

**MiFID 2 (DEFERRED MATTERS) INSTRUMENT 2017****Powers exercised**

- A. The Financial Conduct Authority makes this instrument in the exercise of:
- (1) the following powers and related provisions in the Financial Services and Markets Act 2000 (“the Act”):
    - (a) section 73A (Part 6 Rules);
    - (b) section 84 (Matters which may be dealt with by prospectus rules);
    - (c) section 137A (The FCA’s general rules);
    - (d) section 137T (General supplementary powers); and
    - (e) section 139A (Power of the FCA to give guidance);
  - (2) the powers of direction, guidance and related provisions in or under the following provisions of the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017 (SI 2017/701):
    - (a) paragraph 7 Schedule 1 (Guidance);
    - (b) paragraph 14 Schedule 1 (Statements of policy);
    - (c) paragraph 19 Schedule 1 (Application of Part 11 of the Act (information gathering and investigations)); and
    - (d) paragraph 22 Schedule 1 (Application of Part 26 of the Act (notices));
  - (3) the powers of direction, guidance and related provisions in or under the following provisions of the Financial Services and Markets Act 2000 (Data Reporting Services) Regulations 2017 (SI 2017/699):
    - (a) regulation 20 (Guidance);
    - (b) regulation 27 (Statement of policy);
    - (c) regulation 33 (Application of Part 11 of the Act (information gathering and investigations)); and
    - (d) regulation 37 (Application of Part 26 of the Act (notices)); and
  - (4) the other rule and guidance making powers listed in Schedule 4 (Powers exercised) to the General Provisions of the Handbook.
- B. The rule-making powers listed above are specified for the purpose of section 138G(2) (Rule-making instruments) of the Act.

**Commencement**

- C. This instrument comes into force on 3 January 2018, immediately after those parts of the following instruments which also come into force on the same day:
- (1) Glossary (MiFID 2) Instrument 2017;
  - (2) Markets and Organisational Requirements (MiFID 2) Instrument 2017; and

- (3) Conduct, Perimeter Guidance and Miscellaneous Provisions (MiFID 2) Instrument 2017.

### **Amendments to the Handbook**

- D. The modules of the FCA’s Handbook of rules and guidance listed in column (1) below are amended in accordance with the Annexes to this instrument listed in column (2).

(1)	(2)
Glossary of definitions	Annex A
Decision Procedure and Penalties manual (DEPP)	Annex B
Prospectus Rules sourcebook (PR)	Annex C

### **Notes**

- E. In Annexes B and C to this instrument, the “notes” (indicated by “**Note:**”) are included for the convenience of readers and do not form part of the legislative text.

### **Material outside the Handbook**

- F. The Enforcement Guide (EG) is amended in accordance with Annex D to this instrument.

### **Citation**

- G. This instrument may be cited as the MiFID 2 (Deferred Matters) Instrument 2017.

By order of the Board  
7 December 2017

## Annex A

### Amendments to the Glossary of definitions

In this Annex, underlining indicates new text and striking through indicates deleted text.

- qualified investor* (in *PR*) (as defined in section 86(7) of the *Act*) in relation to an *offer* of *transferable securities*:
- ...
- (c) a *person* who is an *eligible counterparty* in accordance with article ~~24~~ 30 of *MiFID* and has not, before the making of the *offer*, agreed in writing with the relevant firm (or each of the relevant firms) to be treated as a *non-professional client* in accordance with the final paragraph of Section I of Annex II of *MiFID*; or
- (d) a *person* whom:
- (i) any relevant firm ~~is~~ was authorised to continue to treat as a *professional client* ~~in accordance with~~ immediately before 3 January 2018 by virtue of article ~~71(6)~~ 71.6 of *MiFID* Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments; and
- (ii) the firm may continue to treat as a *professional client* from 3 January 2018 by virtue of Section II.2 of Annex II to *MiFID*.

## Annex B

## Amendments to the Decision Procedure and Penalties manual (DEPP)

In this Annex, underlining indicates new text.

## 2 Statutory notices and the allocation of decision making

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### 2.5 Provision for certain categories of decision

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2.5.18 G Some of the distinguishing features of notices given under enactments other than the *Act* are as follows:

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(4) The FCA is only required to give a single *supervisory notice* under Regulations 28 and 36 of the *MiFI Regulations*. No representations can be made to the FCA after the issuing of this notice, but the matter can be referred to the *Tribunal*.

...

## 2 Annex 1G Warning notices and decision notices under the Act and certain other enactments

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The Small and Medium Sized Business (Credit Information) Regulations 2015	Description	Handbook reference	Decision maker
...			
<u>Markets in Financial Instruments Regulations 2017</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Paragraphs 12(1)(a) and 13(1)(a) of Schedule 1</u>	<u>when the FCA is proposing or deciding to publish a statement</u>		<u>RDC</u>
<u>Paragraphs 12(1)(b) and 13(1)(b) of</u>	<u>when the FCA is proposing or deciding to impose a penalty</u>		<u>RDC</u>

<u>Schedule 1</u>			
<u>Paragraph 21(1) and 21(7) of Schedule 1</u>	<u>when the FCA is proposing or deciding to require restitution</u>		<u>RDC</u>

<b>Data Reporting Services Regulations 2017</b>	<b>Description</b>	<b>Handbook reference</b>	<b>Decision maker</b>
...			
<u>Regulations 25(1)(a) and 26(1)(a)</u>	<u>when the FCA is proposing or deciding to publish a statement</u>		<u>RDC</u>
<u>Regulations 25(1)(b) and 26(1)(b)</u>	<u>when the FCA is proposing or deciding to impose a financial penalty</u>		<u>RDC</u>
<u>Regulation 36(1) and 36(7)</u>	<u>when the FCA is proposing or deciding to require restitution</u>		<u>RDC</u>

## 2 Annex 2G Supervisory notices

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<b>The Payment Accounts Regulations 2015</b>	<b>Description</b>	<b>Handbook reference</b>	<b>Decision maker</b>
...			
<b><u>Markets in Financial Instruments Regulations 2017</u></b>	<b><u>Description</u></b>	<b><u>Handbook reference</u></b>	<b><u>Decision maker</u></b>
<u>Regulations 10(2) and 12(2)</u>	<u>when the FCA is exercising its power of intervention in respect of a third country firm</u>		<u>RDC or executive procedures (see DEPP 2.5.7G and DEPP 2.5.7AG)</u>

<u>Regulation 28(4)</u>	<u>when the FCA is imposing a limitation, restriction or requirement under regulation 24</u>		<u>Executive procedures</u> <u>(see DEPP 2.5.18G)</u>
<u>Regulation 36(4)</u>	<u>when the FCA is imposing a requirement under regulation 36</u>		<u>Executive procedures</u> <u>(see DEPP 2.5.18G)</u>
<u>Regulations 40(3) and 40(6)</u>	<u>when the FCA is proposing or deciding to impose a requirement, or deciding to not rescind the imposition of a requirement that has already taken effect under regulation 40</u>		<u>RDC</u>

<u>Data Reporting Services Regulations 2017</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Regulation 22(6)</u>	<u>when the FCA is imposing a limitation or other restriction under regulation 22</u>		<u>RDC or executive procedures</u> <u>(see Note)</u>

**Note:** The RDC will take the decision to give a notice imposing a restriction or limitation if it involves restricting a person from providing a data reporting service. Otherwise the decision to give a notice will be taken by FCA staff under executive procedures.

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**Sch 3 Fees and other required payments**

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3.2G

The FCA's power to impose financial penalties is contained in:
...
<i>the Small and Medium Sized Business (Credit Information) Regulations</i>
<u>the MiFI Regulations</u>
<u>the DRS Regulations</u>

...
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**Sch 4 Powers Exercised**

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4.2G

The following additional powers and related provision have been exercised by the <i>FCA</i> to make the statements of policy in <i>DEPP</i> :
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Regulation 29 (Application of Part 26 of the 2000 Act) of the <i>Immigration Regulations</i>
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<u>Paragraph 7 of Schedule 1 (Guidance) of the <i>MiFI Regulations</i></u>
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<u>Paragraph 14 of Schedule 1 (Statements of Policy) of the <i>MiFI Regulations</i></u>
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<u>Paragraph 22 of Schedule 1 (Application of Part 26 of the Act) of the <i>MiFI Regulations</i></u>
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Regulation 20 (Guidance) of the <i>DRS Regulations</i>
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<u>Regulation 27 (Statements of Policy) of the <i>DRS Regulations</i></u>
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Regulation 37 (Application of Part 26 of the Act) of the <i>DRS Regulations</i>
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## Annex C

## Amendments to the Prospectus Rules sourcebook (PR)

In this Annex, underlining indicates new text and striking through indicates deleted text.

## 1 Preliminary

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### 1.2 Requirement for a prospectus and exemptions

Requirement for a prospectus

- 1.2.1 UK Sections 85 and 86 of the *Act* provide for when a *prospectus* approved by the *FCA* will be required:

85	...		
86	Exempt offers to the public		
	...		
	(7)	“Qualified investor”, in relation to an offer of transferable securities, means –	
		...	
		(d)	a person whom –
		(i)	any relevant firm <del>is</del> <u>was</u> authorised to continue to treat as a professional client <del>in accordance with immediately before 3 January 2018 by virtue of article 71.6 (transitional provisions) article 71(6) of that directive</del> <u>Directive 2004/39/EC on markets in financial instruments; and</u>
		(ii)	<u>the firm may continue to treat as a professional client from 3 January 2018 by virtue of Section II.2 of Annex II to the markets in financial instruments directive.</u>
	...		

...

#### App 1.1 Relevant definitions

App **Note:** The following definitions relevant to the *prospectus rules* are extracted from



1.1.1

the <i>Glossary</i> .			
...			
<i>qualified investor</i>	(as defined in section 86(7) of the <i>Act</i> ) in relation to an <i>offer</i> of <i>transferable securities</i> :		
	...		
	(c)	a <i>person</i> who is <del>recognised</del> as an <i>eligible counterparty</i> in accordance with article <del>24</del> <u>30</u> of <i>MiFID</i> and has not, before the making of the <i>offer</i> , agreed in writing with the relevant firm (or each of the relevant firms) to be treated as a <i>non-professional client</i> in accordance with the final paragraph of Section I of Annex II of <i>MiFID</i> ; or	
	(d)	a <i>person</i> whom:	
	(i)	any relevant firm <del>is</del> <u>was</u> authorised to continue to treat as a <i>professional client</i> <del>in accordance with</del> <u>immediately before 3 January 2018 by virtue of article <del>71(6)</del> 71.6 of <del>MiFID</del> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments; and</u>	
	(ii)	<u>the firm may continue to treat as a <i>professional client</i> from 3 January 2018 by virtue of Section II.2 of Annex II to <i>MiFID</i>.</u>	
...			

## Annex D

### Amendments to the Enforcement Guide (EG)

Insert the following new sections after EG 19.33 (The Small and Medium Sized Business (Finance Platforms) Regulations 2015). The text is not underlined.

#### 19 Non-FSMA powers

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#### 19.34 Markets in Financial Instruments Regulations 2017

19.34.1 The *MiFI Regulations* in part implement *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 directly applicable 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 directly applicable 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;
- (6) 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*.

### 19.35 Data Reporting Services Regulations 2017

19.35.1 The *DRS Regulations* implement *MiFID*. The *FCA* has investigation and enforcement powers in relation to both criminal and non-criminal breaches of the *DRS Regulations* (including requirements imposed on *persons* subject to the *DRS Regulations* by *MiFIR* and any directly applicable EU regulation made under *MiFIR* or *MiFID*). The *DRS Regulations* impose requirements on *data reporting services providers* (“DRSPs”) which are entities authorised or verified to provide services of:

- (1) publishing trade reports (“*APA*”);
- (2) reporting details of transactions (“*ARM*”); and
- (3) collecting trade reports (“*CTP*”).

19.35.2 The *FCA*’s approach to enforcing the *DRS Regulations* 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.

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

- (1) the power to require information and appoint investigators;
- (2) powers of entry and inspection;
- (3) the power of public censure;
- (4) the power to impose financial penalties;

- (5) the power to impose a limitation or other restrictions;
- (6) the power to apply for an *injunction*;
- (7) the power to require restitution; and
- (8) the power to prosecute unauthorised providers.

19.35.4 In addition, the *DRS Regulations* provide the power for the *FCA* to take criminal or non-criminal action for misleading the *FCA*.

19.35.5 The *DRS 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 *DRS Regulations*

19.35.6 The *DRS 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 *DRS Regulations*.

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

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

19.35.9 For decisions made by *executive procedures* the procedures to be followed will be those described in *DEPP* 4.

19.35.10 The *DRS 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.

19.35.11 The *DRS 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 procedure for the equivalent decisions under the *Act*, as set out in *EG* 10 and *EG* 11.

19.35.12 The *DRS 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*.

- 19.35.13 Certain *FCA* decisions (for example the 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 *DRS Regulations*

- 19.35.14 When determining whether to take action to impose a penalty or to issue a public censure under the *DRS 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.

- 19.35.15 As with cases under the *Act*, the *FCA* may settle or mediate appropriate cases involving non-criminal breaches of the *DRS Regulations* to assist us to exercise our functions under the *DRS Regulations* in the most efficient and economic way.  
[**Note:** See *DEPP* 5, *DEPP* 6.7 and *EG* 5 for further information on the settlement process and the *settlement discount scheme*.]

- 19.35.16 The *FCA* will apply the approach to publicity that is outlined in *EG* 6, read in light of applicable publicity provisions in section 391D of the *Act*.

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

- 19.35.17 The *DRS 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 *DRS Regulations* the *FCA* will follow the procedures described in *DEPP* 7.