

EU Benchmarks Regulation Implementation (DEPP and EG)

Consultation Paper

CP18/5*

February 2018



How to respond

We are asking for comments on this Consultation Paper (CP) by 5 March 2018.

You can send them to us using the form on our website at: www.fca.org.uk/cp18-05-response-form.

Or in writing to:

Law & Policy, Enforcement and Market Oversight Division
Financial Conduct Authority
25 The North Colonnade
London
E14 5HS

Telephone:

020 7066 7454

Email:

cp18-05@fca.org.uk

How to navigate this document onscreen



returns you to the contents list



takes you to helpful abbreviations

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1 Summary

Introduction

- 1.1** The EU Benchmarks Regulation ('Benchmarks Regulation')¹ entered into force on 30 June 2016 and most of the provisions came into effect on 1 January 2018.
- 1.2** The Benchmarks Regulation is directly applicable. It substantially replaces the UK regime that previously regulated benchmark administrators and contributors. In its implementing statutory instrument ('UK Benchmarks Regulations 2018'), which was made and laid before Parliament on 5 February 2018 but is not yet in force (at the time of publishing this CP), the Treasury confirms FCA's existing designation as the competent authority under the Benchmarks Regulation² and provides the FCA with supervisory, disciplinary and investigatory powers over persons subject to the Benchmarks Regulation.
- 1.3** The UK Benchmarks Regulations 2018 extend the FCA powers over authorised persons for breaches of the Benchmarks Regulation and also give the FCA powers over certain unauthorised persons, defined as miscellaneous BM persons. It also provides for a bespoke decision-making procedure for authorisation and registration of EU-based benchmark administrators and for recognition of benchmark administrators located in third countries and endorsement of benchmarks provided by benchmark administrators located in a third country for use in the EU.
- 1.4** We encourage you to read this CP in conjunction with our previous CP on the Handbook changes published in June 2017³ and the subsequent Policy Statement⁴ published in December 2017. We also encourage you to look at our Benchmarks Regulation webpages⁵ for up-to-date news. You can also sign up for our Benchmarks Regulation email updates⁶.

Summary of proposals

- 1.5** We need to amend the Decision Procedure and Penalties manual (DEPP) and Enforcement Guide (EG) because of the changes introduced by the Benchmarks Regulation and the UK Benchmarks Regulations 2018. In relation to our powers over miscellaneous BM persons, we propose to apply our existing policy and procedure to the exercise of our enforcement powers under the Benchmarks Regulation. We are further proposing a bespoke decision-making procedure for authorisation, registration, recognition and endorsement which is addressed through amendments to DEPP.

1 'Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016' (OJ L171, 29.06.16, p.1 <http://data.europa.eu/eli/reg/2016/1011/oj>)

2 The FCA was previously designated under the Benchmarks Regulation by administrative means.

3 www.fca.org.uk/publication/consultation/cp17-17.pdf

4 www.fca.org.uk/publication/policy/ps17-28.pdf

5 www.fca.org.uk/markets/benchmarks/eu-regulation

6 www.fca.org.uk/markets/benchmarks/eu-regulation/email-updates



Who does this consultation affect?

- 1.6** These proposals will be of interest to anyone who may be subject to regulation under the Benchmarks Regulation. This will include (but is not limited to):
- benchmark administrators
 - firms that provide or contribute input data to benchmarks
 - service providers to whom functions, services or activities in the provision of a benchmark have been outsourced, or a person who is not the service provider but who is or has been party to a contract for such outsourcing
 - other unauthorised persons subject to the Benchmarks Regulation

Is this of interest to consumers?

- 1.7** The proposed changes to DEPP and EG do not directly affect consumers. The proposals in this paper are however intended to improve the reliability of benchmarks in the UK, and may therefore be of general interest to consumers.

What do you need to do next?

- 1.8** We want to know what you think of our proposals. Please send us your comments on our proposed changes by 5 March 2018. You can use the online response form on our website or write to us at the address on page 2.
- 1.9** We are consulting for 4 weeks to allow us to consider consultation responses and publish our Policy Statement in March 2018. We believe that a short consultation period is appropriate, as the changes we propose are either consequential or extend our current approach and policy to the enforcement of the Benchmarks Regulation.

Equality and diversity considerations

- 1.10** We have considered the equality and diversity issues that may arise from our proposals.
- 1.11** Overall, we do not consider that the proposals adversely impact any of the groups with protected characteristics under the Equality Act 2010. But we will continue to consider the equality and diversity implications of the proposals during the consultation period, and will revisit them when publishing the final rules.
- 1.12** In the meantime, we welcome your input to this consultation.

2 Proposed changes to DEPP and EG

- 2.1** In this chapter we cover the proposals to amend DEPP and EG in light of the Benchmarks Regulation and the UK Benchmarks Regulations 2018. We cover the following:
- decision-making procedure for determining an application for authorisation and registration of an EU-based benchmark administrator
 - decision-making procedure for determining an application for a recognition order or an endorsement order, or for withdrawing, suspending or varying such an order
 - general enforcement approach, application of our penalty policy and decision-making procedure when exercising powers with respect to miscellaneous BM persons
- 2.2** For the avoidance of doubt, we have considered whether our policies on the imposition of penalties, censures, suspensions, restrictions and prohibitions under the Act – DEPP 6 and 6A - need to be amended in light of the Benchmarks Regulation. We have decided that they do not.

Determination of an application for Part 4A permission to carry out the regulated activity of administering a benchmark

- 2.3** Under the Benchmarks Regulation, benchmark administrators in the EU are required, subject to the transitional period, to get authorisation or registration in order to continue to provide a benchmark for use by supervised entities in the EU. Firms that are already subject to supervision, under MiFID II, CRD IV or one of various other pieces of EU legislation specified in Article 3(1)(17) Benchmarks Regulation, will use the registration process. However, if they produce a critical benchmark, then they need to be authorised. Firms that are not already supervised must apply for authorisation. However, if they produce only non-significant benchmarks, then they need to apply for registration.
- 2.4** The UK Benchmarks Regulations 2018 give effect to the Benchmarks Regulation authorisation and registration process through Part 4A FSMA where FSMA makes no distinctions between registration and authorisation. Benchmark administrators seeking authorisation or registration under the Benchmarks Regulation will need to apply to the FCA for permission, under Part 4A FSMA, to carry out the regulated activity of administering a benchmark. However, the FCA has produced different forms for authorisation and registration applications to reflect the differences between the two processes and the different levels of information required for each.
- 2.5** The authorisation and registration forms both require information to show that the applicant can comply with the Benchmarks Regulation. The authorisation form requires a greater level of detail and more documentation to be submitted, whereas in some cases the registration form allows summaries to be provided. The FCA is required, under Article 34 Benchmarks Regulation, to determine an application for



authorisation within 4 months, and an application for registration within 45 working days, of receipt of a complete application.

2.6 Because of the deadlines imposed by the Benchmarks Regulation, the UK Benchmarks Regulations 2018 have introduced a bespoke process for determining applications for permission to administer a benchmark. Under the UK Benchmarks Regulations 2018, we are required to give written notice of our decision if we decide to refuse an application, or to grant an application but impose a limitation on the permission or impose a requirement on the applicant or specify a narrower or wider description of the regulated activity than that applied for. The decision set out in this notice will take effect immediately on the date the notice is given, or on the date specified in the notice if it is a different date. Where an administrator has been providing a benchmark in reliance on the transitional provision in Article 51 Benchmarks Regulation, it must immediately stop administering the benchmark on the effective date of our decision (save where the FCA permits the administrator to continue producing one or more specific benchmarks under article 51(4) Benchmarks Regulation). The applicant then has the right to challenge our decision either by making representations to us or by referral to the Upper Tribunal. If the applicant challenges the decision by making representations to us, we will review our decision and give a second written notice setting out our final decision. The applicant can refer this second decision to the Upper Tribunal.

2.7 We are therefore proposing to make consequential changes to DEPP 2 Annex 2 and add a new paragraph in DEPP 2.5.18G to give effect to the new decision making framework under Part 4A FSMA.

2.8 In addition, we propose to amend DEPP 2 Annex 2 to provide that the decision to give the first written notice will be taken by FCA staff under executive procedures. Where the administrator then seeks a review by the FCA of this decision, the Regulatory Decisions Committee ('RDC') will take representations and take the second FCA decision. Our proposed changes are in Appendix 1.

Q1: Do you agree with our proposed amendments to DEPP in relation to the determination of applications for Part 4A permission to carry out the regulated activity of administering a benchmark?

Determination of applications relating to recognition orders and endorsement orders and the exercise of own initiative powers

2.9 The Benchmarks Regulation sets out 3 ways that benchmarks issued by administrators outside the EU can be approved for use in the EU. Other than equivalence, which does not involve national competent authorities and is therefore not covered by this CP, these include:

- recognition – Article 32 provides that a third-country administrator can apply to a specified EU national competent authority for recognition
- endorsement – Article 33 enables an EU benchmark administrator or other supervised entity to apply to a specified EU national competent authority to endorse a benchmark or family of benchmarks provided in a third country

- 2.10** The decision-making frameworks for the consideration of applications for recognition and endorsement are set out in regulations 34 and 35 respectively, of the UK Benchmarks Regulations 2018.
- 2.11** Applications for recognition and endorsement must be determined within 90 working days of the receipt by us of a complete application (save where we notify ESMA of the recognition application). Where we decide to refuse an application, we are required to give a written notice of our decision.
- 2.12** In addition we may on our own initiative or on the application of an administrator or endorser withdraw, suspend or vary a recognition or endorsement order. Where we decide to refuse an application by the administrator or endorser to withdraw, suspend or vary their recognition or endorsement order, or where we decide to withdraw, suspend or vary a recognition or endorsement order on our own initiative, we are required to give a written notice of our decision.
- 2.13** A decision set out in a written notice will take effect immediately on the date the notice is given, or on the date specified in the notice if it is a different date. The administrator then has the right to challenge our decision either by making representations to us or by referral to the Upper Tribunal. If they decide to challenge the decision by making representations to us, we will review our decision and give a second written notice setting out our final decision. The administrator can refer this second decision to the Upper Tribunal.
- 2.14** We are therefore proposing to make consequential changes to DEPP 2 Annex 2 and to add a new paragraph in DEPP 2.5.18G to give effect to the new decision-making framework for considering applications for recognition orders and endorsement orders under regulations 34 and 35 UK Benchmarks Regulations 2018, and for decisions to refuse an application to withdraw, suspend or vary a recognition order, or to withdraw, suspend or vary such an order on our own initiative.
- 2.15** In addition, we propose to amend DEPP 2 Annex 2 to provide that the decision to give the first written notice in these cases will be taken according to our executive decision-making procedure. Where the administrator seeks a review by the FCA of this decision, then the RDC will take the representations and take the second FCA decision.

Q2: Do you agree with our proposed amendments to DEPP in relation to the determination of applications relating to recognition orders and endorsement orders, and the exercise of our own initiative powers in relation to the same?



Powers over miscellaneous BM persons

- 2.16** The UK Benchmarks Regulations 2018 give us certain regulatory powers over 'miscellaneous BM persons' ('MBMPs'). An MBMP is a person who is not an authorised person and is:
- involved in the provision of, or contribution of input data to, a benchmark
 - a service provider to whom functions or any relevant services and activities in the provision of a benchmark have been outsourced
 - 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
 - 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) Benchmarks Regulation
 - a person who administers a benchmark relying on Article 51(4) Benchmarks Regulation
 - a supervised entity⁷
- 2.17** Our powers include the powers to investigate breaches of relevant requirements imposed by the Benchmarks Regulation and the UK Benchmarks Regulations 2018. We can publicly censure an MBMP under regulation 10 or impose a financial penalty on an MBMP under regulation 11, whom we find to have committed such a breach. Further, under regulations 10 and 11, we can publicly censure or impose a financial penalty on a member of the management body or senior management of the MBMP who has been responsible for the breach. We also have the power to require restitution under section 384 FSMA as applied by regulation 22 of the UK Benchmarks Regulations 2018.
- 2.18** We propose to follow our current general approach to enforcement and apply our current penalty policy, when taking action for breaches of the Benchmarks Regulation and the UK Benchmarks Regulations 2018 by MBMPs and responsible individuals. We propose to add a new chapter in EG 19 to give effect to this approach. This new chapter in EG 19 will also apply our current policy on interviews conducted on behalf of overseas regulators, set out in DEPP 7, to interviews conducted under section 169(7) of the Act as applied by the UK Benchmarks Regulations 2018.
- 2.19** In addition, we are proposing to amend DEPP 2 Annex 1 to provide that decisions to give a warning notice or a decision notice imposing a public censure, financial penalty or restitution requirement on an MBMP or a responsible person will be taken by the RDC in contested cases, and by the settlement decision maker where the case is settled.
- 2.20** The UK Benchmarks Regulations 2018, under regulation 6, also give us the power to impose a requirement on an MBMP, to vary a requirement already imposed, or to cancel such a requirement either on our own initiative or on the application of an MBMP.

⁷ As defined in Article 3(1)(17) of the Benchmarks Regulation.

- 2.21** We propose to apply the same decision making framework when exercising these powers as we do when we impose requirements on authorised persons under FSMA.
- 2.22** When exercising the requirement power on our own initiative, the decision to give a notice exercising these powers will be taken by FCA staff under executive procedures. We propose to amend DEPP 2 Annex 2 to provide for this.
- 2.23** When determining an application under regulation 6 to impose a requirement, vary a requirement already imposed or cancel such a requirement, the decision to give a warning notice proposing or a decision notice deciding to refuse the application will be taken by FCA staff under executive procedures. We propose to amend DEPP 2 Annex 1 accordingly.
- 2.24** Our proposals are set out at Appendix 1.
- Q3:** **Do you agree with our proposed amendment to EG19 to add a new chapter applying our current approach to enforcement, including our penalty policy, to the enforcement of the UK Benchmarks Regulations 2018?**
- Q4:** **Do you agree with our proposals to amend DEPP to apply our current decision-making procedures to the imposition of requirements on an MBMP under the UK Benchmarks Regulations 2018?**



Annex 1

Questions in this paper

- Q1:** Do you agree with our proposed amendments to DEPP in relation to the determination of applications for Part 4A permission to carry out the regulated activity of administering a benchmark?
- Q2:** Do you agree with our proposed amendments to DEPP in relation to the determination of applications relating to recognition orders and endorsement orders, and the exercise of our own initiative powers in relation to the same?
- Q3:** Do you agree with our proposed amendment to EG1 to add a new chapter in EG19 applying our current approach to enforcement, including our penalty policy, to the enforcement of the UK Benchmarks Regulations 2018?
- Q4:** Do you agree with our proposals to amend DEPP to apply our current decision-making procedures to the imposition of requirements on an MBMP under the UK Benchmarks Regulations 2018?

Annex 2

Cost benefit analysis

- 1.** This CP proposes applying our current policy and procedures to breaches of requirements under the Benchmarks Regulation. It also implements the new decision-making procedure for considering applications for authorisation, recognition and endorsement set out in the UK Benchmarks Regulations 2018 by specifying the relevant decision maker for the different stages of the process.
- 2.** Depending on the provision in question, we either have no discretion in implementation or the proposed approach will not be substantially different from the status quo.
- 3.** Our view is that the costs of the proposals will be of minimal significance if compared with any reasonable counterfactual and that no cost benefit analysis is required. Similarly, we do not see any implication for our competition objective.



Annex 3

Compatibility statement

Compliance with legal requirements

1. Section 1B of FSMA requires the FCA to explain why it considers that the proposed rules are compatible with its strategic objective, advance one or more of its operational objectives, and promote effective competition in the interests of consumers.
2. The FCA believes the proposals set out above are compatible with its duties under section 1B of FSMA. The effective and appropriate use of enforcement powers plays an important part in pursuing the FCA's statutory objectives, as it increases compliance with rules by making market participants more aware of conduct that may breach these rules, and the potential for sanctions for such conduct.
3. The FCA has had regard to the regulatory principles set out in section 3B of FSMA. In particular, the proposals are consistent with the need to use resources in the most efficient and economic way, and the principle that the regulators should exercise their functions as transparently as possible.
4. The proposed changes are not expected to have a significantly different impact on mutual societies.
5. Under the Legislative and Regulatory Reform Act 2006 (LRRRA) the FCA is subject to requirements to have regard to a number of high-level 'Principles' in the exercise of some of our regulatory functions and to have regard to a 'Regulators' Code' when determining general policies and principles and giving general guidance (but not when exercising other legislative functions like making rules). We have had regard to the principles in the LRRRA and the Regulators' Code for the parts of the proposals that consist of general policies, principles or guidance.

Annex 4

Abbreviations in this document

BM	Benchmark
CP	Consultation Paper
DEPP	Decision Procedure and Penalties manual
EG	Enforcement Guide
ESMA	European Securities and Markets Authority
EU	European Union
FCA	Financial Conduct Authority
FSMA	Financial Services and Markets Act 2000
LRRA	Legislative and Regulatory Reform Act 2006
MBMP	Miscellaneous benchmark person
RDC	Regulatory Decisions Committee

We have developed the policy in this Consultation Paper in the context of the existing UK and EU regulatory framework. The Government has made clear that it will continue to implement and apply EU law until the UK has left the EU. We will keep the proposals under review to assess whether any amendments may be required in the event of changes in the UK regulatory framework in the future.

We make all responses to formal consultation available for public inspection unless the respondent requests otherwise. We will not regard a standard confidentiality statement in an email message as a request for non-disclosure.

Despite this, we may be asked to disclose a confidential response under the Freedom of Information Act 2000. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by the Information Commissioner and the Information Rights Tribunal.

All our publications are available to download from www.fca.org.uk. If you would like to receive this paper in an alternative format, please call 020 7066 9644 or email: publications_graphics@fca.org.uk or write to: Editorial and Digital team, Financial Conduct Authority, 25 The North Colonnade, Canary Wharf, London E14 5HS



Appendix 1

Draft Handbook text

ENFORCEMENT (EU BENCHMARKS REGULATION) INSTRUMENT 2018

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 139A (Power of the FCA to give guidance);
 - (b) section 395 (The Authority’s procedures); and
 - (2) the powers of direction, guidance and related provisions in or under the following provisions of the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018:
 - (a) regulation 14 (Statements of policy);
 - (b) regulation 19 (Application of Part 11 of the Act (information gathering and investigations)); and
 - (c) regulation 23 (Application of Part 26 of the Act (notices)).
- 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 [*date*] 2018.

Amendments to the Handbook

- D. The Glossary is amended in accordance with Annex A to this instrument.
- E. The Decision Procedure and Penalties manual (DEPP) is amended in accordance with Annex B to this instrument.

Material outside the Handbook

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

Citation

- G. This instrument may be cited as the Enforcement (EU Benchmarks Regulation) Instrument 2018.

By order of the Board
[*date*]

Annex A

Amendments to the Glossary definitions

Insert the following new definition in the appropriate alphabetical position. The text is not underlined.

UK Benchmarks Regulations 2018 the Financial Services and Markets Act 2000 (Benchmarks) Regulations 2018 (SI 2018/xxx).

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

...

2.5 Provision for certain categories of decision

...

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

...

(5) The decision to give a written notice under section 55XA(1) of the *Act* will be taken by *FCA* staff under *executive procedures*. If the applicant decides to seek a review, by the *FCA*, of that decision, they can make representations to the *RDC*. If the *RDC* then decides under section 55XA(5) of the *Act* to confirm the first decision, or take a different decision of the type described by section 55XA(1) of the *Act*, it must give the applicant a written notice.

(6) The decision to give a written notice under regulations 34(5), 34(7), 35(6) or 35(8) of the *UK Benchmarks Regulations 2018* will be taken by *FCA* staff under *executive procedures*. If the administrator or endorser decides to seek a review, by the *FCA*, of that decision, they can make representations to the *RDC*. If the *RDC* then decides under regulations 34(10) or 35(11) of the *UK Benchmarks Regulations 2018* to confirm the first decision, or take a different decision of the type described by regulations 34(5), 34(7), 35(6) or 35(8) of the *UK Benchmarks Regulations 2018*, it must give the administrator or endorser a written notice.

...

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

...

Packaged Retail and Insurance-based Investment Products Regulations 2017	Description	Handbook reference	Decision maker

...			
<u>UK Benchmarks Regulations 2018</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Regulation 6(5)</u>	<u>when the FCA is proposing or deciding to refuse an application for the imposition of a requirement under regulation 6 or for the variation or cancellation of a requirement imposed under regulation 6</u>		<u>Executive Procedures</u>
<u>Regulations 12(1)(a) and 13(1)(a)</u>	<u>when the FCA is proposing or deciding to publish a statement under regulation 10</u>		<u>RDC</u>
<u>Regulations 12(1)(b) and 13(1)(b)</u>	<u>when the FCA is proposing or deciding to impose a financial penalty under regulation 11</u>		<u>RDC</u>
<u>Regulations 22(1), 22(2) and 22(7)</u>	<u>when the FCA is proposing or deciding to require restitution under regulation 22</u>		<u>RDC</u>

2 Annex 2G Supervisory notices

...

<u>Section of the Act</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>55XA(1)(a) and 55XA(1)(b)</u>	<u>when the FCA is deciding to grant an application for a Part 4A permission to carry on the regulated activity specified in article 63S of the Regulated Activities Order with a limitation or a requirement which was not applied for, or with a narrower or wider description of regulated activity than that applied for</u>		<u>Executive procedures or RDC</u> <u>See DEPP 2.5.18G(5)</u>
<u>55XA(1)(c) and 55XA(1)(d)</u>	<u>when the FCA is deciding to grant an application to vary a</u>		<u>Executive procedures or</u>

	<u>firm's Part 4A permission to carry on the regulated activity specified in article 63S of the Regulated Activities Order but, other than as part of the application, to restrict the Part 4A permission either by imposing a limitation or requirement which was not applied for or by specifying a narrower or wider description of regulated activity than that applied for</u>		<u>RDC</u> <u>See DEPP 2.5.18G(5)</u>
<u>55XA(1)(e)</u>	<u>when the FCA is deciding to refuse an application for a Part 4A permission to carry on the regulated activity specified in article 63S of the Regulated Activities Order</u>		<u>Executive procedures or RDC</u> <u>See DEPP 2.5.18G(5)</u>
<u>55XA(1)(f)</u>	<u>when the FCA is deciding to refuse an application to vary a firm's Part 4A permission to carry on the regulated activity specified in article 63S of the Regulated Activities Order</u>		<u>Executive procedures or RDC</u> <u>See DEPP 2.5.18G(5)</u>
...			
Packaged Retail and Insurance-based Investment Products Regulations 2017	Description	Handbook reference	Decision maker
...			
<u>UK Benchmarks Regulations 2018</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
<u>Regulation 6(6)</u>	<u>when the FCA is exercising its power under regulation 6(2) to impose, vary or cancel a requirement on its own initiative</u>		<u>Executive procedures</u>
<u>Regulations 34(7), 34(10), 35(8) and</u>	<u>when the FCA decides to refuse an application for a</u>		<u>RDC or Executive</u>

35(11)	<u>recognition order or an endorsement order under regulation 34(5) or 35(6), or for the withdrawal, suspension or cancellation of a recognition order or an endorsement order which has already been granted under regulation 34(6)(b) or 35(7)(b)</u>		<u>procedures</u> <u>See DEPP 2.5.18G(6)</u>
<u>Regulations 34(7), 34(10), 35(8) and 35(11)</u>	<u>When the FCA decides to withdraw, suspend or vary a recognition order or an endorsement order on its own initiative under regulation 34(6)(a) or 35(7)(a)</u>		<u>RDC or Executive procedures</u> <u>See DEPP 2.5.18G(6)</u>

...

Sch 3 Fees and other required payments

...

3.2G

The <i>FCA</i> 's power to impose financial penalties is contained in:
...
the <i>Small and Medium Sized Business (Finance Platforms) Regulations</i>
<u>the <i>UK Benchmarks Regulations 2018</i></u>

Sch 4 Powers Exercised

...

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> :
...
Paragraph 6 (Application of Part 26 of the Act) of Schedule 1 to the Packaged Retail and Insurance-based Investment Products Regulations
<u>Regulation 14 (Statements of Policy) of the <i>UK Benchmarks Regulations 2018</i></u>
<u>Regulation 19 (Application of Part 11 of the Act (information gathering and investigations)) of the <i>UK Benchmarks Regulations 2018</i></u>
<u>Regulation 23 (Application of Part 26 of the Act (notices)) of the <i>UK Benchmarks</i></u>

Regulations 2018

[*Editor's note:* The text in this annex takes account of the changes proposed in PS17/28 'Handbook changes to reflect the application of the EU Benchmarks Regulation: Feedback to CP17/17 and near-final rules' (December 2017) as if they were made.]

Annex C

Amendments to the Enforcement Guide (EG)

Insert the following new section after EG 19.36 (Packaged Retail and Insurance-Based Investment Products Regulations 2017). The text is not underlined.

19 Non-FSMA powers

...

19.37 UK Benchmarks Regulations 2018

- 19.37.1 The *UK Benchmarks Regulations 2018* in part implement the *benchmarks regulation*. 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 directly applicable 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:
- (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 and vary requirements; and
- (8) 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.

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*.

