

# Chapter 19

## Non-FSMA powers

## 19.34 Markets in Financial Instruments Regulations 2017

### 19.34.1

The *MiFI Regulations* in part implemented *MiFID*. The *FCA* has investigative and enforcement powers in relation to both criminal and non-criminal breaches of the *MiFI Regulations* (including requirements imposed on persons subject to the *MiFI Regulations* by *MiFIR* and any *onshored regulation* which was an *EU regulation* made under *MiFIR* or *MiFID*). The *MiFI Regulations* impose requirements on:

- (1) *persons* holding positions in relevant contracts for commodity derivatives trading on *trading venues* and for *economically equivalent OTC contracts*, whether or not the *persons* are authorised; and
- (2) exempt *investment firms* providing services in *algorithmic trading*, *direct electronic access* or acting as a general clearing member or in relation to the synchronisation of business clocks.

The *MiFI Regulations* also give the *FCA* the powers to investigate and enforce breaches of article 28 of *MiFIR* and any *onshored regulation* which was an *EU regulation* made under *MiFIR*.

### 19.34.2

The *FCA's* approach to enforcing under the *MiFI Regulations*, whether the *person* is authorised or not, 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.

### 19.34.3

The regulatory powers which the *MiFI Regulations* provide to the *FCA* include:

- (1) the power to require information and appoint investigators;
- (2) powers of entry and inspection;
- (3) the power to publicly censure;
- (4) the power to impose financial penalties;
- (5) the power to apply for an injunction or restitution order;

- (4) the power to require restitution;
- (7) the power to impose limitation, restriction or requirement; and
- (8) the power to prosecute relevant offences.

**19.34.4** In addition, the *MiFI Regulations* provide the power to require the removal of persons from the management board of an *investment firm*, a *credit institution* or a *recognised investment exchange*. This is a supervisory power, rather than a disciplinary one, and it may be exercised whenever the *FCA* deems it necessary for the purpose of any of our functions under *MiFID* or *MiFIR*.

**19.34.5** The *MiFI Regulations*, 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.

#### **The conduct of investigations under the MiFI Regulations**

**19.34.6** The *MiFI Regulations* 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 *MiFI Regulations*.

**19.34.7** The *FCA* will notify the subject of the investigation that we have appointed investigators to carry out an investigation under the *MiFI Regulations* 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 *MiFI Regulations* 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 MiFI Regulations**

**19.34.8** The decision making procedures for those decisions under the *MiFI Regulations* requiring the giving of a *warning notice*, *decision notice* or a *supervisory notice* are dealt with in *DEPP*.

**19.34.9** The *MiFI Regulations* 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.

**19.34.10** The *MiFI Regulations* 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.

- 19.34.11 The *MiFI Regulations* 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*.
- 19.34.12 Certain *FCA* decisions (for example a requirement to reduce the size of a position, publication of a statement and the imposition of a penalty) may be referred to the *Tribunal* by an aggrieved party.
- Imposition of penalties under the MiFI Regulations**
- 19.34.13 When determining whether to take action to impose a penalty or to issue a public censure under the *MiFI Regulations* 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.
- 19.34.14 As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving non-criminal breaches of the *MiFI Regulations* to assist us to exercise our functions under the *MiFI Regulations* 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*.
- 19.34.15 The *FCA* will apply the approach to publicity that is outlined in ■ EG 6, read in light of the applicable publicity provisions in section 391D of the *Act*.
- Removal of persons from management boards under the MiFI Regulations**
- 19.34.16 The power under Part 5 of the *MiFI Regulations* to remove a person from a management board may be used in respect of an *investment firm*, a *credit institution* or a *recognised investment exchange*.
- 19.34.17 This power may be used where the *FCA* considers that the removal is necessary for the purpose of exercising functions under *MiFID* or *MiFIR*. Examples of where this power may be used include, but are not limited to, ensuring that all members of the management body:
- (1) are of sufficiently good repute;
  - (2) possess sufficient knowledge, skills and experience to perform their duties;
  - (3) commit sufficient time to perform their functions;
  - (4) do not hold too many directorships;
  - (5) act with honesty, integrity and independence of mind; and
  - (6) have no conflicts of interest.
- 19.34.18 The *FCA* will have regard to all relevant circumstances, on a case-by-case basis, taking into account the specific circumstances of the *investment firm*,

*credit institution or recognised investment exchange* and the member of the management board. The *FCA* will exercise this power fairly and proportionately.

**19.34.19** It should be noted that, while the *FCA* will have regard to the range of regulatory tools at its disposal, we are not required to exhaust all other options before imposing the requirement to remove a person from the management board.

**19.34.20** The *FCA* will take into account all relevant circumstances when considering whether to require the removal to occur immediately or on a specified date.

**Statement of policy in section 169(7) (as implemented by the MiFI Regulations)**

**19.34.21** The *MiFI Regulations* 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 *MiFI Regulations* the *FCA* will follow the procedures described in ■ DEPP 7.