

**ENFORCEMENT (FIFTH MONEY LAUNDERING DIRECTIVE) INSTRUMENT
2020**

Powers exercised

- A. The Financial Conduct Authority (“the FCA”) 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 137A (The FCA’s general rules);
 - (b) section 139A (Power of the FCA to give guidance); and
 - (c) section 395 (The Authority’s procedures);
 - (2) the following provisions in the Money Laundering and Terrorist Financing (Amendment) Regulations 2019:
 - (a) regulation 8 (amendment of Part 8: information and investigation); and
 - (b) regulation 9 (amendment of Part 9: enforcement and Part 10: appeals)
- B. The rule-making provisions listed above are specified for the purposes of section 138G(2) (Rule-making instruments) of the Act.

Commencement

- C. This instrument comes into force on 24 July 2020.

Amendments to the Handbook

- D. The Glossary of definitions 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.

Amendments to 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 (Fifth Money Laundering Directive) Instrument 2020.

By order of the Board
23 July 2020

Annex A

Amendments to the Glossary of definitions

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

cryptoasset exchange provider as defined in the *Money Laundering Regulations*.

custodian wallet provider as defined in the *Money Laundering Regulations*.

Annex B

Amendments to the Decision Procedure and Penalties manual (DEPP)

In this Annex, underlining indicates new text.

2 Statutory notices and the allocation of decision making

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2.5 Provision for certain categories of decision

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Notices under other enactments

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(5A) The decision to impose or vary a direction under regulation 74C of the Money Laundering Regulations will be taken by the RDC, if the direction involves a fundamental imposition or variation. Otherwise, the decision to give the supervisory notice will be taken by FCA staff under executive procedures. FCA staff under executive procedures will be the decision maker whenever a cryptoasset business does not contest the direction. A fundamental imposition or variation of a direction means:

- (a) preventing a cryptoasset business from undertaking cryptoasset business; or
- (b) imposing or varying a direction in relation to the cryptoasset business' assets, or refusing an application to vary or cancel such a direction.

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2 Annex Supervisory notices

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<u>The Money Laundering, Terrorist Financing and Transfer of Funds (Information</u>	<u>Description</u>	<u>Handbook reference</u>	<u>Decision maker</u>
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<u>on the Payer)</u> <u>Regulations 2017</u>			
<u>Regulation 74C(5)</u>	<u>When the FCA is exercising its own initiative powers to impose, vary or rescind a direction.</u>		<i><u>RDC or executive procedures</u></i>

Annex C

Amendments to the Enforcement Guide (EG)

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

6 Publicity

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6.2 Publicity during, or upon the conclusion of regulatory action

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Supervisory notices varying a firm's Part 4A permission, imposing a requirement or varying an approval on the FCA's own initiative (see EG 8 and DEPP 8) and supervisory notices imposing a direction under regulation 74C of the Money Laundering Regulations on the FCA's own initiative (see EG 19.15)

- 6.2.21 It is important that the *FCA* maintains an accurate public record. One of the ways the *FCA* does this is by publishing the reasons for variations of *Part 4A permission*, the imposition of requirements ~~and~~, variations of the approval of *SMF managers* and the imposition and variation of directions under regulation 74C(5) of the *Money Laundering Regulations*. The *FCA* will always aim to balance the interests of *consumers* and the possibility of unfairness to the *person* subject to the *FCA's* action. The *FCA* will publish relevant details of fundamental and non-fundamental variations of *Part 4A permission* and requirements which it imposes on *firms*, ~~and~~ variations of approval of *SMF managers* and directions under regulation 74C(5) of the *Money Laundering Regulations*. But it will use its discretion not to do so if it considers this to be unfair to the *person* on whom the variation or direction is imposed, prejudicial to the interests of *consumers*, or detrimental to the stability of the *UK financial system*. Publication will generally include placing the notice on the *FCA* website and this may be accompanied by a press release. As with warning notice statements, *decision notices* and *final notices*, *supervisory notices* and related press releases that are published on the *FCA's* website will be reviewed upon request. The *FCA* will determine at that time whether continued publication is appropriate, or whether notices and related press releases should be removed or amended. The *FCA* expects usually to conclude that *supervisory notices* and related press releases that have been published for less than six years should not be removed from the website.
- 6.2.22 The *FCA* will amend the *Financial Services Register* to reflect a *firm's* actual *Part 4A permission* ~~or~~, the terms of an *SMF manager's* actual approval under section 59 of the *Act* following any variation or the terms of a direction imposed under regulation 74C of the *Money Laundering Regulations*.
- 6.2.23 Where the *FCA* publishes a *supervisory notice* issued under regulation 74C of the *Money Laundering Regulations* and the *FCA* subsequently decides to rescind

the direction to which a notice relates or the subject of a direction is successful in overturning the direction, the FCA will make it clear on its website that the supervisory notice no longer applies. The FCA will normally do this by publishing a notice of discontinuance with the consent of the person to whom the notice of discontinuance has been copied.

6.2.24 Where the FCA publishes a supervisory notice issued under regulation 74C of the Money Laundering Regulations and the subject of the direction refers the matter to the Tribunal, the FCA will make it clear on its website that the supervisory notice has been referred to the Tribunal.

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19 Non-FSMA powers

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19.14 The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017

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19.14.2 The FCA is responsible for monitoring and enforcing compliance with the *Money Laundering Regulations* not only by authorised firms who are within the *Money Laundering Regulations*' scope, but also by what the Regulations describe as “Annex I financial institutions”, and *cryptoasset exchange providers* and *custodian wallet providers*. These are businesses which are not otherwise authorised by us but which carry out certain of the activities listed in Annex I of the Banking Consolidation Directive²⁸, now Annex I of the *CRD*. The activities include lending (e.g. forfaiters and trade financiers), financial leasing, and safe custody services. Annex I financial institutions are required to register with the FCA.

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19.14.3 The *Money Laundering Regulations* add to the range of options available to the FCA for dealing with anti-money laundering and anti-terrorist financing failures. These options include:

- to prosecute a relevant person, including but not limited to an authorised firm, an Annex I financial institution, an auction platform, a *cryptoasset exchange provider* or a *custodian wallet provider*, as well as any responsible officer;
- to fine or censure a relevant person, including but not limited to an authorised firm, an Annex I financial institution, ~~or~~ an auction platform, a *cryptoasset exchange provider* or a *custodian wallet provider*, as well as any officer knowingly concerned in the breach, under regulation 76 of the *Money Laundering Regulation*;

- to cancel, suspend or impose limitations or other restrictions on the authorisation or registration of an authorised person or payment service provider, under regulation 77 of the *Money Laundering Regulations*; and
- to impose a temporary or permanent prohibition on an officer knowingly concerned in a breach by a relevant person, including an authorised firm or Annex I financial institution, ~~or~~ a payment service provider, a *cryptoasset exchange provider* or a *custodian wallet provider* under regulation 78 of the *Money Laundering Regulations*.

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19.14.4A The FCA also has powers under regulation 74C to impose a direction on a *cryptoasset business* to:

- remedy a failure to comply with a requirement under the *Money Laundering Regulations*;
- prevent a failure to comply, or continued non-compliance with a requirement under the *Money Laundering Regulations*; or
- prevent the *cryptoasset business* from being used for money laundering or terrorist financing.

The FCA may impose a direction requiring or prohibiting the taking of specified action. *Cryptoasset businesses* can also apply for a direction to be imposed, varied or rescinded.

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19.15 The conduct of investigations under the Money Laundering Regulations

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19.15.1A Where the FCA considers it appropriate to do so, it will exercise its powers under regulation 74C of the *Money Laundering Regulations*, to impose a direction on a *cryptoasset business* to ensure requirements of the *Money Laundering Regulations* are met. The FCA will exercise this power where:

- (1) it has serious concerns about the *cryptoasset business*' compliance with the *Money Laundering Regulations*;
- (2) it is concerned that a failure of the *cryptoasset business* to take the desired steps may result in a breach of the *Money Laundering Regulations*;
- (3) the imposition of a direction reflects the importance the FCA attaches to the need for the *cryptoasset business* to address its concerns;
- (4) the imposition of a direction may assist the *cryptoasset business* to take steps which would otherwise be difficult because of legal obligations owed to third parties.

- 19.15.1B The FCA will also exercise its powers to:
- (1) vary a direction; or
 - (2) cancel a direction,
- where it considers it appropriate to do so.
- 19.15.1C Examples of circumstances in which the FCA will consider imposing a direction on a *cryptoasset business* because it has serious concerns about a *cryptoasset business*, or about the way its business is being or has been conducted include where the *cryptoasset business* appears to be failing, or appears likely to fail, to comply with requirements under the *Money Laundering Regulations*, because:
- (1) it appears to have consistently failed to comply with requirements of the *Money Laundering Regulations* and in doing so, it may have put itself at risk of being used for the purposes of *money laundering* or terrorist financing;
 - (2) its personnel do not appear to have adequate skills and experience to carry on *cryptoasset business*; or
 - (3) it appears to have breached requirements imposed on it by or under the *Money Laundering Regulations*, for example in respect of disclosure requirements about the applicability of the jurisdiction of the *Financial Ombudsman Service* to its *cryptoasset business* and whether it is subject to *FSCS* protection.
- 19.15.1D The FCA may impose a direction so that it takes effect immediately or on a specified date if it reasonably considers it necessary to do so, having regard to the ground on which it is exercising this power.
- 19.15.1E The FCA will consider imposing a direction as a matter of urgency where:
- (1) the information available to it indicates serious concerns about the *cryptoasset business* that need to be addressed immediately; and
 - (2) circumstances indicate that it is appropriate to impose a direction immediately to require and/or prohibit certain actions by the *cryptoasset business* to ensure the *cryptoasset business* addresses these concerns.
- 19.15.1F The FCA will consider the full circumstances of each case when it decides whether an urgent imposition of a direction is appropriate. The following is a non-exhaustive list of factors the FCA may consider:
- (1) The extent of any loss, or risk of loss, or other adverse effect on *consumers* caused by the failure to adhere to the *Money Laundering Regulations*. The more serious the loss or potential loss or other adverse effect, the more likely it is that the urgent imposition of a direction will be appropriate, to protect the *consumers'* interests.

- (2) The extent to which *customer* assets appear to be at risk due to the failure to comply with the *Money Laundering Regulations*. Urgent imposition of a direction may be appropriate where the information available to the *FCA* suggests that *customer* assets held by, or to the order of, the *cryptoasset business* may be at risk.
- (3) The nature and extent of any false or inaccurate information provided by the *cryptoasset business*. Whether false or inaccurate information warrants the urgent imposition of a direction will depend on matters such as:
- (a) the impact of the information on the *FCA*'s view of the *cryptoasset business*'s compliance with the requirements of the *Money Laundering Regulations*, or the likelihood that the *cryptoasset business* may be being used in connection with *financial crime*;
 - (b) whether the information appears to have been provided in an attempt knowingly to mislead the *FCA*, rather than through inadvertence;
 - (c) whether the matters to which false or inaccurate information relates indicate there is a risk to *customer* assets or to the other interests of the *cryptoasset business*' actual or potential *customers*.
- (4) The seriousness of any suspected breach of the requirements of the *Money Laundering Regulations* and the steps that need to be taken to correct that breach.
- (5) The financial resources of the *cryptoasset business*. Serious concerns may arise where there is a likelihood of the *cryptoasset business*' assets being dissipated without the *FCA*'s intervention.
- (6) The risk that the *cryptoasset business* may be used or has been used to facilitate *financial crime*, especially *money laundering* and terrorist financing. The information available to the *FCA*, including information supplied by other law enforcement agencies may suggest the *cryptoasset business* is being used for, or is itself involved in *financial crime*. Where this appears to be the case, and the *cryptoasset business* appears to be failing to comply with requirements of the *Money Laundering Regulations* or has put its *customers*' interests at risk, the *FCA*'s urgent imposition of a direction may be appropriate.
- (7) The risk that the *cryptoasset business*' conduct or business presents to the *UK financial system* and to confidence in the *UK financial system*.
- (8) The *cryptoasset business*' conduct. The *FCA* will take into account:
- (a) whether the *cryptoasset business* identified the issue (and if so whether this was by chance or as a result of the *cryptoasset business*' normal *controls* and monitoring);
 - (b) whether the *cryptoasset business* brought this issue promptly to the *FCA*'s attention;

- (c) the *cryptoasset business*' past history, management ethos and compliance culture;
 - (d) steps that the *cryptoasset business* has taken or is taking to address the issue.
- (9) The impact that the imposition of a direction will have on the *cryptoasset business*' business and on its *customers*. The *FCA* will need to be satisfied that the impact of any use of the direction power is likely to be proportionate to the concerns being addressed, in the context of the overall aim of achieving its *statutory objectives*.

19.15.1G Examples of directions that the *FCA* may consider imposing in support of its enforcement function are: a direction not to take on new business; a direction that prohibits the disposal of, or other dealing with, any of the *cryptoasset business*' assets (whether in the *United Kingdom* or elsewhere) or restricts those disposals or dealings; and a direction that all or any of the *cryptoasset business*' assets, or all or any assets belonging to *consumers* but held by the *cryptoasset business* to its order, must be transferred to a *trustee* approved by the *FCA*.