

5: Directions under the Counter-Terrorism Act 2008, Schedule 7

HM Treasury power to issue directions

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| CTA 2008 c 28 | 5.1 | The CTA gained royal assent on 26 November 2008 and came into force on that date. The UK Government has deemed it a necessary further tool in the range of legislation to address the risks from money laundering, terrorist financing and the proliferation of nuclear, radiological, biological or chemical weapons. |
| CTA Sch 7, para 9(4) | 5.2 | Schedule 7 to the CTA gave new powers to HM Treasury to issue directions to firms in the financial sector. The kinds of requirement that may be imposed by a direction under these powers relate to <ul style="list-style-type: none"> ○ customer due diligence (see paragraph 5.21); ○ ongoing monitoring (see paragraph 5.31); ○ systematic reporting (see paragraph 5.36); ○ limiting or ceasing business (see paragraph 5.39). |
| | 5.3 | The requirements to carry out CDD measures and ongoing monitoring build on the similar obligation under the ML Regulations. The requirements for systematic reporting and limiting or ceasing business are new. |
| | 5.4 | Orders under POCA and Terrorism Act cannot be issued by HM Treasury; they are issued by judges in connection with law enforcement investigations into money laundering. Such orders are, therefore, very specific. It is possible that a direction by HM Treasury could impose requirements which overlap with the effect of an order under POCA or Terrorism Act although HM Treasury are working with SOCA to avoid this. |

What grounds must HM Treasury have for issuing directions?

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| CTA Sch 7, para 1 | 5.5 | The Treasury may give a direction if one or more of the following conditions is met in relation to a non-EEA country: <ul style="list-style-type: none"> ○ that the Financial Action Task Force has advised that measures should be taken in relation to the country because of the risk of terrorist financing or money laundering activities being carried on <ul style="list-style-type: none"> (a) in the country, (b) by the government of the country, or (c) by persons resident or incorporated in the country. ○ that the Treasury reasonably believe that there is a risk that terrorist |
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financing or money laundering activities are being carried on

- (a) in the country,
- (b) by the government of the country, or
- (c) by persons resident or incorporated in the country,

and that this poses a significant risk to the national interests of the UK.

- o that the Treasury reasonably believe that
 - (a) the development or production of nuclear, radiological, biological or chemical weapons in the country, or
 - (b) the doing in the country of anything that facilitates the development or production of any such weapons,
 poses a significant risk to the national interests of the UK.

5.6 There are therefore a number of restrictions on the use of the powers by HM Treasury:

- o They can only be issued in relation to activities believed to be being carried on in a particular non-EEA jurisdiction;
- o Unless the FATF have advised that additional measures should be taken, HM Treasury must ‘reasonably believe’ that
 - o relevant activities (see paragraph 5.24) are being carried on **and**
 - o that this poses a significant risk to UK national interests.

Regulation 18

5.7 The restriction in relation to countries subject to advisory measures by FATF differs from the condition under which HM Treasury may exercise powers under the ML Regulations. The power under the Regulations is only exercisable in relation to countries in respect of which FATF have recommended counter measures, and is limited to directing a firm to cease entering into business relationships or carrying out occasional transactions with a person situated or incorporated in that country. The powers to issue directions under the CTA are broader, reflecting the range of counter measure options identified by the FATF.

CTA, Sch 7, para 2

5.8 Money laundering is defined in CTA Sch 7 by cross reference to s340(11) of POCA. Terrorist financing, however, is specifically defined in CTA Sch 7, but in different terms from that in the Terrorism Act.

5.9 HM Treasury are to issue specific guidance on the requirements of any directions made. These will be available on HM Treasury’s website http://www.hm-treasury.gov.uk/fin_crime_policy.htm.

What firms may be subject to these directions?

CTA, Sch 7, paras 3, 4

5.10 Directions under the CTA Sch 7 may only be given to persons (i.e., firms) operating in the financial sector. A person operating in the financial sector is defined as one that is a credit or financial institution

that is either a UK person or is acting in the course of a business carried on by it in the UK.

- CTA Sch 7, para 5(2)(g) Regulation 3(2),(3) 5.11 The definition of credit institution is the same as that in the ML Regulations, but the definition of financial institution contains an additional category of firm – an insurance company as defined by section 1165(3) of the Companies Act 2006. This extends the scope to include all insurance companies authorised under Part IV of FSMA, as well as Lloyd’s underwriters and companies offering vehicle accident or breakdown cover. However, firms brought into the scope of CTA Sch 7 only through this definition are only subject to two of the four categories of direction. Life assurance companies are therefore subject to all four categories of direction, as they are within the definition of financial institution in the ML Regulations.
- 5.12 These firms are excluded from the scope of the first two direction powers because those brought in are not currently required to carry out CDD measures or ongoing monitoring under the ML Regulations – in proposing the new powers, HM Treasury were seeking to be consistent with what firms were already required to do, and so had systems for. But the additional firms were included in the other two direction powers as these do not directly flow from the ML Regulations, and HM Treasury would expect all firms in the industry to have to implement them to address the potentially substantial risks against which they might be used.
- CTA Sch 7, para 3(1) 5.13 HM Treasury may issue directions to
- A particular person operating in the financial sector; **or**
 - Any description of persons in that sector; **or**
 - All persons operating in that sector
- CTA Sch 7, para 14 5.14 Where directions are given to firms of a given type or to all firms, generally an Order must be laid before parliament by HM Treasury under the negative resolution procedure. The exception is a direction to limit or cease business, which requires an Order laid under the affirmative resolution procedure.
- SI 2009/2725 5.15 As an example, the first Order under CTA Sch 7 was laid on 12 October 2009. The order was in respect of two Iranian entities, Bank Mellat and Islamic Republic of Iran Shipping Lines, and was accompanied by an interpretive note issued by HM Treasury – the interpretive note is at http://www.hm-treasury.gov.uk/d/fin_crime_interpretive_note.pdf.
- 5.16 Firms may obtain direct electronic notification of any such orders, interpretive notes and other HM Treasury-originated publications or announcements relating to the exercise of powers under CTA Sch 7 by subscribing to the HM Treasury AML/CTF mailing list – see http://www.hm-treasury.gov.uk/fin_crime_mailinglist.htm.

What directions may be imposed?

- CTA Sch 7, para 9(1) 5.17 Requirements may be imposed in relation to transactions or business

relationships with

- A person carrying on business in a particular country
- The government of that country
- A person resident or incorporated in that country

CTA Sch 7, para 9(2)	5.18	<p>A direction may impose requirements in relation to</p> <ul style="list-style-type: none"> ○ a particular person described in paragraph 5.17, ○ any description of persons detailed in that paragraph, or ○ all persons detailed in that paragraph. <p>Any person in relation to whom a direction is given is a ‘designated person’ for the purposes of a direction.</p>
CTA Sch 7, para 9(4)	5.19	<p>As mentioned in paragraph 5.2, the kinds of requirement that may be imposed by a direction relate to</p> <ul style="list-style-type: none"> ○ customer due diligence (see paragraphs 5.21ff); ○ ongoing monitoring (see paragraphs 5.31ff); ○ systematic reporting (see paragraphs 5.36ff); ○ limiting or ceasing business (see paragraphs 5.39ff).
CTA Sch 7, para 15(3)	5.20	<p>Any direction (if not previously revoked and whether or not varied) ceases to have effect after one year from the day it is given (although a further direction may be given).</p>

Customer due diligence

CTA Sch 7, para 10	5.21	<p>The requirements in relation to customer due diligence that may be imposed relate to</p> <ul style="list-style-type: none"> ○ timing of carrying out enhanced due diligence ○ obligation to carry out enhanced due diligence ○ content of CDD measures
Regulations 5, 7, 9 Regulation 14	5.22	<p>The general obligation to carry out CDD measures, and the timing and content of such measures, are already set out in the ML Regulations (although expressed in slightly different language from CTA Sch 7). EDD measures are also already required under the ML Regulations, but only in relation to the types of customer/product situation that are specified in the Regulation. Guidance on meeting the obligation to carry out EDD is given in Part I, section 5.5.</p>
	5.23	<p>The specified requirements that may be imposed under a direction may differ in detail from the general requirements for CDD measures under the ML Regulations, although HM Treasury intend to direct similar requirements unless there are specific reasons to apply different requirements. As mentioned in paragraph 5.11, insurance companies (as defined there) may not be made subject to a direction under this paragraph of Schedule 7.</p>

Timing

- Regulation 7 (c)
CTA Sch 7, para 10 (3),
(4)
- 5.24 Under the ML Regulations a firm must carry out CDD measures when, inter alia, it suspects money laundering or terrorist financing. The powers under the CTA permit HM Treasury to direct that firms must carry out enhanced CDD of specified entities where it reasonably believes that there is a risk of money laundering or terrorist financing in a country, or that the development or production of nuclear, radiological, biological or chemical weapons, or the facilitation of such development or production in a country (the latter are collectively referred to as ‘relevant activities’), poses a significant risk to the national interests of the UK.
- CTA Sch 7, para 10(1)
- 5.25 A direction may require a firm to undertake enhanced customer due diligence measures—
- (a) before entering into a transaction or business relationship with a designated person, and
- (b) during a business relationship with such a person.
- 5.26 In practical terms, if such requirements are imposed under a direction from HM Treasury, a firm would not be expected to apply CDD measures at a point that was different from that in respect of which guidance is given in Part I, section 5.2, unless specifically directed to (although the exceptions referred to in paragraphs 5.2.3 - 5.2.5 would not apply, as the firm would be under a specific direction, thus indicating a high risk of money laundering or terrorist financing that requires checks before any access to the financial system is facilitated).

Enhanced due diligence

- CTA Sch 7, para 10(2)
- 5.27 The direction may
- (a) impose a general obligation to undertake enhanced customer due diligence measures; and/or
- (b) require a firm to undertake specific measures identified or described in the direction.
- 5.28 In practical terms, if such requirements are imposed under a direction from HM Treasury, a firm would not be expected to apply different EDD measures from those carried out in accordance with the guidance given in Part I, section 5.5, unless specifically directed to. The discretion in the risk-assessment as to whether EDD should be applied is removed through a direction having been given; within this, however, there will still be discretion to determine the extent of EDD measures appropriate in each case (unless these are specified in the direction).

Content of CDD measures

- CTA Sch 7, para 10(3) 5.29 “Customer due diligence measures” is defined in CTA Sch 7 as measures
- (a) to establish the identity of the designated person (see paragraph 5.18),
 - (b) to obtain information about—
 - (i) the designated person and their business, and
 - (ii) the source of their funds, and
 - (c) to assess the risk of the designated person being involved in relevant activities.
- 5.30 In practical terms, if such requirements are imposed under a direction from HM Treasury, a firm would not be expected to apply different CDD measures from those carried out in accordance with the guidance given in Part I, section 5.3, unless specifically directed to.
- Ongoing monitoring*
- CTA Sch 7, para 11(1), (2) 5.31 A direction may require a firm to undertake enhanced ongoing monitoring of any business relationship with a designated person. The direction may
- (a) impose a general obligation to undertake enhanced ongoing monitoring; and/or
 - (b) require a firm to undertake specific measures identified or described in the direction.
- Regulation 8
Regulation 14 (1), (4)(c) 5.32 The general obligation to carry out ongoing monitoring is already set out in the ML Regulations (although expressed in slightly different language from CTA Sch 7). Enhanced ongoing monitoring is required generally in relation to higher risk situations, and specifically where the customer is a PEP. Guidance on carrying out ongoing monitoring is set out in Part I, section 5.7.
- 5.33 As mentioned in paragraph 5.11, insurance companies (as defined there) may not be made subject to a direction under this paragraph of Schedule 7.
- CTA Sch 7, para 11(3) 5.34 “Ongoing monitoring” of a business relationship is defined in CTA Sch 7 as
- (a) keeping up to date information and documents obtained for the purposes of customer due diligence measures, and
 - (b) scrutinising transactions undertaken during the course of the relationship (and, where appropriate, the source of funds for those transactions) to ascertain whether the transactions are consistent with the firm’s knowledge of the designated person and their business.
- 5.35 In practical terms, if such requirements are imposed under a direction from HM Treasury, a firm would not be expected to apply different enhanced ongoing monitoring from that carried out in accordance with

the guidance given in Part I, section 5.7, unless specifically directed to.

Systematic reporting

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| CTA Sch 7, para 12(1) | 5.36 | A direction may require a firm to provide such information and documents as may be specified in the direction relating to transactions and business relationships with designated persons. |
| CTA Sch 7, para 12(2) | 5.37 | A direction imposing such a requirement must specify how the direction is to be complied with, including <ul style="list-style-type: none"> (a) the person to whom the information and documents are to be provided, and (b) the period within which, or intervals at which, information and documents are to be provided. |
| | 5.38 | Transactions that are subject to a direction imposing systematic reporting are very likely to be prospective. Although it is possible that historic data may be requested, this would likely only result from a follow up to a previous systematic reporting order. |

Limiting or ceasing business

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| CTA Sch 7, para 13 | 5.39 | A direction may require a firm not to enter into or continue to participate in <ul style="list-style-type: none"> (a) a specified transaction or business relationship with a designated person, or (b) a specified description of transactions or business relationships with a designated person, or (c) any transaction or business relationship with a designated person. |
| Regulation 18 | 5.40 | This power is broader than the power in the ML Regulations given to HM Treasury in relation to customers from non-EEA states to which the FATF have decided to apply counter measures. |
| | 5.41 | The obligation to limit or cease business with a designated person is different from the obligation not to do business with a name on a sanctions list. The CTA direction is more flexible, and can be applied more broadly; it also does not involve freezing a customer's assets. |
| | 5.42 | There may be situations where a firm itself prefers to close a relationship with a designated person. In such circumstances it might be important to consult with HM Treasury before taking that action. |
| CTA Sch 7, para 17 (1) – (4) | 5.43 | HM Treasury may grant a licence to exempt acts specified in the licence |

from requirements in a direction to limit or cease business. A licence may be

- (a) general or granted to a description of persons or to a particular person;
- (b) subject to conditions;
- (c) of indefinite duration or subject to an expiry date.

HM Treasury may vary or revoke a licence at any time.

CTA Sch 7, para 17 (5) 5.44

On the grant, variation or revocation of a licence, HM Treasury must

- (a) in the case of a licence granted to a particular person, give notice of the grant, variation or revocation to that person;
- (b) in the case of a general licence or a licence granted to a description of persons, take such steps as HM Treasury consider appropriate to publicise the grant, variation or revocation of the licence.

Enforcement and penalties for non-compliance

CTA Sch 7, paras 25, 30 5.45

A firm may be penalized for a failure to comply with a requirement under a direction in one of two ways:

- A civil penalty by the supervisory and enforcement authority (the FSA); or
- Criminal prosecution for the failure

CTA Sch 7, para 25(5), 30(6) 5.46

A firm cannot be made liable to a civil penalty and be prosecuted for the same failure.

CTA Sch 7, para 25(3), 30(3) 5.47

In deciding whether to impose a penalty, or whether a firm has committed an offence, in relation to a failure to comply with a requirement, an enforcement authority or a court must consider whether the firm followed any relevant guidance which was at the time

- (a) issued by a supervisory authority or any other appropriate body,
- (b) approved by the Treasury, and

(c) published in a manner approved by the Treasury as suitable in their opinion to bring the guidance to the attention of persons likely to be affected by it.

Civil penalty

CTA Sch 7, para 25(1) 5.48

An enforcement authority may impose a penalty of such amount as it considers appropriate on a person who fails to comply with a requirement imposed

- (a) by a direction under Sch 7, or
- (b) by a condition of a licence under such a direction.

CTA Sch 7, para 25(2) 5.49

No such penalty is to be imposed if the authority is satisfied that the

person took all reasonable steps and exercised all due diligence to ensure that the requirement would be complied with.

SYSC 6.1.1 R	5.50	Firms should note that the regulatory requirement to have in place adequate policies and procedures for countering the risk that a firm might be used to further financial crime - which includes terrorist financing - also applies. This means that the FSA can take regulatory action against a firm relating to its systems and controls, even where no breach of a direction under Schedule 7 of the CTA has occurred.
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Offence: failure to comply with requirement imposed by a direction

CTA Sch 7, paras 30(1), 32(1)	5.51	Where a firm fails to comply with a requirement imposed by a direction under CTA Sch 7 it is open to criminal prosecution, subject to paragraph 5.51. An offence may be committed by a UK person by conduct wholly or partly outside the UK.
CTA Sch 7, para 30(2),	5.52	No offence is committed if the person took all reasonable steps and exercised all due diligence to ensure that the requirement would be complied with.
CTA Sch 7, para 30(5)	5.53	The criminal sanction under CTA Sch 7 is a prison term of up to two years, and/or a fine.