

Chapter 19

Non-FSMA powers

19.26 OTC Derivatives, Central Counterparties and Trade Repositories Regulations 2013

19.26.1 The *FCA* has information gathering and sanctioning powers under the *Act* which are applicable to breaches of *EMIR requirements* by *authorised persons* or *recognised bodies*. The *OTC derivatives, CCPs and trade repositories regulation* adds to the powers available to the *FCA* for dealing with breaches of *EMIR requirements* and sets out information gathering and sanctioning powers enabling the *FCA* to investigate and take action for breaches of the *EMIR requirements* by *non- authorised counterparties* and for certain breaches of the *OTC derivatives, CCPs and trade repositories regulation* by *authorised persons*. Such powers under the *OTC derivatives, CCPs and trade repositories regulation* or the *Act* do not extend to breaches of ■ [article 11\(3\) and \(4\) of EMIR](#) by PRA-*authorised financial counterparties*. The *FCA* has additional powers in relation to trade repositories under the *Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018* (see ■ [EG 19.40](#)).

Information gathering powers

19.26.2 The *FCA* may require a *non-authorised counterparty* that is subject to obligations under *EMIR* to provide specified information or specified documents so that it can verify whether the *non-authorised counterparty* has complied with *EMIR*. The *FCA* also has the power to require a *person* to provide specified information or specified documents so that it can verify whether the *person* is subject to *EMIR*. The *FCA* may require the above information to be provided in such form, or to be verified or authenticated in such manner, as is reasonably required in connection with the exercise of the *FCA's* functions under *EMIR*.

Sanctioning powers

19.26.3

- (1) The *FCA* has the power to publish a statement or impose a financial penalty of such amount as it considers appropriate on:
 - (a) a financial counterparty who is not an *authorised person*, a non-financial counterparty or any other *person* who has breached an *EMIR requirement* or regulation 7 or 8 of the *OTC derivatives, CCPs and trade repositories regulation*;
 - (b) a financial counterparty who is an *authorised person* who has breached regulation 8 of the *OTC derivatives, CCPs and trade repositories regulation*.

- (2) Where the *FCA* exercises its power to impose a financial penalty under the *OTC derivatives, CCPs and trade repositories regulation* or the *Act* for breaches in relation to *EMIR* a penalty, it must publish a statement to that effect unless such disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

[**Note:** article 12(2) of *EMIR* and regulation 9(3) of the *OTC derivatives, CCPs and trade repositories regulation*]

- 19.26.4** As the power to impose penalties for contravention of an *EMIR* requirement or regulations ■ 7 or ■ 8 of the *OTC derivatives, CCPs and trade repositories regulation* mirrors similar powers to that the *FCA* has under the *Act*, the *FCA* will adopt procedures and policies in relation to the use of those powers akin to those it has adopted under the *Act*, subject to ■ EG 19.26.3(2).
- 19.26.5** The *FCA* will use the sanctioning powers where it is appropriate to do so and with regard to the relevant factors listed in ■ DEPP 6.2.1G and ■ DEPP 6.4. In determining the appropriate level of financial penalty, the *FCA* will have regard to the principles set out in ■ DEPP 6.5, ■ DEPP 6.5A, ■ DEPP 6.5B, ■ DEPP 6.5D and ■ DEPP 6.7.
- 19.26.6** Where the *FCA* proposes or decides to take action to publish a statement or impose a financial penalty referred to in ■ EG 19.26.3, it will give the *person* concerned a *warning notice* or a *decision notice* respectively. In the case of a public statement, the *warning notice* or *decision notice* will also set out the terms of the statement. In the case of a financial penalty, the *warning notice* or *decision notice* will also state the amount of the penalty. On receiving a *warning notice*, the *person* concerned has a right to make representations regarding the *FCA*'s proposed decision. A *person* that receives a *decision notice* may refer the matter to the *Tribunal*.
- 19.26.7** If it is proposing to publish a statement or impose a penalty under the *OTC derivatives, CCPs and trade repositories regulation*, the *FCA*'s decision maker will be the *RDC*. The *RDC* will make its decisions following the procedure set out in ■ DEPP 3.2 or where appropriate, ■ DEPP 3.3.
- 19.26.8** Sections 393 and 394 of the *Act* apply to notices referred to in this section. See ■ DEPP 2.4 (Third party rights and access to *FCA* material).
- 19.26.9** In relation to the notices in this section, the *FCA* will, subject to ■ EG 19.26.3(2), apply the approach to publicity that is outlined in ■ EG 6.
- 19.26.10** In relation to *authorised persons* and *recognised bodies* which are subject to obligations under *EMIR*, other information gathering powers and sanctions may also be applicable under the *Act*.