
DRAFT STATUTORY INSTRUMENTS

2018 No.

The Over the Counter Derivatives, Central Counterparties
and Trade Repositories (Amendment, etc., and
Transitional Provision) (EU Exit) Regulations 2018

PART 4

SPECIFIC PROVISION FOR TRADE REPOSITORIES

CHAPTER 1

PRELIMINARY

Interpretation of Part 4

64. In this Part—

“the TRATP Regulations” means the Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018(1);

“trade repository” has the meaning given in point (2) of Article 2 of the EMIR regulation;

“trade repository activities” means the activities of centrally collecting and maintaining records of derivatives;

“the Tribunal” means the Upper Tribunal.

CHAPTER 2

ENFORCEMENT PROVISIONS RELATING TO TRADE REPOSITORIES

Warning notice

65.—(1) If the FCA proposes to—

- (a) publish a statement in respect of a trade repository under regulation 67; or
- (b) impose a penalty on a trade repository under regulation 68,

it must give the trade repository a warning notice.

(2) A warning notice about a proposal to publish a statement must set out the terms of the statement.

(3) A warning notice about a proposal to impose a penalty must state the amount of the penalty.

Decision notice

66.—(1) If, having considered any representations made in response to the warning notice, the FCA decides to—

- (a) publish a statement under regulation 67 (whether or not in the terms proposed); or
- (b) impose a penalty under regulation 68 (whether or not of the amount proposed);

it must without delay give the trade repository concerned a decision notice.

- (2) In case of a statement, the decision notice must set out the terms of the statement.
- (3) In the case of a penalty, the decision notice must state the amount of the penalty.
- (4) If the FCA decides to —

- (a) publish a statement in respect of a trade repository under regulation 67; or
- (b) impose a penalty on a trade repository under regulation 68;

the trade repository may refer the matter to the Tribunal.

(5) After a statement under regulation 67 is published, the FCA must send a copy of it to the trade repository concerned and to any person to whom a copy of the decision notice was given under section 393(4) of the FSMA (third party rights) (as applied by regulation 76).

Public censure

67. If the FCA considers that a trade repository has contravened a requirement imposed by or under this Part, the EMIR regulation or the TRATP Regulations, the FCA may publish a statement to that effect.

Financial penalties

68.—(1) If the FCA considers that a trade repository has contravened a requirement imposed by or under this Part, the EMIR regulation or the TRATP Regulations, it may impose a penalty of such amount as it considers appropriate on the trade repository.

(2) A penalty imposed under this regulation is payable to the FCA and may be recovered as a debt owed to the FCA.

Statement of policy

69.—(1) The FCA must prepare and issue a statement of policy with respect to—

- (a) the imposition of penalties under regulation 68; and
- (b) the amount of penalties under that regulation.

(2) The FCA's policy in determining what the amount of a penalty should be must include having regard to—

- (a) the seriousness of the contravention in question in relation to the nature of the requirement contravened; and
- (b) the extent to which that contravention was deliberate or reckless.

(3) The FCA may at any time alter or replace a statement issued by it under this regulation.

(4) If a statement issued under this regulation is altered or replaced by the FCA, the FCA must issue the altered or replacement statement.

(5) The FCA must, without delay, give the Treasury a copy of any statement which it issues under this regulation.

(6) A statement issued under this regulation by the FCA must be published by the FCA in the way appearing to the FCA to be best calculated to bring it to the attention of the public.

(7) The FCA may charge a reasonable fee for providing a person with a copy of the statement.

(8) In exercising, or deciding whether to exercise, its power under regulation 68 in the case of any particular contravention, the FCA must have regard to any statement of policy published by it under this regulation and in force at the time when the contravention in question occurred.

Statement of policy: procedure

70.—(1) Before the FCA issues a statement under regulation 69, the FCA must publish a draft of the proposed statement in the way appearing to the FCA to be best calculated to bring it to the attention of the public.

(2) The draft must be accompanied by a notice that representations about the proposed statement may be made to the FCA within a specified time.

(3) Before issuing the proposed statement the FCA must have regard to any representations made to it in accordance with paragraph (2).

(4) If the FCA issues the proposed statement it must publish an account, in general terms, of—

- (a) the representations made to it in accordance with paragraph (2); and
- (b) its response to them.

(5) If the statement differs from the draft published under paragraph (1) in a way which is, in the opinion of the FCA, significant, the FCA must (in addition to complying with paragraph (4)) publish details of the difference.

(6) The FCA may charge a reasonable fee for providing a person with a copy of a draft published by it under paragraph (1).

(7) This regulation also applies to a proposal to alter or replace a statement.

Powers to issue guidance

71.—(1) The FCA may give guidance consisting of such information and advice as it considers appropriate in respect of—

- (a) the operation of this Part, Titles 6 and 7 of the EMIR regulation or the TRATP Regulations;
- (b) any matters relating to the functions of the FCA under this Part, Titles 6 and 7 of the EMIR regulation or the TRATP Regulations;
- (c) any other matters about which it appears to the FCA to be desirable to give information or advice about this Part, Titles 6 and 7 of the EMIR regulation or the TRATP Regulations.

(2) The FCA may—

- (a) publish its guidance;
- (b) offer copies of its published guidance for sale at a reasonable price;
- (c) if it gives guidance in response to a request made by any person, make a reasonable charge for that guidance.

Injunctions

72.—(1) If, on the application of the FCA, the court is satisfied—

- (a) that there is a reasonable likelihood that any person will contravene a requirement imposed by or under this Part or by or under Title 6 or 7 of the EMIR regulation; or
- (b) that any person has contravened such a requirement and that there is a reasonable likelihood that the contravention will continue or be repeated,

the court may make an order restraining (or in Scotland an interdict prohibiting) the contravention.

(2) If, on the application of the FCA, the court is satisfied—

- (a) that any person has contravened a requirement imposed by or under this Part or by or under Title 6 or 7 of the EMIR regulation; and
 - (b) that there are steps which could be taken for remedying the contravention,
- the court may make an order requiring that person, and any other person who appears to have been knowingly concerned in the contravention, to take such steps as the court may direct to remedy it.
- (3) If, on the application of the FCA, the court is satisfied that any person may have—
 - (a) contravened a requirement imposed by or under this Part or by or under Title 6 or 7 of the EMIR regulation; or
 - (b) been knowingly concerned in the contravention of such a requirement,
 it may make an order restraining (or in Scotland an interdict prohibiting) them from disposing of, or otherwise dealing with, any assets of theirs which it is satisfied they are reasonably likely to dispose of or otherwise deal with.
 - (4) The jurisdiction conferred by this regulation is exercisable by the High Court and the Court of Session.
 - (5) In paragraph (2), references to remedying a contravention include references to mitigating its effect.

CHAPTER 3

APPLICATION OF THE FSMA FOR THE PURPOSES OF THIS PART, THE EMIR REGULATION AND THE TRATP REGULATIONS

Application of Part 9 of the FSMA (hearings and appeals)

73.—(1) Part 9 of the FSMA (hearings and appeals) applies in respect of a reference to the Tribunal under this Part, under the FSMA as applied by this Part or under the EMIR regulation, as it applies in respect of a reference to the Tribunal under the FSMA but with the following modifications.

- (2) Before section 133 insert—

“Interpretation of Part 9

132A. In this Part, “the 2018 Regulations” means the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018.”.

- (3) In section 133 (proceedings before Tribunal: general provisions)—
 - (a) in subsection (1)—
 - (i) omit “(whether made under this or any other Act)”;
 - (ii) in paragraph (a), omit “or the PRA”;
 - (iii) omit paragraphs (b) and (c);
 - (b) omit subsection (1A);
 - (c) in subsection (2), omit “, (b) or (c)”;
 - (d) in subsection (5), the reference to section 393(11) is treated as a reference to section 393(11) as applied by these Regulations;
 - (e) for subsection (7A) substitute—
 - “(7A) A reference is a “disciplinary reference” for the purposes of this section if it is in respect of the following decisions—

- (a) a decision to publish a statement under regulation 67 of the 2018 Regulations;
- (b) a decision to impose a penalty under regulation 68 of the 2018 Regulations.”.
- (4) In section 133A (proceedings before the Tribunal: decision and supervisory notices, etc)—
 - (a) for subsection (1) substitute—
 - “(1) In determining in accordance with section 133(5) (as applied by the 2018 Regulations) a reference made as a result of a decision notice given by the FCA under regulation 66 of the 2018 Regulations, the Tribunal may not direct the FCA to take action which it would not, by or under those Regulations have had power to take when giving the notice.”;
 - (b) in subsection (5), omit “or the PRA”.
- (5) In section 133B (offences), in subsection (1)—
 - (a) in paragraph (a) omit “or the PRA”;
 - (b) omit paragraphs (b) and (c).

Application of Part 9A of the FSMA (rules and guidance)

74.—(1) The provisions of Part 9A of the FSMA (rules and guidance) specified in the following paragraphs apply but with the following modifications.

(2) In Part 9A, the references to rules includes rules made under that Part as modified by this regulation.

- (3) Before section 137A insert—

“Interpretation of Part 9A

137ZA. In this Part, “the 2018 Regulations” means the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018.”.

- (4) In section 137A (the FCA’s general rules)—
 - (a) for subsection (1) substitute—
 - “(1) The FCA may make such rules applying to trade repositories registered under Chapter 1 of Title 6 to the EMIR regulation—
 - (a) with respect to the carrying on by them of trade repository activities within the meaning given in Part 4 of the 2018 Regulations, or
 - (b) with respect to the carrying on by them of activities which are not trade repository activities within the meaning given in that Part of those Regulations, as appear to the FCA to be necessary or expedient for the purpose of advancing one or more of its operational objectives.”;
 - (b) each reference to the FCA’s general rules is a reference to the rules made under this section as modified by sub-paragraph (a);
 - (c) each reference to an authorised person is a reference to a trade repository.
- (5) In section 138A (modification or waiver of rules)—
 - (a) each reference to a regulator is a reference to the FCA;
 - (b) each reference to either regulator is a reference to the FCA only.
- (6) In section 138B (publication of directions under section 138A)—

- (a) each reference to a regulator is a reference to the FCA, and each reference to either regulator is a reference to the FCA only;
 - (b) omit subsections (3)(b) and (4).
- (7) In section 138G (rule-making instruments)—
- (a) each reference to a regulator is a reference to the FCA;
 - (b) each reference to either regulator is a reference to the FCA only.
- (8) In section 138I (consultation by the FCA)—
- (a) in subsection (1)(b), omit “after doing so,”;
 - (b) in subsection (2), omit paragraphs (a), (c) and (d);
 - (c) in subsection (5)—
 - (i) in paragraph (a) omit “together with a cost benefit analysis, and”;
 - (ii) omit paragraph (b);
 - (iii) omit subsections (6) to (11).
- (9) In section 139B (notification of FCA guidance to the Treasury)—
- (a) for subsection (5), substitute—
 - “(5) “General guidance” means guidance given by the FCA under regulation 71(1) of the 2018 Regulations which is—
 - (a) given to persons generally or to trade repositories generally;
 - (b) intended to have continuing effect;
 - (c) given in writing or other legible form.”;
 - (b) omit subsection (6).

Application of Part 11 of the FSMA (information gathering and investigations)

75.—(1) Part 11 of the FSMA (information gathering and investigations), other than sections 165A, 165B, 165C, 169A and 173, applies with respect to the discharge by the FCA of its functions under this Part and the EMIR regulation as it applies with respect to the discharge by the FCA of its functions under the FSMA but with the following modifications.

- (2) In Part 11—
- (a) each reference to the FSMA includes a reference to this Part and the EMIR regulation;
 - (b) each reference to a section or Part of the FSMA is a reference to that section or Part as applied by this Part;
 - (c) each reference to an authorised person is a reference to a trade repository registered or recognised in accordance with Title 6 of the EMIR regulation;
 - (d) omit each reference to the PRA;
 - (e) each reference to a regulator, however phrased, is a reference to the FCA, and each reference to either regulator is a reference to the FCA only.
- (3) Before section 165 insert—

“Part 11 Interpretation

164A. In this Part—

“the 2018 Regulations” means the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018;

“the TRATP Regulations” means the Trade Repositories (Amendment and Transitional Provision) (EU Exit) Regulations 2018.”.

- (4) In section 165 (regulators’ power to require information: authorised persons etc.)—
- (a) omit subsections (4)(b), (7)(b) to (e) and (8A);
 - (b) after subsection (7)(e) insert—
 - “(f) by the FCA, to impose requirements on related third parties to whom the trade repositories have outsourced operational functions or activities to provide all information that is necessary in order to carry out the trade repository’s duties.”.
- (5) In section 166 (reports by skilled persons), omit subsections (10) and (11).
- (6) In section 166A (appointment of skilled person to collect and update information)—
- (a) for subsection (1) substitute—
 - “(1) This section applies if the FCA considers that a person has contravened a requirement imposed by or under the EMIR regulation to collect, and keep up to date, information of a description specified in that Regulation.”;
 - (b) omit subsection (10).
- (7) In section 167 (appointment of persons to carry out general investigations)—
- (a) for subsection (1) substitute—
 - “(1) If it appears to the FCA that there is good reason for doing so, the FCA may appoint one or more competent persons to conduct an investigation on its behalf into—
 - (a) the nature, conduct or state of the business of a person in respect of whom a requirement is imposed by or under the TRATP Regulations, Part 4 of the 2018 Regulations or the EMIR regulation;
 - (b) a particular aspect of that business; or
 - (c) the ownership or control of a person subject to the TRATP Regulations, Part 4 of the 2018 Regulations or the EMIR regulation.”;
 - (b) omit subsections (2)(c) and (3A);
 - (c) for subsection (4) substitute—
 - “(4) The power conferred by this section may be exercised in relation to a person who was formerly a person subject to the TRATP Regulations or the EMIR regulation but only in relation to—
 - (a) a business carried on when the person was a person subject to the TRATP Regulations, Part 4 of the 2018 Regulations or the EMIR regulation; or
 - (b) the ownership or control of a person who was formerly a person subject to the TRATP Regulations, Part 4 of the 2018 Regulations or the EMIR regulation at any time when the person was a person subject to the TRATP Regulations, Part 4 of the 2018 Regulations or the EMIR regulation.”;
 - (d) in subsection (5), for “regulated activities” substitute “trade repository activities within the meaning given in Part 4 of the 2018 Regulations”;
 - (e) omit subsections (5A) and (6);
- (8) In section 168 (appointment of persons to carry out investigations in particular cases)—
- (a) for subsection (1) substitute—

- “(1) Subsection (3) applies if it appears to the FCA that there are circumstances suggesting that a person—
- (a) may be guilty of an offence under section 398, as applied by regulation 80 of the 2018 Regulations;
 - (b) may be guilty of an offence under section 177, as applied by regulation 78 of the 2018 Regulations;
 - (c) may have contravened a requirement imposed by or under—
 - (i) this Act as applied by Part 4 of the 2018 Regulations;
 - (ii) Part 4 of the 2018 Regulations; or
 - (iii) the EMIR regulation.”;
- (b) omit subsections (2), (4) and (5);
- (c) for subsection (6) substitute—
- “(6) “Investigating authority” means the FCA.”.
- (9) In section 169 (investigations etc. in support of overseas regulator)—
- (a) omit subsection (2A);
 - (b) for subsection (13) substitute—
- “(13) “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 EMIR regulation and Part 4 of the 2018 Regulations.”.
- (10) In section 170 (investigations: general)—
- (a) each reference to the investigating authority is a reference to the FCA;
 - (b) in subsection (1), omit “or (5)”;
 - (c) for subsection (3) substitute—
- “(3) Subsections (2) and (9) do not apply if the investigator is appointed as a result of section 168(1) and the FCA believes that the notice required by subsection (2) or (9) would be likely to result in the investigation being frustrated.”.
- (d) omit subsection (10).
- (11) In section 171 (powers of persons appointed under section 167) omit subsections (3A) and (7);
- (12) In section 172 (additional power of persons appointed as a result of section 168(1) or (4)) omit “or (4)” both in the heading and in subsection (4).
- (13) In section 174 (admissibility of statements made to investigators)—
- (a) in subsection (2), omit “or in proceedings in relation to action to be taken against that person under section 123 to which this section applies”;
 - (b) omit subsection (3A);
 - (c) in subsection (4), omit the words from “or (5),” to the end;
 - (d) in subsection (5), omit “,173”.
- (14) In section 175 (information and documents: supplemental provisions), in subsection (8), omit “or (5)”.
- (15) In section 176 (entry of premises under warrant)—
- (a) for subsection (1) substitute—

“(1) A justice of the peace may issue a warrant under this section if satisfied on information on oath given by or on behalf of the FCA or an investigator that there are reasonable grounds for believing that the first, second or third set of conditions is satisfied.”;

- (b) in subsection (3)(a), omit “or an appointed representative”;
- (c) in subsection (10), omit “or (5)”;
- (d) in subsection (11)—
 - (i) in paragraph (a), omit “87C, 87J,” and “165A, 169A”;
 - (ii) in paragraph (b), omit “173”.

Application of Part 26 of the FSMA (notices)

76.—(1) Part 26 of the FSMA (notices), other than sections 391A, 391B, 391C, 391D and 391E, applies with respect to the giving of notices under this Part, under the FSMA as applied by this Part and under the EMIR regulation as it applies with respect to the giving of notices under the FSMA but with the following modifications.

- (2) In Part 26—
 - (a) each reference to the FSMA includes a reference to this Part and the EMIR regulation;
 - (b) each reference to a section of the FSMA is a reference to that section as applied by this Part;
 - (c) each reference to a regulator or to the regulator concerned is a reference to the FCA;
 - (d) omit references to the PRA.
- (3) Before section 387 insert—

“Part 26 Interpretation

386A. In this Part, “the 2018 Regulations” means the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018.”.

- (4) In section 387 (warning notices) omit subsections (1A) and (3A).
- (5) In section 388 (decision notices) omit subsections (1A) and (2).
- (6) In section 391 (publication)—
 - (a) in subsection (1) the reference to a warning notice falling within subsection (1ZB) is to a warning notice given under regulation 65;
 - (b) omit subsections (1ZA), (1ZB), (4A), (5A), (6A), (7A), (7B), (8A), (8B), (8C), (8D) and (8E);
 - (c) for subsection (11) substitute—
 - “(11) Section 425A (meaning of “consumers”) applies for the purposes of this section as if—
 - (a) subsection (2)(c) were omitted;
 - (b) for subsection (3) there were substituted—
 - “(3) The services within this subsection are trade repository activities within the meaning given in Part 4 of the 2018 Regulations.”;
 - (c) subsection (7) were omitted.”.
- (7) In section 392 (application of sections 393 and 394)—
 - (a) for paragraph (a) substitute—

- “(a) a warning notice given in accordance with regulation 65(1) of the 2018 Regulations;”;
- (b) for paragraph (b) substitute—
 - “(b) a decision notice given in accordance with regulation 66(1) of the 2018 Regulations.”;
- (8) In section 395 (the FCA’s and PRA’s procedures)—
 - (a) for subsection (1) substitute—
 - “(1) The FCA must determine the procedure that it proposes to follow in relation to a decision which gives rise to an obligation for it to give—
 - (a) a supervisory notice, warning notice or decision notice; or
 - (b) a decision under section 391(1)(c), to publish information about the matter to which a warning notice relates.”;
 - (b) in subsection (2)(a), for “any of paragraphs (a) to (c)”, substitute “paragraph (a)”;
 - (c) in subsection (2)(b) for “(d)” substitute “(b)”;
 - (d) in subsection (2)(c)—
 - (i) for “(d)” substitute “(b)”;
 - (ii) for “(b) or (c)” substitute “(a)”;
 - (e) omit subsections (3)(b) and (4);
 - (f) in subsection (9), omit “other than a warning notice or decision notice relating to a decision of the PRA that is required by a decision of the FCA of the kind mentioned in subsection (1)(b)(ii)”;
 - (g) omit subsection (9A);
 - (h) for subsection (13) substitute —
 - “(13) “Supervisory notice” means a supervisory notice given in accordance with paragraph 6 or 10 of Article 71a of the EMIR regulation.”.

Application of Part 27 of the FSMA (offences)

77.—(1) Part 27 of the FSMA applies with respect to the discharge by the FCA of its functions under—

- (a) that Act as applied by this Part;
- (b) this Part; and
- (c) the EMIR regulation,

as it applies with respect to the discharge by it of its functions under the FSMA but with the following modifications.

- (2) In section 398, in subsection (1A), after paragraph (i) insert—
 - “(j) the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment, etc., and Transitional Provision) (EU Exit) Regulations 2018;
 - (k) the EMIR regulation.”.

Application of Schedule 1ZA to the FSMA (the Financial Conduct Authority)

78.—(1) Paragraphs 19 to 21 (penalties) of Schedule 1ZA to the FSMA apply with respect to the discharge by the FCA of its functions under that Act as applied by this Chapter of this Part as

they apply with respect to the discharge by it of its functions under the FSMA but with the following modifications.

- (2) In those paragraphs—
 - (a) each reference to penalties imposed under the FSMA includes a reference to penalties imposed under this Part;
 - (b) each reference to a section or Part of the FSMA includes a reference to that section or Part as applied by this Part;
 - (c) each reference to the functions of the FCA includes a reference to its functions under this Part, the EMIR regulation or the TRATP Regulations.
- (3) In paragraph 20, the references to the FCA's enforcement powers include references to—
 - (a) its powers under this Part, under Part 26 of the FSMA as applied by this Part;
 - (b) its powers in relation to the investigation of offences under this Part or under the FSMA as applied by this Part;
 - (c) its powers in England and Wales or Northern Ireland in relation to the prosecution of offences under this Part or under the FSMA as applied by this Part.
- (4) In paragraph 21, the references to regulated persons includes references to trade repositories.