STATUTORY INSTRUMENTS

2018 No. 135

FINANCIAL SERVICES AND MARKETS

The Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018

Made - - - - 1st February 2018

Laid before Parliament 5th February 2018

Coming into force in accordance with regulation 1(2)

The Treasury are designated [F1] for the purposes of section 2(2) of the European Communities Act 1972 [F2] in relation to financial services.

The Treasury make the following Regulations in exercise of the powers conferred by section 2(2) of the European Communities Act 1972.

F1 S.I. 2012/1759.

F2 1972 c. 68; section 2(2) was amended by section 27 of the Legislative and Regulatory Reform Act 2006 (c.51) and by section 3 of, and the Schedule to, the European Union (Amendment) Act 2008 (c.7). By virtue of the amendment of section 1(2) by section 1 of the European Economic Area Act 1993 (c.51) regulations may be made under section 2(2) of the European Communities Act to implement obligations of the United Kingdom created or arising by or under the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (Cm 2073) and the Protocol adjusting the Agreement signed at Brussels on 17th March 1993 (Cm 2183).

PART 1

Introductory provisions

Citation and commencement

1.—(1) These Regulations may be cited as the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018.

(2) These Regulations come into force on 27th February 2018 except for—

(a) regulation 57 (amendments to the Consumer Credit (Disclosure of Information) Regulations 2010) [F3] which comes into force on 1st July 2018; and

(b) regulations 37(c) and (d), 39, 43(b), 49(2)(c) and (d), 50 and 53 which come into force on 1st May 2020.

F3 S.I. 2010/1013.

Interpretation

2.—(1) In these Regulations—

"the Act" means the Financial Services and Markets Act 2000 [F4];

"the EU Benchmarks Regulation 2016" means Regulation EU 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014 **[**[F5]as it forms part of retained EU law**]**;

"benchmark administrator" means a person who acts as an administrator of a benchmark within the meaning of Article 3 of the EU Benchmarks Regulation 2016;

"competent authority" means an authority designated under Article 40 of the EU Benchmarks Regulation 2016;

"the FCA" means the Financial Conduct Authority;

"non-authorised person" means a person who is not an authorised person;

"the RAO" means the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 [F6];

"relevant requirement" means a requirement imposed by or under these Regulations or by or under the EU Benchmarks Regulation 2016; and

[[F7]"third country" means a country other than the United Kingdom.**]**

(2) In Part 2 of these Regulations—

"overseas regulator" means an authority in a country or territory outside the United Kingdom which has functions corresponding to those of the FCA under the EU Benchmarks Regulation 2016;

"own-initiative requirement powers" means the FCA's powers in regulation 6(2); and

"senior management" has the meaning given in Article 4.1.37 of Directive 2014/65/EU off the European Parliament and of the Council of 16 April 2014 on Markets in Financial Instruments (recast) **[**[F8]as it had effect immediately before IP completion day**]**.

(3) Except as provided by paragraphs (1) and (2)—

(a) any expression used in these Regulations which is defined for the purposes of the EU Benchmarks Regulation 2016 has the meaning which it has in the EU Benchmarks Regulation 2016; and

(b) any other expression used in these Regulations which is defined for the purposes of the Act has the meaning given by the Act.

F4 2000 c .8.

F5 Words in reg. 2(1) inserted (31.12.2020 immediately before IP completion day) by The Securities Financing Transactions, Securitisation and Miscellaneous Amendments (EU Exit) Regulations 2020 (S.I. 2020/1385), regs. 1(4), **42**

F6 S.I. 2001/544.

F7 Words in reg. 2(1) substituted (31.12.2020) by The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/710), regs. 1(3), **12(2)(a)**; 2020 c. 1, Sch. 5 para. 1(1)

F8 Words in reg. 2(2) inserted (31.12.2020) by The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/710), regs. 1(3), **12(2)(b)** (as amended by The Financial Services and Economic and Monetary Policy (Consequential Amendments) (EU Exit) Regulations 2020 (S.I. 2020/1301), regs. 1, 3, **Sch. para. 43(b)**); 2020 c. 1, Sch. 5 para. 1(1)

[F9Retained direct EU legislation]

3. In these Regulations, a reference to an Article of the EU Benchmarks Regulation 2016 includes a reference to any **[**F10retained direct EU legislation**]** made under that Article.

F9 Reg. 3 heading substituted (31.12.2020) by The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/710), regs. 1(3), **12(3)**; 2020 c. 1, Sch. 5 para. 1(1)

F10 Words in reg. 3 substituted (31.12.2020) by The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/710), regs. 1(3), **12(4)**; 2020 c. 1, Sch. 5 para. 1(1)

Designation of competent authority

F11**4.** . . . . . .

F11 Reg. 4 omitted (31.12.2020) by virtue of The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/710), regs. 1(3), **12(5)**; 2020 c. 1, Sch. 5 para. 1(1)

PART 2

FCA powers over Miscellaneous BM persons

5.—(1) The FCA has the powers conferred on it by this Part of the Regulations in respect of Miscellaneous BM persons.

(2) A "Miscellaneous BM person" is a person who is not an authorised person and is—

(a) involved in the provision of, or contribution of input data to, a benchmark;

(b) a service provider to whom functions or any relevant services and activities in the provision of a benchmark have been outsourced;

(c) a person who is not the service provider but who is or has been party to a contract in relation to the outsourcing of functions or any relevant services and activities in the provision of a benchmark;

(d) a legal representative of a benchmark administrator located in a third country which has obtained or has applied for prior recognition as referred to in Article 32(1) and as provided for in Article 32(3) of the EU Benchmarks Regulation 2016;

(e) a person who administers a benchmark relying on **[**F12Article 46(8) or**]** Article 51(4) of the EU Benchmarks Regulation 2016; or

(f) a supervised entity.

F12 Words in reg. 5(2)(e) inserted (14.10.2019) by The Financial Services and Markets Act 2000 (Benchmarks) (Amendment) Regulations 2019 (S.I. 2019/1256), regs. 1, **2(2)**

FCA's power to impose requirements

6.—(1) The FCA may exercise its power under paragraph (2) in relation to a Miscellaneous BM person if it appears to the FCA that—

(a) the Miscellaneous BM person has contravened or is likely to contravene a relevant requirement;

(b) it is desirable for the FCA to exercise its powers in order to advance any of its operational objectives **[**F13but only in respect of a Miscellaneous BM person coming within regulation 5(2)(d) or (e)**]**; or

(c) it is desirable for the FCA to exercise its powers order to facilitate the performance of its functions under the EU Benchmarks Regulation 2016.

(2) The FCA's power under this paragraph is a power to—

(a) impose a requirement that the FCA considers appropriate;

(b) vary a requirement already imposed under this paragraph; or

(c) cancel such a requirement.

(3) The FCA may, on the application of the Miscellaneous BM person—

(a) impose a requirement that the FCA considers appropriate;

(b) vary a requirement already imposed by the FCA; or

(c) cancel such a requirement.

(4) The FCA may refuse an application under paragraph (3) if it appears to the FCA that—

(a) the Miscellaneous BM person has contravened or is likely to contravene a relevant requirement;

(b) it is desirable to do so in order to advance any of the FCA's operational objectives; or

(c) it is desirable to do so in order to facilitate the performance of the FCA's functions under the EU Benchmarks Regulation 2016.

(5) Where the FCA refuses an application under paragraph (3), section 55X of the Act (determination of applications: warning notices and decision notices) applies as if—

(a) the reference in section 55X(2) to "an application made under this Part" included applications made under paragraph (3) of this regulation;

(b) the reference to section 55X(4) to "an application under this Part" included applications made under paragraph (3) of this regulation; and

(c) each reference to a "regulator" were a reference to the FCA.

(6) Where the FCA proposes to impose or vary a requirement or imposes or varies a requirement under paragraph (2), section 55Y of the Act **F14** (exercise of own-initiative power: procedure) applies as if—

(a) each reference to either regulator's own-initiative requirement power were a reference to the FCA's power to impose a requirement under this regulation;

(b) each reference to the regulator were a reference to the FCA, and each reference to either regulator were a reference to the FCA only;

(c) each reference to an authorised person were a reference to a Miscellaneous BM person;

(d) each reference to a variation of permission, or the imposition or variation of a requirement, were a reference to a restriction imposed on a Miscellaneous BM person under paragraph (2); and

(e) the reference in subsection (12) [F15] to section 391(8) were a reference to section 391(8) as applied by these Regulations.

F13 Words in reg. 6(1)(b) inserted (14.10.2019) by The Financial Services and Markets Act 2000 (Benchmarks) (Amendment) Regulations 2019 (S.I. 2019/1256), regs. 1, **2(3)**

F14 Section 55Y was inserted by section 11(2) of the Financial Services Act 2012 (c. 21).

F15 Subsection (12) of section 55Y of the Act was inserted by section 11(2) of the Financial Services Act 2012.

Right to refer matters to the Tribunal

7. A Miscellaneous BM person who is aggrieved by the exercise of the FCA's powers under regulation 6 may refer the matter to the Tribunal.

Exercise of power in support of overseas regulator

8.—(1) The FCA's own-initiative requirement powers may be exercised in respect of a Miscellaneous BM person at the request of, or for the purpose of, assisting an overseas regulator.

(2) If a request to the FCA for the exercise of its own-initiative requirement powers has been made by an overseas regulator, the FCA must, in deciding whether or not to exercise those powers in response to the request, consider whether it is necessary to do so in order to comply with **[**[F16]a retained EU obligation**]**.

(3) In deciding whether or not to do so, in any case in which the FCA does not consider that the exercise of its own-initiative requirement powers is necessary in order to comply with **[**[F17]a retained EU obligation**]**, it may take into account in particular—

(a) whether in the country or territory of the overseas regulator concerned, corresponding assistance would be given to a United Kingdom regulatory authority;

(b) whether the case concerns the breach of a law, or other requirement, which has no close parallel in the United Kingdom or involves the assertion of a jurisdiction not recognised by the United Kingdom;

(c) the seriousness of the case and its importance to persons in the United Kingdom;

(d) whether it is otherwise appropriate in the public interest to give the assistance sought.

(4) (a) The FCA may decide not to exercise its own-initiative requirement powers in response to a request unless the overseas regulator concerned undertakes to make such contribution towards the cost of their exercise as the FCA considers appropriate.

(b) in subparagraph (a) "request" means a request of a kind mentioned in paragraph (1).

(5) Paragraph (4) does not apply if the FCA decides that it is necessary for it to exercise its own-initiative requirement powers in order to comply with **[**[F18]a retained EU obligation**]**.

F16 Words in reg. 8(2) substituted (31.12.2020) by The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/710), regs. 1(3), **12(6)**; 2020 c. 1, Sch. 5 para. 1(1)

F17 Words in reg. 8(3) substituted (31.12.2020) by The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/710), regs. 1(3), **12(6)**; 2020 c. 1, Sch. 5 para. 1(1)

F18 Words in reg. 8(5) substituted (31.12.2020) by The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/710), regs. 1(3), **12(6)**; 2020 c. 1, Sch. 5 para. 1(1)