation requires removal or variation.

(3) For the purposes of paragraph (2), an operational function is important if a defect or failure in its performance would materially impair—

- (a) compliance by the authorised payment institution with these Regulations and any requirements of its authorisation;
- (b) the financial performance of the authorised payment institution; or
- (c) the soundness or continuity of the authorised payment institution's payment services.

(4) An authorised payment institution must notify the FCA without undue delay of any change in outsourced functions or the persons to which functions are outsourced.

### *Exercise of passport rights*

## **Application of regulations 27 to 30 to account information service providers**

**26.** Regulations 27 to 30 apply in relation to a registered account information service provider as if the provider were an authorised payment institution, and apply in relation to an EEA registered account information service provider as if the provider were an EEA authorised payment institution.

## **Notice of intention**

**27.**—(1) Where an authorised payment institution intends to exercise its passport rights for the first time in an EEA State it must give the FCA, in such manner as the FCA may direct, notice of its intention to do so (“a notice of intention”) which—

- (a) states the name and address of the authorised payment institution, and any authorisation or reference number;
- (b) identifies the EEA States in which it intends to operate;
- (c) identifies the payment services which it seeks to carry on in those States;

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- (d) if the authorised payment institution intends to use an agent to provide the services in any of those States, includes the information referred to in regulation 34(3)(a) (use of agents);
  - (e) if the authorised payment institution intends to use an EEA branch to provide the services in any of those States, includes—
    - (i) the information referred to in paragraphs 2 and 5 of Schedule 2 (information to be included in or with an application for authorisation) in relation to the services to be provided through each EEA branch;
    - (ii) the names of those responsible for the management of each proposed EEA branch; and
    - (iii) details of the organisational structure of each proposed EEA branch; and
  - (f) if the authorised payment institution intends to enter into a contract with a person in another EEA State under which that person will carry out any operational function relating to its provision of payment services in that EEA State, includes notification of that intention.
- (2) If any of the information provided by an authorised payment institution in a notice of intention changes, including by the addition of a further branch, the authorised payment institution must give the FCA notice of such changes in a further notice of intention.
- (3) The FCA must, within one month beginning with the date on which it receives a complete notice of intention, inform the host state competent authority of the information contained in the notice of intention.

#### **Decision following notice of intention**

**28.**—(1) If the FCA, taking into account any information received from the host state competent authority, proposes to determine that an authorised payment institution is not permitted to exercise passport rights in an EEA State as notified in a notice of intention, the FCA must give the relevant authorised payment institution a warning notice.

(2) The FCA must, within the period of three months beginning with the date on which it receives a notice of intention and having considered any representations made in response to the warning notice—

- (a) if it decides—
    - (i) that the authorised payment institution is not permitted to exercise passport rights in the EEA State, not to register an EEA branch, or to cancel the registration an EEA branch, give the authorised payment institution a decision notice; or
    - (ii) that the authorised payment institution is permitted to exercise passport rights in the EEA State, to register an EEA branch, or not to cancel the registration of an EEA branch, give the authorised payment institution notice of its decision; and
  - (b) notify the host state competent authority of its decision, providing reasons for that decision if the FCA does not agree with the assessment of the host state competent authority.
- (3) If the FCA decides that the authorised payment institution is not permitted to exercise passport rights in the EEA State, not to register an EEA branch, or to cancel the registration of an EEA branch, the authorised payment institution may refer the matter to the Upper Tribunal.
- (4) If the FCA decides to register an EEA branch, it must update the register as soon as practicable.
- (5) If the FCA decides to cancel the registration of an EEA branch, the FCA must, where the period for a reference to the Upper Tribunal has expired without a reference being made, as soon as practicable update the register accordingly.

(6) The authorised payment institution may commence activities as notified in its notice of intention only after the FCA has notified the institution of its decision under paragraph (2)(a)(ii) and, in the case of services to be provided through an EEA branch, after entry of the branch on the register.

(7) After registration, the authorised payment institution must notify the FCA of the date on which it starts to provide payment services in the other EEA State through the EEA branch, and the FCA must notify such date to the host state competent authority.

### **Notice of intention from an EEA authorised payment institution**

**29.**—(1) If a home state competent authority sends information to the FCA about an EEA authorised payment institution which intends to provide payment services in the United Kingdom, the FCA must, before the end of the period of one month beginning on the day which the FCA receives all the required information—

- (a) assess the information; and
- (b) provide relevant information to the home state competent authority in connection with the intended provision of payment services in the United Kingdom, including in particular any reasonable grounds for concern with regard to money laundering or terrorist financing within the meaning of the money laundering directive in connection with the intended appointment of an agent or establishment of a branch in the United Kingdom.

(2) The EEA authorised payment institution may provide payment services in the United Kingdom in accordance with the information it has provided to the home state competent authority upon entry of the branch or agent in the register maintained by the home state competent authority.

### **Supervision of firms exercising passport rights**

**30.**—(1) Without prejudice to the generality of regulation 147 (duty to co-operate and exchange of information), the FCA must co-operate with the host state competent authority or home state competent authority, as the case may be, in relation to the exercise of passport rights by any authorised payment institution or EEA authorised payment institution.

(2) The FCA must, in particular—

- (a) notify the host state competent authority whenever it intends to carry out an on-site inspection in the host state competent authority's territory; and
- (b) provide the host state competent authority or home state competent authority, as the case may be—
  - (i) on request, with all relevant information; and
  - (ii) on its own initiative, with all essential information, including on compliance with the conditions at regulation 6(4) and (5) (conditions for authorisation),

relating to the exercise of passport rights by an authorised payment institution or EEA authorised payment institution, including where there is an infringement or suspected infringement of these Regulations or of the provisions of the payment services directive by an agent or branch.

(3) Where the FCA and the home state competent authority agree, the FCA may carry out on-site inspections on behalf of the home state competent authority in respect of payment services provided by an EEA authorised payment institution exercising its passport rights.

(4) The FCA may direct that an EEA authorised payment institution exercising its passport rights to provide payment services in the United Kingdom through a branch or an agent in the United Kingdom must report to the FCA on such activities, for information and statistical purposes and, where the EEA authorised payment institution has exercised its right of establishment in the United Kingdom, to monitor compliance with Parts 6 (information requirements for payment services) and 7 (rights and obligations in relation to the provision of payment services) of these Regulations.

(5) Reports required under paragraph (4) must be given at such times and in such form, and verified in such manner, as the FCA may direct.

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(6) An agent in the United Kingdom appointed by an EEA authorised payment institution or a branch of an EEA authorised payment institution in the United Kingdom must maintain the confidentiality of any confidential information provided to the FCA under paragraph (4).

(7) The FCA may direct that an EEA authorised payment institution exercising its passport rights to provide payment services in the United Kingdom through an agent under the right of establishment must appoint a central contact point in the United Kingdom in order to ensure adequate communication and information reporting on compliance with Parts 6 and 7 and to facilitate supervision by the FCA and the home state competent authority.

(8) If a host state competent authority informs the FCA that an authorised payment institution providing services through an EEA branch or an EEA agent does not comply with a provision of the payment services directive, the FCA must—

- (a) exercise its powers as appropriate without undue delay, to ensure that the authorised payment institution complies with the relevant provisions; and
- (b) inform the host state competent authority and the competent authority of any other relevant EEA State of the measures taken without delay.

(9) Where immediate action is necessary to address a serious risk to the collective interests of payment service users in the United Kingdom, the FCA may, in addition to providing information under paragraph (2), take precautionary measures in relation to an EEA authorised payment institution pending action by the home state competent authority.

(10) Any measures taken under paragraph (9) must be temporary and must end when the risk identified has been addressed.

(11) If the FCA decides to take measures under paragraph (9), it must inform the home state competent authority, the competent authority of any other relevant EEA State, and the European Banking Authority of the measures to be taken and the reason that immediate action is necessary—

- (a) in advance of taking the measures, if that is compatible with the need for immediate action; and
- (b) in any event without undue delay.

(12) In paragraphs (8)(b) and (11) “competent authority of any other relevant EEA State” means a competent authority designated in accordance with Article 22 of the payment services directive in an EEA State which the FCA considers to have an interest in the measures taken, or to be taken, by the FCA.

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