

Chapter 19

Non-FSMA powers



19.37 UK Benchmarks Regulations 2018

19.37.1 The *UK Benchmarks Regulations 2018* in part implemented the *benchmarks regulation* (before it was brought into UK law). The FCA has investigative and enforcement powers in relation to both criminal and non-criminal breaches of the *UK Benchmarks Regulations 2018* (including requirements imposed on *persons* subject to the *UK Benchmarks Regulations 2018* by the *benchmarks regulation* and any *onshored regulation* which was an *EU regulation* made under the *benchmarks regulation*). Our powers in relation to Miscellaneous BM persons are set in the *UK Benchmarks Regulations 2018*.

19.37.2 The FCA's approach to enforcing the *UK Benchmarks Regulations 2018* will mirror our general approach to enforcing the *Act*, as set out in ■ EG 2. We will seek to exercise our enforcement powers in a manner that is transparent, proportionate, responsive to the issue and consistent with our publicly stated policies. We will also seek to ensure fair treatment when exercising our enforcement powers. Finally, we will aim to change the behaviour of the *person* who is the subject of our action, to deter future non-compliance by others, to eliminate any financial gain or benefit from non-compliance and, where appropriate, to remedy the harm caused by the non-compliance.

19.37.3 The powers which the *UK Benchmarks Regulations 2018* provide to the FCA include:

- the power to require information and appoint investigators;
- powers of entry and inspection;
- the power to publicly censure;
- the power to impose financial penalties;
- the power to apply for an injunction or restitution order;
- the power to require restitution;
- the power to impose and vary requirements; and
- the power to prosecute relevant offences.

19.37.4 The *UK Benchmarks Regulations 2018*, for the most part, mirror the FCA's investigative, sanctioning and regulatory powers under the *Act*. The FCA has

decided to adopt procedures and policies in relation to the use of those powers akin to those we have under the *Act*. Key features of the *FCA's* approach are described below and in ■ SUP 15B.5.

The conduct of investigations under the UK Benchmarks Regulations 2018

19.37.5 The *UK Benchmarks Regulations 2018* apply much of Part 11 of the *Act*. The effect of this is to apply the same procedures under the *Act* for appointing investigators and requiring information when investigating breaches of the *UK Benchmarks Regulations 2018*.

19.37.6 The *FCA* will notify the subject of the investigation that we have appointed investigators to carry out an investigation under the *UK Benchmarks Regulations 2018* and the reasons for the appointment, unless notification is likely to prejudice the investigation or otherwise result in it being frustrated. The *FCA* expects to carry out a scoping visit early on in the enforcement process in most cases. The *FCA's* policy in non-criminal investigations under the *UK Benchmarks Regulations 2018* is to use powers to compel the provision of information in the same way as we would in the course of an investigation under the *Act*.

Decision making under the UK Benchmarks Regulations 2018

19.37.7 The decision making procedures for those decisions under the *UK Benchmarks Regulations 2018* requiring the giving of a *warning notice*, *decision notice* or a *supervisory notice* are dealt with within *DEPP*.

19.37.8 The *UK Benchmarks Regulations 2018* do not require the *FCA* to have published procedures for commencing criminal prosecutions. However, in these situations the *FCA* expects that we will normally follow our decision making procedures for the equivalent decisions under the *Act*, as set out in ■ EG 12.

19.37.9 The *UK Benchmarks Regulations 2018* do not require the *FCA* to have published procedures to apply to the court for an *injunction* or restitution order. However, the *FCA* will normally follow our decision making procedures for the equivalent decisions under the *Act*, as set out in ■ EG 10 and ■ EG 11.

19.37.10 The *UK Benchmarks Regulations 2018* require the *FCA* to give third party rights as set out in section 393 of the *Act* and to give access to certain material as set out in section 394 of the *Act* as applied by the *UK Benchmarks Regulations 2018*.

19.37.11 Certain *FCA* decisions (for example an imposition of a requirement) may be referred to the *Tribunal* by an aggrieved party.

Imposition of penalties under the UK Benchmarks Regulations 2018

- 19.37.12** When determining whether to take action to impose a penalty or to issue a *public censure* under the *UK Benchmarks Regulations 2018* the *FCA's* policy includes having regard to the relevant factors in ■ DEPP 6.2 and ■ DEPP 6.4. The *FCA's* policy in relation to determining the level of a financial penalty includes having regard, where relevant, to ■ DEPP 6.5 to ■ DEPP 6.5D.
- 19.37.13** As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving non-criminal breaches of the *UK Benchmarks Regulations 2018* to assist us to exercise our functions under the *UK Benchmarks Regulations 2018* in the most efficient and economic way. See ■ DEPP 5, ■ DEPP 6.7 and ■ EG 5 for further information on the settlement process and the *settlement discount scheme*.
- 19.37.14** The *FCA* will apply the approach to publicity that is outlined in ■ EG 6, read in light of Article 45 of the *benchmarks regulation*.
- Statement of policy in section 169(7) (as applied by the UK Benchmarks Regulations 2018)**

- 19.37.15** The *UK Benchmarks Regulations 2018* apply section 169 of the *Act* which requires the *FCA* to publish a statement of policy on the conduct of certain interviews in response to requests from *overseas regulators*. For the purposes of the *UK Benchmarks Regulations 2018* the *FCA* will follow the procedures described in ■ DEPP 7.