

2019 No. 1361

EXITING THE EUROPEAN UNION

FINANCIAL SERVICES AND MARKETS

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

Made - - - - at 12.47 p.m. on 24th October 2019

Coming into force in accordance with regulation 1

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28. Interpretation

The Treasury make these Regulations in exercise of the powers conferred by section 8(1) of, and paragraph 1(1) of Schedule 4 to and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018^(a).

In accordance with paragraph 1(1) of Schedule 7 to that Act, a draft of this instrument has been laid before and approved by each House of Parliament.

(a) 2018 c. 16.

PART 1

Introductory

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019.

(2) These Regulations come into force on the day after the day on which they are made.

(3) In these Regulations—

“the 2000 Act” means the Financial Services and Markets Act 2000(a);

“the 2001 Order” means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001(b);

“the 2002 Regulations” means the Electronic Commerce Directive (Financial Services and Markets) Regulations 2002(c).

PART 2

Amendment of Commission Delegated Regulation (EU) 2015/35

Amendment of Commission Delegated Regulation (EU) 2015/35

2.—(1) Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of insurance and reinsurance is amended as follows.

(2) In Article 1 (definitions)(d), after paragraph 58 insert—

“58A. ‘PRA’ means the Prudential Regulation Authority;”.

(3) In Article 257 (requirements for investments in securitisations that no longer comply with the risk-retention and qualitative requirements)(e)—

(a) in paragraphs 1 and 2, for “supervisory authority” substitute “PRA”; and

(b) in paragraph 5 for “undertaking’s system of governance as referred to in Article 37(1)(c)” substitute “standards of governance laid down in Title 1, Chapter IV, Section 2”.

PART 3

Amendments relating to electronic commerce

CHAPTER 1

Amendment of sections 417 and 418 of the 2000 Act

Amendment of sections 417 and 418 of the 2000 Act

3. In section 417 of the 2000 Act (definitions)—

(a) in subsection (1), omit the definitions of “electronic commerce directive”, “information society service” and “the Treaty”(f);

(a) 2000 c. 8.

(b) S.I. 2001/544.

(c) S.I. 2002/1775.

(d) Article 1 was amended by S.I. 2019/407.

(e) Paragraphs 1 and 2 of Article 257 were replaced by Commission Delegated Regulation (EU) 2018/1221, Article 1(8).

(f) The definitions of “electronic commerce directive” and “information society service” were inserted by S.I. 2002/1775.

- (b) omit subsection (4)(a).

4. In section 418 (carrying on regulated activities in the United Kingdom) of the 2000 Act, omit subsection (5A)(b).

CHAPTER 2

Amendment of subordinate legislation

Amendment of the 2001 Order

- 5.—(1) The 2001 Order is amended as follows.
- (2) Omit article 72A(c) (information society services).
 - (3) In consequence of the amendment made by paragraph (2)—
 - (a) in articles 9AA, 58A and 60A(d)—
 - (i) for “exclusions” substitute “exclusion”;
 - (ii) omit “article 72A (information society services) and”;
 - (iii) in the heading, omit “Information society services and”;
 - (b) in article 12A(e)—
 - (i) for “exclusions” substitute “exclusion”;
 - (ii) omit “article 72A (information society services), as qualified by paragraph (2) of that article, and”;
 - (iii) in the heading, omit “Information society services and”;
 - (c) in articles 20, 24, 36(1) and (2), 36G, 39, 39C, 44, 50, 55(1) and (2), 60K, 63A, 63E, 63I, 63M and 65(f) omit “72A (information society services),”;
 - (d) omit article 36I(g);
 - (e) in article 39L(h) omit “article 72A (information society services),”;
 - (f) in articles 51A and 52A(i), for “article 72A (information society services),” substitute “articles”;
 - (g) in article 60R(j) omit “the exclusion in article 72A (information society services) and”;
 - (h) in article 89D(k) omit paragraph (1) and the word “also” in paragraph (2).

Amendment of the 2002 Regulations

- 6.—(1) The 2002 Regulations are amended as follows.

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- (a) Subsection (4) was inserted by S.I. 2002/1775 and amended by S.I. 2012/1809.
 - (b) Subsection (5A) was inserted by S.I. 2002/1775.
 - (c) Article 72A was inserted by S.I. 2002/1776.
 - (d) Articles 9AA, 58A and 60A were inserted by S.I. 2002/1776 and amended by S.I. 2013/1773.
 - (e) Article 12A was inserted by S.I. 2002/1776 and amended by S.I. 2013/1773.
 - (f) Articles 20 was amended (so far as relevant) by S.I. 2013/1773. Articles 24 and 39 were amended (so far as relevant) by S.I. 2003/1476. Article 36 was amended (so far as relevant) by S.I. 2003/1476 and S.I. 2013/1773. Article 36G was inserted by S.I. 2013/1881 and amended by S.I. 2014/366 and S.I. 2015/910. Article 39C was inserted by S.I. 2003/1476. Article 44 was amended (so far as relevant) by S.I. 2002/1776 and S.I. 2003/1476. Article 50 were amended (so far as relevant) by S.I. 2002/1776 and S.I. 2013/1773. Article 55 was amended by S.I. 2003/1475, S.I. 2003/1476 and S.I. 2013/1773. Article 60K was inserted by S.I. 2013/1881 and amended by S.I. 2015/910. Article 63A was inserted by S.I. 2002/1776 and amended (so far as relevant) by S.I. 2013/1773 and 2014/366. Article 63E was inserted by S.I. 2006/2383 and amended (so far as relevant) by S.I. 2013/1773 and S.I. 2014/366. Article 63M was inserted by S.I. 2009/1342 and was amended (so far as relevant) by S.I. 2013/1773 and S.I. 2014/366. Article 65 was substituted by S.I. 2002/1776 and was amended by S.I. 2014/366.
 - (g) Article 63I was inserted by S.I. 2006/2383 and was amended (so far as relevant) by S.I. 2013/1773 and 2014/366.
 - (h) Article 39L was inserted by S.I. 2013/1881.
 - (i) Articles 51A and 52A were inserted by S.I. 2002/1776 and were amended by S.I. 2014/366.
 - (j) Article 60R was inserted by S.I. 2013/1881.
 - (k) Article 89D was inserted by S.I. 2013/1881 and was amended by S.I. 2014/366.

- (2) Omit regulations 2 to 18.
- (3) In regulation 19(a)—
 - (a) omit paragraph (1);
 - (b) for paragraph (2), substitute—
 - “(2) Regulation 4(3) of the general regulations does not apply to the Authority or any enforcement authority in respect of its responsibility in relation to a requirement imposed by or under the 2000 Act or these Regulations.
 - (2A) Regulation 4(3) of the general regulations also does not apply to the Authority in respect of its responsibility in relation to a requirement imposed by or under regulations made by the Treasury under section 8 of the European Union (Withdrawal) Act 2018.”;
 - (c) in paragraph (5)—
 - (i) before the definition of “enforcement authority”, insert—
 - ““the Authority” means the Financial Conduct Authority;”;
 - (ii) after the definition of “general regulations”, insert—
 - ““rule” means a rule made by the Authority under the 2000 Act.”

Amendment of the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001

7. In the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001(b), omit regulation 12B (electronic commerce).

Amendment of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001

8. In regulation 3 (private person) of the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001(c), in paragraph (1)(a)(ii), omit “or 72A (information society services)”.

Amendment of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005

9. In article 2 (interpretation: general) of the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005(d), in paragraph (1), at the appropriate place, insert—

““information society service” is to be read in accordance with the definition of “information society services” in regulation 2 of the Electronic Commerce (EC Directive) Regulations 2002;”.

Revocation of the Electronic Commerce Directive (Financial Services and Markets) (Amendment) Order 2015

10. The Electronic Commerce Directive (Financial Services and Markets) (Amendment) Order 2015(e) is revoked.

(a) Regulation 19 was inserted by S.I. 2002/2015.
 (b) S.I. 2001/2188. Regulation 12B was inserted by the 2002 Regulations and amended by S.I. 2013/472.
 (c) S.I. 2001/2256. Regulation 3(1)(a)(ii) was amended by the 2002 Regulations; there are other amending instruments but none is relevant.
 (d) S.I. 2005/1529, to which there are amendments not relevant to these Regulations.
 (e) S.I. 2015/852.

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)(a).

(a) Paragraph 3 was substituted by S.I. 2015/575.

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.

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(a) 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—

(a) S.I. 2002/2013, as amended by S.I. 2019/87.

“the 2018 Regulations” means the EEA Passport (Amendment etc., and Transitional Provisions) (EU Exit) Regulations 2018(a);

“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.

*Michelle Donelan
Rebecca Harris*

At 12.47 p.m. on 24th October 2019 Two of the Lords Commissioners of Her Majesty’s Treasury

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made in exercise of the powers in section 8 of the European Union (Withdrawal) Act 2018 (c. 16) in order to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the United Kingdom from the European Union (and in particular, the deficiencies under paragraphs (d) and (g) of section 8(2)), as well as the powers in paragraph 1 of Schedule 4 to that Act and in paragraph 21(b).

Part 2 of these Regulations amends Article 257(1) and (2) of Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of insurance and reinsurance.

Part 3 of these Regulations makes amendments related to electronic commerce in the financial services field. It amends sections 417 and 418 of Financial Services and Markets Act 2000 (c.8) to remove various EU references which are no longer needed. It also revokes article 72A (information society services) of the Financial Services and Markets Act (Regulated Activities) Order 2001 (S.I. 2001/544) (“the RAO”) and amends the Electronic Commerce Directive (Financial Services and Markets) Regulations 2002 (S.I. 2002/1775). This Part also makes various consequential amendments to other subordinate legislation.

Part 4 of these Regulations makes transitional provisions in connection with the revocation of article 72A of the RAO. It provides a regime by which a person providing information society services to which that article applied immediately before the commencement date to persons in the United Kingdom from an establishment in an EEA State can continue to provide such services while those services are run down.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen.

(a) S.I. 2018/1149, as amended by S.I. 2019/405 and S.I. 2019/1010.

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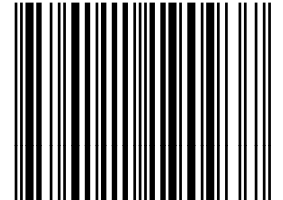
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