

# **The Future Regulation of Consumer Credit**

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## List of Acronyms

<b>Acronym</b>	<b>Full name</b>
AR	Appointed Representative
APER	Statement of Principles for Approved Persons
BIS	Department for Business Innovation and Skills
BCOB(s)	Banking Conduct of Business
CAB	Citizens Advice Bureau
COB	Conduct of Business
CCA	Consumer Credit Act 1974
CCA 2006	Consumer Credit Act 2006
CCD	Consumer Credit Directive 2008
CCJ	Consumer Credit Jurisdiction
CPMA	Consumer Protection and Markets Authority
CPRs	Consumer Protection from Unfair Trading Regulations 2008
EA 2002	Enterprise Act 2002
ENF	FSA Enforcement Guide
EU	European Union
FCA	Financial Conduct Authority
FIT	Fit and Proper Test for Approved Persons
FOS	Financial Ombudsman Service
FSA	Financial Services Authority
FSMA	Financial Services and Markets Act 2000
HMT	HM Treasury
IFA	Independent Financial Advice
IMD	Insurance Mediation Directive 2002
IWI	Issues with Wider Implications
MCOB	Mortgage Conduct of Business
MIPRU	Prudential Sourcebook for Mortgage and Home Finance Firms and Insurance Intermediaries
NAO	National Audit Office
NIM	National Intelligence Model
OFT	Office of Fair Trading
PPI	Payment Protection Insurance
PSD	Payment Services Directive 2007
PSPs	Payment Service Providers
PSRs	Payment Services Regulations 2009
PII	Professional Indemnity Insurance
RMAR	Retail Mediation Activities Return
SEPA	Single European Payment Area
SECCI	Standard European Consumer Credit Information
SIs	Statutory Instruments
SUP	FSA Handbook: Supervision
TSS	Trading Standards Services
UTCCRs	Unfair Terms in Consumer Contract Regulations 1999

## 1. Executive Summary

### *The future regulation of consumer credit*

- 1.1 The consumer credit market has been very fast moving in recent years, with new and innovative services starting to appear. These have included the entry of hybrid services such as claims handling and debt management services<sup>1</sup>, new pawnbroking services, decision-instant guarantor loans and the rise of 'Payday' lending, currently estimated by Which? to be a £1.9 billion market and rapidly growing<sup>2</sup>. These developments are often combined with marketing strategies aimed at a very different type of consumer and credit market in comparison to the more traditional 'high street' model. Products and services are being designed for technology savvy consumers, younger and more at ease with the speed and convenience technology offers. Once consumers are 'captured', this also means that further targeting can be undertaken on a bespoke or individualized basis, making services even more 'tempting' or attractive.
- 1.2 Whilst there will be many reputable providers of these new services, the speed at which they can appear both within and outside the UK, almost 'overnight' and disappearing just as quickly, poses particular challenges for regulators and consumers alike. Such rapid changes are taking place during a time of great economic uncertainty, consumers grappling with higher food and energy prices and falling salaries, as well as an ageing population. Yet, the inherent appeal of 'live for today' that drives demand in the credit market means that consumer credit, when coupled with the variety and diversity of very accessible credit services now on offer, is a different proposition to that of other financial services; consumers are even more likely to experience consumer detriment, with even the poorest consumers being seen as lucrative markets.
- 1.3 In its joint consultation, "A new approach to financial regulation: consultation on reforming the consumer credit regime" published in December 2010, HM Treasury (HMT) and the Department for Business Innovation and Skills (BIS) proposed that responsibility for the regulation of consumer credit should be passed from the Office of Fair Trading (OFT) across to the Financial Services Authority (FSA), soon to become the Financial Conduct Authority (FCA), and that,
- "The current Financial Services and Markets Act (FSMA) framework, which the Government has announced will form the basis of the Consumer Protection and Markets Authority or CPMA [now referred to as the FCA] powers and functions, includes a number of elements that represent a different approach to the Consumer Credit Act (CCA) regime".<sup>3</sup>
- 1.4 The FSA Consumer Panel acknowledges there is some logic for bringing consumer credit under the auspice of the FSMA. However, the Panel remains concerned about the precise authorization, supervisory and substantive approach that would be adopted or, in other words, what will be the regulatory outcomes for consumers.
- 1.5 To help the Panel form a view as to whether responsibility for consumer credit should be passed to the new FCA, a comparative analysis of the FSMA and CCA regimes was undertaken, along with an investigation into the regulatory models or approaches adopted by the FSA for other consumer sectors, such as those applied to the mortgage intermediary and payment services sectors. Consideration was further given to FSA and

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<sup>1</sup> Financial Ombudsman Service (FOS) statistics for July-September 2011 show that debt collection is the 3<sup>rd</sup> largest area of complaint under the Consumer Credit jurisdiction (CCJ)

<sup>2</sup> Which? evidence to the BIS Committee Inquiry into Debt Management, November 2011: the value of payday loans taken out by borrowers has increased from £1.2bn in 2009 to £1.9bn in 2010, suggesting that more consumers are turning to this form of credit.

<sup>3</sup> See HMT and BIS joint consultation "A new approach to financial regulation: consultation on reforming the consumer credit regime", December 2010 (hereinafter referred to as the joint consultation document)

OFT approaches to enforcement, including regulatory strategies used to drive standards of firm behaviour without taking formal enforcement action.

1.6 This analysis and investigation of regulatory approaches, which was carried out over 4 weeks between mid-October and mid-November 2011, is set out in this paper; and, from a consumer protection point of view shows the following:

- The legal provisions governing threshold conditions for market entry in the FSMA regime are more stringent than those found in the CCA regime, suggesting there would be benefit to consumers of adopting an FSA Handbook approach here.
- The CCA regime has as its focus the form and function of a credit agreement rather than the services they could receive from a financial adviser. Conduct of Business (COB) requirements for pre-contractual and other consumer information are therefore more prescriptive in the CCA regime than they are in the FSMA regime.
- The CCA goes to the substance of the credit bargain and where only the civil courts can make a Time Order to compel firms to alter or vary contractual terms of credit agreements and accommodate a consumer's financial distress. By contrast, the FSA may only impose a fine or other sanction on firms should they breach any of its Handbook or COB rules.
- Many of the CCA COB requirements have been given effect by the Consumer Credit Directive 2008 (CCD), which is a maximum harmonising Directive of those areas that are 'in scope'. They are also implemented through primary legislation and statute, so it would seem perverse to adopt a FSA COB rules based approach for consumer credit.
- CCA s.75 and other consumer rights bring into stark focus the interdependency between private rights of redress and public enforcement; with one often giving rise to the other. The interaction of private rights of redress and public enforcement is integral to the operation of the CCA regime in protecting consumers. This is not currently as evident in the FSMA regime, but is starting to become more so with the FSA's adoption of complaints-led strategies.
- Enforcement in the CCA regime has a narrower scope and its range of powers is also more limited than in the FSMA regime. The FSMA regime is able to curb malpractice on an industry wide basis as well as to compensate consumers across the piece, which is especially of benefit to networked consumers.
- The FSA already has powers under the Unfair Terms in Consumer Contracts Regulations (UTCCRs) 1999 and the Consumer Protection from Unfair Trading Regulations (CPRs) 2008 since these apply across all financial services. Were consumer credit to be passed across to the FCA, it would be sensible for the FCA to give further consideration to the approach it would adopt in applying these to providers of consumer credit; and, similarly, to the CCA 'Unfair relationships' test since this also closely interacts with the provisions of the UTCCRs and CPRs.
- OFT Guidance is produced under s.4 and s.25A of the CCA and in response to a diverse and fast moving sector that requires a greater degree of handholding. Industry Codes of practice also help to interpret different parts of the CCA but are treated differently by the FSA and the OFT. Were consumer credit to be passed across to the FCA, further consideration of this area would also be sensible.
- The nature, diversity and changing face of the consumer credit market suggests capitalisation requirements would be of benefit to consumers provided these were flexible enough to accommodate a wide range of business models. The Payment Service Provider (PSP) model of regulation could provide useful lessons for the

future regulation of consumer credit.

- The FSA style and culture of regulation is set by the FSMA statutory objectives, yet there is a tension that operates across the FSMA statutory objectives that works to the detriment of consumers in allocating resources and forming priorities for enforcement. The FSA has started to address this through its intensive approach to supervision and enforcement but, as is the case for mortgages, this relies heavily on the co-operation of larger firms or firms of 'scale' but where there is a greater diversity of firms in the consumer credit market.
- Given the nominal values of some credit agreements as well as technological innovations, under the ARROW risk framework there is also a danger that the types of consumer detriments that are "on the margins" as well as those experienced by vulnerable consumers, will fail to be detected and subsequently prioritised. Better integrated, local Trading Standards Services (TSS) input provide a ready means by which to plug this gap, and equally help to drive good firm behaviour at the local level.
- Under the FSMA regime, supervisors have a lot of direct contact with firms but unlike local TSS, there is little to no direct contact with consumers.
- As evidenced by the recent Payment Protection Insurance (PPI) scandal, it is in the interests of consumers to ensure that there is a regulator capable of taking action where there is evidence of consumer detriment in the market place. Contacts and complaints intelligence, or consumer 'feedback loops', can provide useful triggers that would ensure that it is the concerns of consumers, and not just those considered as threats by regulators, that are being addressed.
- The FSA's complaints-led approach suggests there is merit in adopting an intelligence and complaints-led strategy for consumer credit but further work will need to be done internally to ensure this is integrated into the wider culture of the new FCA. If done well, this could form the cornerstone of any 'preventative' approach to regulation.
- Given their experience of TSS operational issues, were consumer credit to be passed to the FCA, it would be desirable for former OFT staffers to play a role in the new FCA.
- To rebuild consumer confidence in the financial services industry, any future regulatory regime for consumer credit will need to be capable of both protecting the most vulnerable as well as being 'flexed' around the behaviours of an ever more diversified consumer credit market, and consumer, in the future. There is a need for a longer-term strategy for multi-agency, regional and localized enforcement for consumer credit so that any future regime is fit for the modern era.

## 2. **Introduction**

2.1 The Office of Fair Trading (OFT) is the body responsible for regulating consumer credit under the Consumer Credit Act (CCA) 1974. Under the CCA, firms who provide consumer credit must hold a licence issued by the OFT. Trading without a licence is a criminal offence, so all must adhere to the CCA with enforcement action being undertaken at national level by the OFT and at the local level by Trading Standards Services (TSS).

2.2 By contrast, the enforcement responsibility of the Financial Services Authority (FSA) under the Financial Services and Markets Act (FSMA) 2000 is much broader, the FSA being the regulatory authority for most types of financial firm (both wholesale and retail) as well as most types of financial services activities, for e.g. investments, life insurance, mortgages, general insurance, banking and payment services.

2.3 The FSA then is the 'single' financial services regulator in the UK, but the OFT (currently) leads in the area of consumer credit. Of the approximately 96,000 firms regulated by the OFT, the FSA estimates 16,000 are also authorised by the FSA for financial services activities regulated under the FSMA. The FSA further estimates that 80% of the consumer credit market or 'volume of business', already meet key threshold conditions, namely:

- The 'fit and proper' persons test
- Checks for criminal convictions

since (it is assumed) that the vast majority of consumer credit is underwritten by major high street banks.

2.4 It is important to note at the outset that many CCA licensees are not financial firms at all, but provide access to credit as 'introducers, brokers or intermediaries', allow payment in instalments for goods and services, or provide ancillary services such as debt advice or credit reference information.

2.5 To help the Panel form a view as to whether responsibility for consumer credit should be passed to the new FCA, a comparative analysis of the FSMA and CCA regimes was undertaken, along with an investigation into the regulatory models or approaches adopted by the FSA for other consumer sectors, such as those applied to the mortgage intermediary and payment services sectors. Consideration was further given to FSA and OFT approaches to enforcement, including regulatory strategies used to drive standards of firm behaviour without taking formal enforcement action. This analysis, which was carried out over 4 weeks between mid-October and mid-November 2011, is set out below.

Section A

## 3. **The regulatory framework**

### 3.1 **Comparative analysis of the FSMA and CCA regimes**

3.1.1 The statutory legal framework that sits behind the operation of the FSMA and CCA regimes is incredibly complex. Aside from having to contend with greater firm diversity in the consumer credit sector, the FSA and the OFT have dual responsibility for the regulation of some financial firms which gives rise to the potential for regulatory arbitrage, with the OFT also having lead responsibility for other areas of consumer protection law that are horizontal in nature thus applying to all firms irrespective of whether they provide financial services or not. This again may give rise to regulatory arbitrage.

- 3.1.2 The FSMA regime essentially comprises the FSMA and its statutory objectives, the FSA's 'high level' Principles for Business and the ARROW risk framework; with the FSA also having the power to write Conduct of Business (COB) rules and guidance.
- 3.1.3 At the heart of the consumer credit regime sits the CCA 1974, as amended by the Consumer Credit Act 2006 (CCA 2006) and, more recently by the Consumer Credit Directive 2008 (CCD)<sup>4</sup>. The CCD is a maximum harmonizing Directive of the areas it covers. This means that the government is unable to give statutory effect, or be more prescriptive, to any other provisions than the CCD in those areas that are 'in scope'.<sup>5</sup> The CCA and CCD is further supplemented by the OFT writing regulatory guidance such as the OFT Guidance on fitness test as provided by CCA s.25.
- 3.1.4 An overview and comparative analysis of the statutory legal framework provided under the FSMA and the CCA regimes is attached as Annex 1. The contents of Annex 1 are not intended to provide a definitive or exhaustive analysis of the 2 regimes, but to illustrate the different types of requirement that exist and assist the Panel, and others, in identifying key consumer protection issues that would arise were responsibility for consumer credit to be passed across to the FCA.
- 3.1.5 For ease of comparison, the 2 regimes have been set against 4 key themes:
- Threshold conditions, or 'high level' requirements for market entry;
  - COB requirements as they occur during the 'product lifecycle';
  - Consumer rights and obligations;
  - Enforcement and restitution

With theme 2 being further benchmarked against FSA COB provisions for mortgage providers given that a mortgage, in many respects, resembles a consumer credit agreement.

- 3.1.6 In considering the comparative analysis provided by Annex 1, and later, together with investigation into the respective enforcement approaches of the FSA and the OFT, we are able to draw informed conclusions about the extent to which the levels of consumer protection currently afforded by the CCA regime could be maintained in the event that responsibility for consumer credit did pass to the FCA.

***Threshold conditions for market entry***

- 3.1.7 Both the FSMA and the CCA set 'high level' threshold conditions on businesses for market entry which, broadly speaking, include the following:

*Authorisation or licensing*

FSMA FSA Handbook - Firms should have adequate resources and meet suitability requirements under the FSA's Fit and Proper Test for Approved Persons (FIT): honesty, integrity, reputation; competence and capability; financial soundness

CCA S.25 - Licensees should satisfy the OFT that they are 'Fit and proper'.

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<sup>4</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:133:0066:0092:EN:PDF>

<sup>5</sup> Article 22(1). Insofar as this Directive contains harmonised provisions, Member States may not maintain or introduce in their national law provisions diverging from those laid down in this Directive



### *Fairness*

- FSMA FSA Handbook – FSA ‘high level’ Principles for Business, Principle 6. A firm must pay due regard to the interests of its customers and treat them fairly.
- CCA S.140A-140C (CCA 2006) - Contractual obligations arising under contract and the ‘Unfair relationships’ test. This provides that a court may determine that the relationship between a lender and a borrower arising out of a credit agreement (or the agreement taken with any related agreement) is unfair to the borrower because of: any of the terms of the credit agreement or a related agreement; the way in which the lender has exercised or enforced its rights under the credit agreement or a related agreement, or; any other thing done (or not done) by or on behalf of the lender either before or after the making of the credit agreement or a related agreement.

### *Capitalisation*

- FSMA FSA Handbook – Firms should demonstrate financial prudence (FIT) and must at all times maintain capital resources equal to or in excess of its relevant capital resources requirement. See MIPRU 4.2.11 for home finance mediation.
- CCA The CCA does not require firms to maintain adequate capital resources.

### *Professional Indemnity Insurance cover*

- FSMA FSA Handbook - MIPRU 3.2.1 A firm must take out and maintain Professional Indemnity Insurance (PII) although there are exemptions for firms, for example, where another authorized person which has net tangible assets of more than £10 million provides a comparable guarantee, a ‘comparable guarantee’ meaning a written agreement on terms at least equal to those in a contract of professional indemnity insurance (see MIPRU 3.2.4 R) to finance the claims that might arise as a result of a breach by the firm of its duties under the regulatory system or civil law.
- CCA There are no requirements for firms to take out and maintain PII under the CCA although firms may as a matter of good practice decide to do so. This is especially the case since the introduction of the Consumer Credit Jurisdiction (CCJ) under the Financial Ombudsman Service (FOS) which provides consumers of consumer credit, and not just those of FSA authorised firms, as was previously, with access to the FOS.

### *Regulatory reporting*

- FSMA FSA Handbook – Integrated regulatory reporting, for example, applies to the retail activity of home finance mediation under SUP 12.4 and is also dependent on a firm’s level of capital adequacy. Those firms categorized as small firms are also required to submit a Retail Mediation Activities Return (RMAR) covering such things as profit and loss account, client money, regulatory capital, supplementary product sales data, adviser charging revenue and charging structures and payment.
- CCA There are no requirements for firms to submit regulatory returns to the OFT under the CCA.

- 3.1.8 As can be seen from the above, the legal provisions governing market entry under the FSMA are more stringent than those required by the CCA licensing regime since they impose regulatory disciplines on firms that are intended to separate the wheat from the

chaff. Taken together FSMA capitalisation and PII requirements, for example, require firms to have a solid financial basis. This may increase start up costs for some firms yet this needs to be weighed against the potential benefit to consumers of being able to distinguish between serious minded firms and non-serious minded firms or those with little vested self interest. The FSA 'high level' threshold conditions suggest then that there would be benefit to consumers were the government to adopt a FSA Handbook approach here.

### ***Conduct of Business requirements and the 'product lifecycle'***

- 3.1.9 By contrast to the FSMA's more robust 'high level' threshold conditions, the CCA is concerned with the provision of consumer credit as a contract, or its design as a product. By way of reminder a consumer credit agreement is an agreement between an individual (the debtor) and any other person (the creditor) by which the creditor provides the debtor with credit of any amount.<sup>6</sup> 'Credit' is defined broadly in the Act as including a cash loan and any other form of financial accommodation (under which the debtor is allowed time to pay).<sup>7</sup> It includes a hire-purchase agreement<sup>8</sup> as well as second charge lending.<sup>9</sup>
- 3.1.10 CCA thus has as its focus the form and function of a credit agreement so includes comparable COB requirements for advertising and other pre-contractual information which are then carried through the product lifecycle from contract conclusion through to post contractual statements and default. To help illustrate this, analysis of CCA COB requirements as they relate to the product lifecycle is also attached at Annex 1. Some of the newer requirements introduced under the revised CCD, and that have just recently taken effect (1<sup>st</sup> February 2011), have also been drawn out further below.

#### *Advertising*

FSMA FSA MCOB – MCOBs provide COB rules for both real (face to face or simultaneous promotion) and non-real time financial promotions. The fundamental principle underlying the financial promotions rules is that these should be 'clear, fair and not misleading' (MCOB 3.6.3). MCOBs also has very prescriptive rules for the form and content of financial promotions concerning such things as adequate mortgage descriptions, expression of key terms, prominence of certain terms and information concerning charges. MCOB 10 contains specific rules in connection with the Annual Percentage Rate (APR) calculation with MCOB 10 Annex 1 providing a direct read across to the APR provisions set by the CCA: *A guide to the substantively identical provisions of MCOB 10 and the Consumer Credit (Total Charge for Credit) Regulations 1980*.

CCA S.44 of the CCA Advertising Regulations 2010 – the general requirements for credit advertising are that they must use plain and intelligible language, be easily legible and specify the name of the advertiser. However, the new CCD requirements have dispensed with the typical APR approach and moved to the 'representative' example, with the Schedule to the CCA Advertising Regulations 2010 setting out the calculation and disclosure of total charge for credit APR.

#### *Pre-contractual information*

FSMA MCOB 5 – prescribes rules for pre-application disclosure, for example, the provision of illustrations.

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<sup>6</sup> s.8 of the Act. The previous financial limit of £25,000 was removed by the CCA 2006.

<sup>7</sup> s.9(1)

<sup>8</sup> s.9(3)

<sup>9</sup> See Second charge lending, OFT Guidance for lenders and brokers, July 2009

CCA Standard European Consumer Credit Information (SECCI)<sup>10</sup>. The SECCI is to be provided to consumers “in good time” before a credit agreement is made and is meant to act as an aide memoire for consumers when shopping for credit across the EU, enabling them to compare different credit offers and make informed decisions. The SECCI contains information about: contact details, the credit product, costs of credit, rights of withdrawal and early repayment. It must also be produced in the format prescribed by Articles 5.1 to 5.5 and 6.4 of the CCD, as implemented through the Consumer Credit (Disclosure of Information) Regulations 2010. A copy of the SECCI is attached as Annex 1a.

#### *Form and content of agreements*

FSMA MCOB 6 - prescribes rules for disclosure at the offer stage, for example, content of the offer document, including a modified illustration to reflect that an offer is being made to a particular consumer, set text and prominent statements, and the tariff of charges.

CCA CCA s.60 – Consumer Credit (Agreement) Regulations 2010 provides for specific information to be included in the credit agreement (schedule 1) as well as forms of statement and protection such as information about rights of withdrawal and how to terminate a credit agreement (schedule 2) and, disclosures of total charge for credit and APR (schedule 3).

3.1.11 Essentially, these new requirements introduced by the CCD reinforce the underlying product ethos that sits behind the operation of the CCA. Being highly ‘product’ prescriptive, so the COB requirements are concerned more with the credit agreement itself rather than with the services provided by a financial adviser. Of course, the FSA has powers under FSMA to write rules, and could adopt a similar prescriptive approach. However, this would seem perverse when we consider that the ‘COB’ requirements for consumer credit have been given effect both by the CCD and by primary legislation and statute.

#### ***CCA Consumer rights and obligations***

3.1.12 Perhaps, the more pressing issue is that because many CCA COB requirements form a part of the credit agreement and continue throughout the ‘product lifecycle’, should a consumer fall into financial difficulties and be unable to make any of the payments as agreed under contract, their act of ‘default’ may give rise to a contractual breach. Here too the CCA contains a number of substantive consumer protection provisions, referred to in the CCA as consumer rights and obligations. These very specific CCA provisions give (i) powers to the courts when resolving credit disputes, and (ii) rights to consumers when resolving other types of consumer dispute, namely, when a consumer purchases goods and services using a credit card or another form of credit agreement.

#### *Time orders*

CCA S.129 of the CCA - provides that a court can make a Time Order, giving the consumer more time to repay a debt, if the court considers it ‘just’ to do so. In addition, s.136 provides that *an agreement may be amended as a consequence of a Time Order by, for example, reducing the rate of interest or extending the term of the agreement*. The consumer can apply for a Time Order following receipt of a default notice, or a notice of enforcement action under the Act.

The civil court can also make a Time Order as part of proceedings brought by the lender for enforcement of the agreement or to recover possession of goods or land (for example, mortgage repossession).

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<sup>10</sup> <http://www.legislation.gov.uk/ukxi/2010/1013/schedule/1/made>

A consumer can also apply for a Time Order following receipt of an arrears notice, provided that s/he first gives notice to the lender and submits an alternative payment proposal, and at least 14 days elapse before an application is made to the court.

- 3.1.13 In response to the economic downturn, the FSA has recently adopted MCOB rules<sup>11</sup> that appear to mirror the Time Order provisions found in the CCA. For example, MCOB 13.3.2.A provides that firms “make reasonable efforts to reach an agreement with the consumer over the method for repaying any payment or sale shortfall” with firms demonstrating through their policies, internal procedures and record keeping that they have, in some way, considered forbearance from mortgage repossession when a consumer falls into financial difficulty. But, whilst, the MCOB rules are intended to provide protection for consumers, they are more persuasive than they are conclusive.
- 3.1.14 If a firm does not adhere to the MCOB rules, the FSA may, under the ARROW risk framework (see section B below), decide to take enforcement action or the consumer may have a private right of action for damages, yet it is only the civil courts that can make an Order or compel a firm to alter or vary the contractual terms of the credit agreement itself to accommodate the consumer’s financial distress. Arguably, the act of taking forward an enforcement action, could, along the way, bring about the same effect as a Time Order but unlike a Time Order there is no certainty of this happening. An enforcement action then does not directly or ‘immediately’ benefit a consumer in the same way as that intended by a Time Order. When making a Time Order, the civil courts will further be guided by any Pre-action Protocols<sup>12</sup> issued by the Ministry of Justice, which if not followed prior to initiating court action, can give rise to the award of costs and penalties to either the firm or the consumer.

#### *Section 75*

- CCA Debtor-creditor - If the debtor under a debtor-creditor-supplier agreement has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, he shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor.
- 3.1.15 S.75, as outlined above, does not govern the form and function of a credit agreement as do other CCA provisions, but its operation nevertheless turns on the existence of a credit agreement, and it becomes integral to it when a consumer uses a credit agreement to purchase goods and services which are of unsatisfactory quality or are not fit for purpose. This is probably best illustrated by way of real life scenarios, with the following case studies being taken from the Citizens Advice contacts and complaints database.

#### **Case study 1**

In 2011, a CAB in the North West saw a 27 year old man who was presently unemployed, living with his partner and a 1 year old child. At the time of seeking advice, he was taking a training course to become an electrician that he found online. The client called them, a salesperson came to his home and he signed up for the course, which cost £3,950. He took out a loan to pay for the course which was to be repaid at £110 per month.

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<sup>11</sup> See PS 10/9 FSA Mortgage market review: arrears and approved persons, feedback to CP 10/2 and final policy [http://www.fsa.gov.uk/pubs/policy/ps10\\_09.pdf](http://www.fsa.gov.uk/pubs/policy/ps10_09.pdf)

<sup>12</sup> Such as Practice Direction 49 – Pre-action Conduct for debt claims; and, Pre-Action Protocol for possession claims based on mortgage or home purchase plan arrears in respect of residential property.

The client was disappointed with the content of the course, which he could not understand and the software was incompatible with his PC. He was also promised that he could start the practical part of the course in 9 months, although at his rate of repayment, he would not be able to start for 13 months. He was currently 2 months in arrears and wanted to end the contract.

The CAB advised the client to complain to the supplier about the quality of the course, under the Supply of Goods and Services Act 1982 and by sending a copy of the letter to the finance provider, citing s.75 of the CCA. If the complaint was not upheld by the company, the client could then (after 8 weeks) take the complaint to the FOS. The adviser further advised the client how to use a template letter on the Consumer Direct website to make the complaint.

## Case study 2

In 2010, a CAB in the South East of England saw a 60 year old woman who was in dispute with a kitchen company. The company had quoted her over £3,000 for fitting kitchen doors, of which she had paid a £1,500 deposit using her credit card. The company promised they could supply doors that matched the one she showed them in another company's brochure but did not show her a picture of their kitchen. All they showed her was a door knob and a small sample of a door.

When the kitchen was delivered, the client was shocked to discover that the doors did not match the picture she had showed the salesman when agreeing to the purchase. When the client contacted the company to complain, they requested that she paid the full amount. The CAB advised the client to write one last formal letter of complaint to the company, asking for a refund within 10 days, otherwise further action for misrepresentation and breach of contract would be taken. The CAB also contacted the client's credit card provider. The credit card company asked the client for all details to be sent to them.

- 3.1.16 S.75 brings into stark focus the interdependency between the private rights of action for consumers and the public enforcement of regulatory bodies under the CCA; with one, in effect, giving rise to the other. Or, in other words, where consumers experience problems with firms or suppliers, this acts as an 'alert' to TSS and the OFT that there may be other consumers experiencing similar problems in the market. This is especially true when we consider that credit is now a widely accepted method of payment for most goods and services, and a part of most people's daily lives.
- 3.1.17 S.75 then sits as the cornerstone of UK consumer protection law, and it is notable that the new s.75A recently introduced by the CCD which speaks to the process that underlies the protections provided by s.75, reaffirms that the substance of s.75 was in contemplation by the EU when the CCD was adopted.
- 3.1.18 This interdependency between consumers' private rights of action and public enforcement is extended yet further by ss.40 and 140A of the CCA.

### *Unenforceable credit agreements*

CCA S.40 - any loans made by a trader lending without the right sort of licence cannot be enforced except with leave of the OFT.

### *'Unfair relationships' test*

CCA (CCA 2006) S.140A-140C - provides the court with wider powers to make refunds, award compensation, release security and rewrite agreements and liabilities,

“if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following:

(a) any of the terms of the agreement or of any related agreement;

(b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;

(c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

3.1.19 Both ss.40 and 140A also more directly tie consumer rights provided by the CCA to the OFT’s public enforcement powers, the OFT basing its licensing and other enforcement decisions on the evidence and legal interpretation of whether a firm has acted in a manner that gives rise to an unfair relationship between the firm and a consumer, which in turn would mean the firm has acted in a manner that is not “fit and proper” under s.25.

3.1.20 To summarise, the CCA regime goes much further in protecting consumers than the FSA’s COB rules which principally govern how a product or service is sold. This is partly as a result of the CCA COB provisions prescribing pre-contract disclosures or the form and content of credit agreements, but also, because CCA COB provisions are combined with the additional consumer rights that are conferred on consumers by the CCA itself, namely, ss.75, 40 and 140A.

3.1.21 It is because of these specific consumer rights that the CCA goes right to the “heart of things” for consumers; that it is ultimately a matter for the civil legal courts to determine how parties should resolve their difficulties, and which may further serve as the basis for the OFT and TSS to take public enforcement actions. Such close interaction of private and public enforcement is integral to the operation of the CCA regime in protecting consumers. It is not currently integral to the operation of the FSMA regime, although interestingly, and as we shall in section B below, there is some evidence that such interlinking is starting to happen.

### ***Enforcement and restitution***

3.1.22 As is the case for authorization and licensing, again both the FSMA and the CCA regimes have some similar enforcement powers but also some important differences.

#### *Enforcement powers*

FSMA Part XIV – ss.205-211 enables the FSA to impose unlimited fines, public censure, suspend permissions and withdraw approvals.

Part 8 of the Enterprise Act 2002 (EA 2002) – gives the FSA powers to seek an Enforcement Order (similar to an injunction) to stop firms engaging in practices that are harmful to the collective interests of consumers. Part 8 powers attach to the UTCCRs and CPRs

CCA S.25 – provides for the revocation of a CCA license (on an individual basis) if a firm is not “fit and proper” or under s.33A the OFT may impose license ‘requirements’. Breach of a requirement attracts a fine of up to £50,000

CCA Part 8 of the EA 2002– gives the OFT powers to seek an Enforcement Order (similar to an injunction) to stop firms engaging in practices that are harmful to the collective interests of consumers. Part 8 powers attach to the CCA, UTCCRs

and CPRs, and the OFT particularly considers these can be construed under the CCA 'Unfair relationships' test.

### *Restitution*

FSMA S.382 powers of restitution – on application to the Court the FSA may seek a restitution Order compelling a firm to compensate those who have suffered loss or who have been adversely affected by their actions. Compensation can be awarded to a class of consumers.

S.404 – recently amended, s.404 also enables the FSA to make rules (subject to formal public consultation) requiring firms to establish and operate consumer redress schemes. By virtue of being an industry scheme, the FSA is able to compel more than 1 firm at a time as well as to compensate a class of consumer.

CCA There are no powers of restitution for a class of consumer under the CCA. Neither is the OFT able to seek compensation on behalf of a class of consumer.

3.1.23 The enforcement powers under the CCA regime have a narrower scope and range than those found in the FSMA regime, and whilst, the OFT shares Part 8 enforcement powers with the FSA under the EA 2002, these too only extend as far as injunctive action to 'stop' firms from engaging in wrongdoing. The FSMA regime, on the other hand, is able to curb malpractice and address widespread consumer detriments on an industry-wide basis, including the ability to compensate across the piece, which has been evidenced in the past by the FSA's Pensions Mis-selling Review and, more recently through its interventions on Payment Protection Insurance (PPI).

## 3.2 **Unfair Terms in Consumer Contracts Regulations and Consumer Protection from Unfair Trading Regulations**

3.2.1 In addition to the CCA, the FSA and the OFT have 2 other main areas of mutual interest, and which also interact with the substantive provisions of the CCA. These are the Unfair Terms in Consumer Contracts Regulations<sup>13</sup> (UTCCR's) 1999 and the Consumer Protection from Unfair Trading Regulations<sup>14</sup> (CPRs) 2008. Both the UTCCRs and CPRs seek to define legal concepts of fairness, with the CPRs imposing specific obligations on firms not to mislead consumers through acts or omissions; subject them to aggressive or high pressure selling; or extract payments under duress or undue influence.

3.2.2 The OFT is the designated lead authority of the UTCCRs and CPRs with wrongdoing capable of being 'stopped' under Part 8 EA 2002 in a similar way to an injunctive action (see above). And, since both the FSA and the OFT have joint responsibility for assessing the conduct or behaviour of firms against both sets of Regulations, the FSA and the OFT may potentially cross over into one another's enforcement jurisdiction. More importantly, there is again the potential for substantive divergence should they subsequently adopt different approaches from one another. This is especially true in the context of the CPRs since the CPRs also include a general duty for firms not to treat their customer's unfairly, while one of the FSA's 'high-level' Principles for Business, namely Principle 6, is for 'Firms to pay due regard to the interests of its customer's and to treat them fairly'. Such divergence, if left unchecked, would lead to regulatory arbitrage.

3.2.3 In carrying out their regulatory responsibilities then, the OFT and the FSA have produced formal co-operation agreements, referred to as Concordats.<sup>15</sup> For the UTCCRs, the FSA considers the fairness of standard terms in financial services contracts issued by FSA-

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<sup>13</sup> <http://www.legislation.gov.uk/ukxi/1999/2083/contents/made>

<sup>14</sup> <http://www.legislation.gov.uk/ukxi/2008/1277/contents/made>

<sup>15</sup> FSA and OFT Concordats: Unfair Terms in Consumer Contracts Regulations 1999 [http://www.fsa.gov.uk/pubs/other/concordat08\\_fsa\\_offt.pdf](http://www.fsa.gov.uk/pubs/other/concordat08_fsa_offt.pdf) and; Consumer Protection from Unfair Trading Regulations 2008 [http://www.fsa.gov.uk/pubs/other/concordat\\_fsa\\_offt\\_08.pdf](http://www.fsa.gov.uk/pubs/other/concordat_fsa_offt_08.pdf)

authorised firms, or their Appointed Representatives (ARs), for FSA-regulated activities and the OFT considers the fairness of standard terms in all other financial services contracts, namely consumer credit, unless any of the 'conduct' issues raised under contract fall within the FSA's remit as competent authority under the Payment Services Regulations (PSRs) 2009.

- 3.2.4 For the CPRs, the OFT and FSA concordat explains that it "will consult and liaise with the OFT to reduce duplication of effort and promote appropriate action by the body best placed to lead with an issue (subject to an legal requirements or restrictions); as well as ... Have regard to the Primary Authority Principle and/or any Home Authority arrangements applicable". Since the FSA is already able to make reference to Principle 6, neither does the FSA see the need for additional rules in its Handbook, "because it already contains principles and rules that have the same effect as the UCPD"<sup>16</sup>. Misdemeanors under the CPRs are thus interpreted in the light of the FSA's Principle 6, and may act as a trigger for the wider range of regulatory tools available to the FSA under the FSMA,

"FSA will, in addition to its statutory obligations to the OFT under the EA02:

- Consider using powers under FSMA where appropriate
- Consider the use of all appropriate methods of resolution, whether statutory or not, before taking formal enforcement action under the EA02."<sup>17</sup>

- 3.2.5 Consumer groups have previously raised a number of concerns under the Regulations, which are of relevance to the future enforcement of the CCA. These include the rise in illegal money lending or loan sharks, the aggressive practices of debt management firms and pressure selling of goods to vulnerable and old people with these items being sold as part of a debtor-creditor-supplier agreement. To help set the operation of the Regulations in context, referenced below are a number of scenarios illustrating the types of difficulty vulnerable and old people, for example, have experienced in the mobility aids market,

"I went to this house, it was the scruffiest smelliest awful house you've ever seen in your life. So I sold him a dual Balmoral bed for £5,300. Went back [... and] sold him a Midi 4 Plus for £5,200 [a scooter which the company sold for only £3,200] and then a couple of days later I went back to deliver his scooter and managed to sell him a rise and recline chair for £4,600. So all together I got £15,000 out of that one customer."<sup>18</sup>

" When my mother said she could not afford the whole price [£1,700 for an adjustable chair, he offered her a credit arrangement ... He never told her the total price or the interest rate, merely saying it would cost her just £62 per month for five years, total cost £3,720. The market rate for similar chairs on the high street is around £600 - £800."<sup>19</sup>

"... A potential customer had to object more than 20 times before the salesman finally left two and a half hours after he had arrived"<sup>20</sup>

"Elderly people are often unaware of their rights, embarrassed about what has happened and reluctant to make a fuss. By the time family and friends find out about the problem, the cancellation period has passed."<sup>21</sup>

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<sup>16</sup> See FSA 'Our policy and approach' CP06/19

<http://www.fsa.gov.uk/Pages/About/What/International/ucp/index.shtml> And, PS07/6.

<sup>17</sup> As above, at footnote 12

<sup>18</sup> Law Commissions consultation: Consumer redress for misleading and aggressive sales practices, April 2011, para 10.37, p.142

<sup>19</sup> As above, para 10.40, p.142

<sup>20</sup> As above, para 10.41, p.143

<sup>21</sup> As above, para 10.44, p.143



3.2.6 The OFT currently receives an average 4,000 complaints per year about the aggressive and pressure selling of mobility aids and is currently investigating a series of enforcement actions.<sup>22</sup>

3.2.7 Were the FSA to take over responsibility for consumer credit, its regulatory framework and any enforcement activity that flowed from it would need to be capable of addressing these types of consumer credit detriment.

### 3.3 CCA 'Unfair relationships' test

3.3.1 Introduced by the amended CCA 2006, the CCA 'Unfair relationships' test enables a consumer to challenge a credit agreement in court on the grounds that the relationship between the creditor and the consumer is unfair. Whilst, it is for a court to decide whether there is indeed an unfair relationship, the OFT's Guidance on Unfair Relationships, Enforcement Action under Part 8 of the Enterprise Act 2002 (updated August 2011)<sup>23</sup> seeks to set out how the 'Unfair relationships' test interacts and relates to both the UTCCRs and CPRs. S.3 of the guidance, for example, states:

"Matters which, in the OFT's view, may give rise to an unfair relationship, and might trigger Part 8 enforcement action, are (for convenience) grouped under two broad headings - contract terms and business practices."<sup>24</sup>

3.3.2 and emphasises that whilst,

"a term may be unfair under the UTCCRs [this does not] necessarily give rise to an unfair relationship. For example, the term may be insufficiently central to the relationship between the parties as to make the relationship as a whole unfair to the borrower. This will depend upon the facts of the individual case."<sup>25</sup>

And, equally, that a term may not be unfair under the UTCCRs but may still warrant consideration of whether there is an 'Unfair relationship' within the meaning of the CCA.

3.3.3 With respect to the kinds of business practice which may give rise to an unfair relationship, the OFT lists other relevant legislation such as the CPRs and the Distance Selling Regulations<sup>26</sup> as matters for consideration. At the same time, the OFT Guidance sets these together alongside s.25 of the CCA. By way of reminder s.25 requires the OFT to assess whether a trader is 'fit and proper' to hold a credit licence based on evidence of whether they or any of their "employees, agents or associates (whether past or present), has engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper, whether unlawful or not"<sup>27</sup>.

3.3.4 Not only then does the OFT consider the CPRs may give rise to a private right of action to challenge whether there is an unfair relationship but also for the OFT to either (a) take Part 8 enforcement proceedings or (b) revoke a credit licence or impose requirements on the basis that the trader is no longer 'fit and proper' or behaving appropriately under s.25, or (c) both.

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<sup>22</sup> OFT Market Study into Mobility Aids, 2011 - More than 4,000 complaints in respect of mobility aids sales have been made to Consumer Direct in each of the last three years. In addition, OFT has found that complaints about unfair sales practices in this sector are highest for doorstep sales. Such experiences are often under-reported by consumers.

<sup>23</sup> Unfair Relationships, Enforcement Action under Part 8 of the Enterprise Act 2002, May 2008 (updated August 2011)

[http://www.of.gov.uk/shared\\_of/business\\_leaflets/enterprise\\_act/oft854Rev.pdf](http://www.of.gov.uk/shared_of/business_leaflets/enterprise_act/oft854Rev.pdf)

<sup>24</sup> As above, para 3.1, p.13

<sup>25</sup> As above, para 3.7, p.14

<sup>26</sup> Consumer Protection Distance Selling Regulations 2000

<sup>27</sup> CCA s.25(2A)(e) and as above, footnote 21, para 3.34, p.13

3.3.5 Since the FSA already has powers under the UTCCRs and CPRs, it would be sensible for the FCA to give consideration to the approach it would adopt when applying these, to the consumer credit market, along with the CCA 'Unfair relationships' test.

### 3.4 **OFT Guidance**

#### *The importance of being 'nimble'*

3.4.1 OFT Guidance is produced under s.4 and s.25A of the CCA which gives the OFT authority to produce information in the 'manner it sees fit'. So, for example, the OFT's Guidance on Unfair Relationships (as above) is part of the OFT's response to a diverse and fast moving financial services sector given that many smaller, high street or networked firms, including sole traders, shop retailers and car dealerships, require a greater degree of hand holding if they are to continue to be 'fit and proper'.

3.4.2 The OFT's Debt Management Guidance, September 2008<sup>28</sup> was also published in the wake of consumer concerns and following receipt of its new powers under the CCA 2006, whilst its draft guidance for credit brokers and intermediaries (a consultation document)<sup>29</sup> published earlier this year, was devised to implement key elements of the revised EU Consumer Credit Directive (2008/48/EC)<sup>30</sup> much of which was already covered by the CCA 2006, but as the EU and UK legal frameworks for consumer credit have become increasingly intertwined, so the Guidance sought to draw together a body of law with other related guidance previously published by the OFT, namely: *Non-status lending – Guidelines for lenders and brokers* (OFT192), *Consumer Credit Act 1974 – Section 155* (OFT301), *Second charge lending – OFT guidance for lenders and brokers* (OFT1105) and *Irresponsible lending OFT guidance for creditors* (OFT1107).

3.4.3 Para 1.4 of the draft guidance for credit brokers and intermediaries stated that the OFT's focus will continue to be on 'high risk' credit sectors, including some aspects of credit brokerage such as sub-prime credit brokerage and/or the brokerage of credit agreements in a consumer's home, "who will be subject to greater scrutiny at the application stage" with this objective being reaffirmed by the OFT's more recent publication of 2 further sets of guidance, one specifically for debt collection<sup>31</sup>, and the other as the final Guidance for brokers, intermediaries and the consumer credit and hire businesses.<sup>32</sup> Like its guidance on the 'Unfair relationships' test, both sets of guidance also now set out what the OFT considers would constitute unfair or improper business practices by reference to both the UTCCRs and CPRs, with the latter providing particular clarification of the use and operation of price comparison websites and aggregators.

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<sup>28</sup> OFT Debt Management Guidance, September 2008

[http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/credit\\_licences/oft366.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/credit_licences/oft366.pdf)

<sup>29</sup> Credit brokers and intermediaries – Draft OFT guidance for brokers, intermediaries and the consumer credit and hire businesses which employ or use their services, A consultation, June 2011

<sup>30</sup> This included the introduction of the definition of 'credit intermediary' (section 160A of the Consumer Credit Act 1974 as inserted by regulations 2 and 41 of the Consumer Credit (EU) Directive Regulations.

<sup>31</sup> 'Debt Collection' OFT Guidance for all businesses engaged in the recovery of consumer credit debt, July 2003 (updated October 2011)

[http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/consumer\\_credit/OFT664Rev.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/consumer_credit/OFT664Rev.pdf)

<sup>32</sup> Credit brokers and intermediaries – OFT guidance for brokers, intermediaries and the consumer credit and hire businesses which employ or use their services, November 2011

[http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/consumer\\_credit/oft1388.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/consumer_credit/oft1388.pdf)

## **Published/updated    OFT Guidance**

November 2011	OFT Guidance on brokers, intermediaries and the consumer credit and consumer hire businesses (OFT1388)
October 2011	Debt Collection Guidance (OFT664Rev1)
August 2011	Unfair relationships: Enforcement action under Part 8 of the Enterprise Act 2002, (May 2008) (OFT854Rev)
June 2011	OFT Debt Management Guidance (September 2008) (OFT366)
February 2011	OFT Guidance on Irresponsible Lending (March 2010)

3.4.4 Together with the CCA, OFT Guidance sets a baseline of consumer protection in the consumer credit sector that in light of the rapidly changing face of the consumer credit market seeks to act as the ‘nimble’ part of the regulatory framework that can subsequently be relied upon by many different and varied firms, and disseminated widely across the UK via the local TSS network.

3.4.5 As with the UTCCRs and CPRs, were responsibility for consumer credit to be passed to the FCA, again further consideration of this area would be sensible.

### **3.5 Industry Codes of Practice and guidance**

3.5.1 To further complement the legal framework, across the whole of the consumer credit sector, there are a number of voluntary industry Codes of Practice and corresponding guidance that help firms in their interpretation of different parts of the CCA.

3.5.2 Industry Codes feature in both the CCA and FSMA regimes but since they are treated by each regulator a little differently from one another, they have different ‘standing’; the OFT running an ‘approved Codes’ scheme and the FSA, which already has sanctionable COB rules, opting to ‘confirm’ industry guidance. The Codes are also perceived by other stakeholders, as distinguishable from one another, not necessarily because of their scope and coverage but owing to how each scheme is governed and/or operated.

3.5.3 A mapping of the different types of industry Code and guidance, including their scope and coverage, is attached at Annex 2 and has 3 sections:

- (i) the ‘standing’ of industry Codes and related guidance
- (ii) comparison of ‘Lending Codes’ and their relevance to the CCA
- (iii) comparison of ‘Collection and recoveries Codes’ and their relevance to the CCA

Annex 2 is not a definitive analysis of the Codes that exist in the credit sector, and neither does it seek to assess the relative merits of different Codes, but rather its aim is to help illustrate the ‘patchwork quilt’ effect of how industry initiatives interact with the CCA as well as the potential areas of overlap.

## **4. FSA regulatory models used in other consumer sectors**

4.1 In considering how the FSMA and CCA regimes compare with one another it is further helpful to take a look at the regulatory models used by the FSA in other consumer sectors. Here, we focus on the mortgage sector and requirements for payment service providers (PSPs) since these can be said to bear some resemblance to the credit brokers and intermediaries that operate in the consumer credit market.

### **4.2 Mortgage intermediaries**

4.2.1 Firstly, in respect of intermediaries, it is important to note that the CCD introduced a new definition of credit intermediary found under s.160A of the CCA, and requiring them to disclose the fees they charge consumers in making credit agreements available to them.

### *Initial Disclosures*

CCA Section 160A and Consumer Credit (EU Directive) Regulations 2010 - provides for credit intermediaries i.e. those who are:

- (i) recommending or making available prospective regulated consumer credit agreements, other than agreements secured on land, to individuals;
- (ii) assisting individuals by undertaking other preparatory work in relation to such agreements, or
- (iii) entering into regulated consumer credit agreements, other than agreements secured on land, with individuals on behalf of creditors.

must in their advertising, or other documentation, disclose whether they are acting independently, and in particular whether they work exclusively with a creditor. Credit intermediaries must also disclose the fees they charge consumers, as well as disclose the fees they charge to creditors "if the annual percentage rate of the total charge for credit prescribed under section 20 is to be ascertained by the creditor" (160A(5)).

- 4.2.2 These initial disclosures are similar to the ones found, for example, in MCOB 4, "A firm must ensure that, on first making contact with a consumer when it anticipates giving personalised information or advice, that it gives the consumer an Initial Disclosure Document (or Combined Disclosure Document) setting out their independent or tied status, and how it will be paid for its services." Yet, the responsibilities of consumer credit intermediaries are more concerned with the provision of pre-contractual (such as the SECCI) and other information to consumers so that they are able to make an informed choice about the credit agreements on offer, as provided by Article 5(6) of the CCD and s.55A of the CCA.
- 4.2.3 For completeness, s.145 of the CCA also defines credit brokerage as the effecting of introductions, and again, whilst most firms that currently engage in "credit brokerage" will also be credit intermediaries, in some cases a credit intermediary may not also be a credit-broker. So, someone who provides advice to prospective borrowers or assists them in filling in forms would be a credit intermediary (as long as there was a charge for the service) but this activity alone would not qualify as "credit brokerage" if that person did not introduce prospective borrowers to a creditor or credit-broker. Similarly, the display by a person of leaflets advertising the credit agreements of others (e.g. credit cards), or the display of advertisements in a newspaper or on a website, would not be considered the carrying out by that person of the activity of recommending or making available prospective credit agreements.<sup>33</sup> In recent times, credit brokerage, for example, has become increasingly evident in the Payday lending market.
- 4.2.4 Extension of the FSA's responsibilities to include mortgage advice and arranging, was decided by the Government in December 2001 and timed to coincide with the implementation of the Insurance Mediation Directive. At the same time, restrictions on existing COB rules for Appointed Representatives (ARs) – and to be applied to mortgage intermediaries - were also expanded so that intermediaries could become either tied to one provider or multi-tied across different providers and sell a wider range of services.
- 4.2.5 The FSA's rules for ARs are thus rooted in COB rules initially designed for the Independent Financial Advice (IFA) market when giving investment advice, and subsequently adapted for the mortgage (and insurance) intermediary market when giving

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<sup>33</sup> See BIS Guidance on Consumer Credit Regulations 2010, August 2010, paras 18.4-18.6, p.81 <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/10-1053-consumer-credit-directive-guidance.pdf>. See also OFT Guidance on brokers, intermediaries and the consumer credit and consumer hire businesses, November 2011, as above at footnote 32

mortgage advice, with COB rules intended to make consumers aware of whether the intermediary is offering a full or narrower product range.

- 4.2.6 Since an AR acts as an agent for a Principal, another firm that is FSA authorised and who accepts responsibility for any liabilities that might arise from the AR's business, the FSA sees its AR regime as one of the ways in which it can more readily exercise its 'risk based' approach to regulation (see para 5.2 below) and exert regulatory influence in the mortgage market as a whole. Principal firms generally tend to be much larger firms with market clout, and so are considered by the FSA as having more of a commercial interest or stake in adhering to its rules, an ethos which is presumably then passed down to its ARs, this then becoming more of a commercial imperative.
- 4.2.7 As Principal firms assume responsibility for the conduct of its ARs, so AR's are not required to hold capital as part of their operational capacity (although the Principal would usually require evidence that the AR remains financially sound). By, direct contrast, a directly authorised mortgage intermediary is required to hold capital. The FSA's capitalisation requirements for mortgage intermediaries are set out in the Prudential Sourcebook Book for Mortgage and Home Finance Firms and Insurance Intermediaries (MIPRU) and broadly calculated as a percentage of the volume of their business,

MIPRU 4.2.11

(1) If a *firm* carrying on *insurance mediation activity* or *home finance mediation activity* (and no other *regulated activity*) does not hold *client money* or other *client* assets in relation to these activities, its capital resources requirement is the higher of:

(a) £5,000; and

(b) 2.5% of the *annual income* from its *insurance mediation activity* or *home finance mediation activity* (or both).

(2) If a *firm* carrying on *insurance mediation activity* or *home finance mediation activity* (and no other *regulated activity*) holds *client money* or other *client* assets in relation to these activities, its capital resources requirement is the higher of:

(a) £10,000; and

(b) 5% of the *annual income* from its *insurance mediation activity* or *home finance mediation activity* (or both).

- 4.2.8 In its joint consultation document, the government estimates that "a significant proportion of the nearly 30,000 FSA ARs currently active as retail intermediaries are also licensed by the OFT for credit brokerage activities (for example, independent financial advisers; motor dealers; and other retailers brokering both credit and insurance)"<sup>34</sup> and so is considering whether AR should be extended to consumer credit. But, AR is not without criticism, the regulatory relationship between the FSA and ARs being perceived as too distant, especially considering the diverse nature of the credit market and the types of detriment experienced by consumers, as highlighted above, which require more of a hands on approach that can 'get to the heart of things' for consumers.
- 4.2.9 Equally, there are concerns that were too high capitalization requirements introduced for credit brokers and intermediaries, this might negatively impact on the credit market whereas the changing face of the consumer credit market suggests a need for something that will support competition, but which is also capable of being flexible enough to accommodate a wider range of evolving business models.

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<sup>34</sup> Joint consultation document, para 3.31 p.31.

### 4.3 Payment Service Providers

- 4.3.1 The regulation of Payment Service Providers (PSPs) became a part of UK law quite recently, following adoption of the EU Payment Services Directive (PSD) in 2009. Like the CCD, the PSD is a maximum harmonisation Directive aimed at creating a cross-border electronic payments market, or the Single European Payment Area (SEPA), and gives the FSA, as the competent authority, responsibilities for the authorisation and registration of PSPs, as well as for monitoring their conduct.
- 4.3.2 To implement the PSD, some changes were made to the FSA Handbook, such as for authorizations, FOS complaint handling, and the FSA's general enforcement approach, but the bulk of the provisions concerning firm conduct were 'copied out' through statutory instruments (SIs) as the Payment Services Regulations (PSRs).<sup>35</sup> Part 5 of the Regulations, for example, contains information requirements<sup>36</sup> and Part 6 contains rights and obligations.<sup>37</sup> Supplementary material is issued through industry guidance (as per Annex 2 attached).
- 4.3.3 The PSD further allows PSPs to offer preferential services to their customers provided that they do not risk non-compliance with the Regulations so they can choose to apply the requirements to products and services that are outside of scope. The scope of the PSD covers non-bank account (not cash only or cheque) payments. It does not cover bank account (not cash only or cheque payments) for which there used to be provisions in the Banking Code.
- 4.3.4 At the same time as implementing the PSD, the FSA introduced the Banking Conduct regime by writing COB rules known as the BCOBs<sup>38</sup>. BCOBs is underscored by the FSA's 'high level' Principles for Business, Principle 6, an approach considered by some as 'gold-plating' and counter intuitive to EU maximum harmonization. The remaining parts of the Banking Code, namely the provisions related to lending, fell into the 'Lending' Code(s). These continue to be monitored by the Banking Code Standards Board and the Finance and Leasing Lending Code Committee.

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<sup>35</sup> <http://www.legislation.gov.uk/ukxi/2009/209/contents/made>

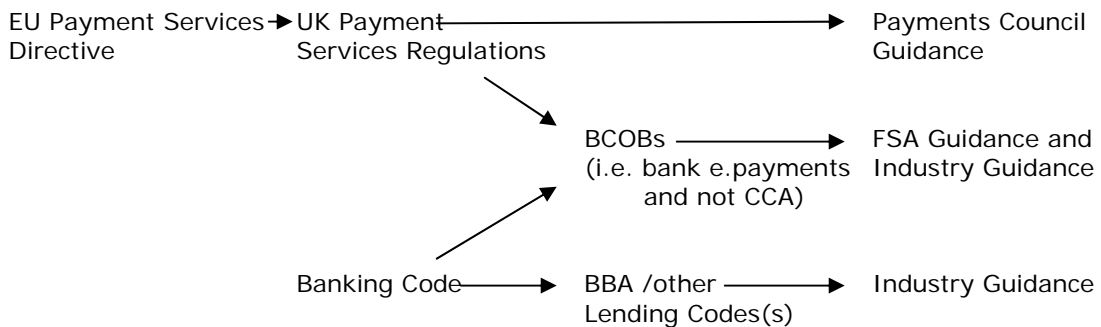
<sup>36</sup> information consumers must be given before the conclusion of a contract, and before and after a payment transaction takes place includes: the execution time for payments, its cost and a unique identifier.

<sup>37</sup> Key provisions under rights and obligations include: not charging customers for providing information required by the Regulations; ensuring that the personalised security features are not accessible to other persons and not sending unsolicited payment instruments (except as a replacement); an obligation to immediately refund the amount of the transaction where an error occurs; a legal obligation on the customer to use any payment instrument (e.g. a credit card) in accordance with its terms and conditions of issue, to take all reasonable steps to keep it secure, and to notify the issuer without undue delay of its loss, theft, misappropriation or unauthorised use.

<sup>38</sup> The Banking Conduct Regime took effect in November 2009 and is applied to the regulated activity of accepting deposits, and replaced the non-lending aspects of the Banking Code and Business Banking Code (industry-owned codes that were monitored by the Banking Code Standards Board).

- 4.3.5 Set out in the diagram below is the legislative journey of the PSD, along with its impact on the Banking Code.

*The legislative journey of the PSD*



- 4.3.6 Since many of the provisions contained in Parts 5 & 6 of the PSRs also relate to those contained in the CCA and CCD, again potentially giving rise to overlap, the government decided that where there is a conflict between the PSRs and the CCA or CCD, the consumer credit provisions would take precedence. In other words, some specific information requirements in the PSRs are “not applied where the contract under which a payment service is provided is also a regulated agreement under the CCA (regulation 34)<sup>39</sup>. There are also specific provisions of the rights and obligations requirements that are not applied where the contract under which a payment transaction is provided is a regulated agreement to which particular sections of the CCA applies (regulation 52)”.<sup>40</sup>

- 4.3.7 As is the case for directly authorised mortgage intermediaries, PSPs are also required to hold capital as set out in Schedule 3 of the PSRs. The requirements here are closely circumscribed around the different types of business model found in the e.payments sector along with the FSA having a legal discretion to adjust the ‘own funds’ requirements where it considers it appropriate.<sup>41</sup> Special provision is also given for ‘start-ups’, which is designed to spur competition in the e.payments market.

- 4.3.8 With respect to supervising compliance with the PSRs, a relatively ‘light’ prudential monitoring is undertaken through firms submitting electronic returns via the FSA’s electronic reporting system (GABRIEL), with supervision of compliance with COB rules being based on,

“primarily on information such as complaints that we receive from payment service providers’ customers and other interested parties ....Where a complaint to us about an alleged breach is significant or suggests a systemic problem, we are likely to follow up the complaint with supervisory action ... and we will discuss the matter with our Enforcement division”.<sup>42</sup>

- 4.3.9 What is interesting about this approach is that consumer complaints data may be used as an indicator of consumer detriment and thus has an acknowledged role in triggering potential FSA enforcement activity. Yet, equally, it is also worth noting that:

“For those credit institutions, authorised e-money issuers and other FSMA regulated firms who are relationship managed because of their other regulated

<sup>39</sup> namely, Regulations 41, 42 and 43 concerning statements, changes in contractual information and contract termination.

<sup>40</sup> The FSA’s role under the Payment Services Regulations 2009, Our approach, para 8.13, p.53 [http://www.fsa.gov.uk/pubs/other/PSD\\_approach.pdf](http://www.fsa.gov.uk/pubs/other/PSD_approach.pdf)

<sup>41</sup> PSRs, Schedule 3, s.12

<sup>42</sup> as above at footnote 35, para 12.6-12.8

activities, we will adopt the same complaints-led approach described above, but where payment services are a significant element of their activities, will consider those activities within the ongoing risk assessment and ARROW arrangements for those firms.”<sup>43</sup>

- 4.3.10 And so, whether the FSA does indeed then initiate any further action also depends on whether the FSA feels it is right to act given its broader risk based approach and the range of regulatory tools available. The FSA’s approach to regulation and supervision is outlined below in Section B.

## **Section B**

### **5. Driving firm behaviour**

5.1 Since the regulatory framework and regulation of firms is only effective as it is enforced, or produces good outcomes for consumers, in addition to the comparative analysis of the FSMA and CCA regimes set out above, investigation into the respective enforcement approaches of the FSA and OFT was also undertaken. For the FSA, we consider the FSA’s risk based approach to regulation and supervision, its referral criteria for enforcement and some of its past enforcement activity. Whilst, for the OFT, we consider the OFT and TSS structural arrangements, alongside a targeted, risk based and local approach to regulation. In the main, and perhaps not unsurprisingly, this shows some marked differences in regulatory styles and culture but where there are useful consumer lessons that can be learned from one another.

5.2 Finally, in the latter part of this section, we consider the role of firm complaint handling in securing good outcomes for consumers and the FSA’s adoption of complaints-led strategies.

#### **5.3 The FSA’s risk based approach to regulation and supervision**

5.3.1 The FSMA regime essentially takes the *regulator to firm* relationship as its starting point and adopts a ‘risk based’ approach to regulation, which has 2 key elements:

- (a) Supervision built around the FSA’s statutory objectives and ARROW risk framework, and
- (b) Enforcement, undertaken by the FSA’s Enforcement and Financial Crime Division usually following referral from a firm’s supervisor (i.e. ‘centrist’ and regulator led)

5.3.2 The FSA’s statutory objectives are (1) market confidence – maintaining confidence in the UK financial system (1A) financial stability - contributing to the protection and enhancement of stability of the UK financial system (2) raising public awareness (3) consumer protection - securing the appropriate degree of protection for consumers; and (4) the reduction of financial crime - reducing the extent to which it is possible for a regulated business to be used for a purpose connected with financial crime.

5.3.3 Regulatory attention is given to firms both as viable business entities as well as to their business conduct when providing services to consumers, with each authorised firm and its activities being scored on the basis of impact of scale (severity of the effect on consumers and the market if risk was to crystallise) and probability (likelihood of risk crystallizing). Each score determines how the FSA allocates its resources, along with the precise nature and intensity of the ensuing FSA supervisory relationship. In effect, this means that the level of supervision received by each firm under the ARROW is dependant on the ‘relative’ risk each firm, along with its activities, when set against all other firms

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<sup>43</sup> as above at footnote 35, para 12.15



from across the whole of the financial services sector and their activities, pose to the FSA's statutory objectives.

5.3.4 The supervisory relationship is thus essentially one where supervisors have a lot of direct contact with firms but where there is little to no direct contact with consumers.

5.3.5 Fundamental to the FSA philosophy is that regulatory interventions should be proportionate to the risk they seek to address, and that it is impossible, indeed, undesirable to remove all risk and failure from the financial system. This philosophy or culture further underscores the often competing tensions across the FSA's current statutory objectives; namely, that of financial stability and market confidence on the one hand versus consumer protection on the other.

5.3.6 Small firms<sup>44</sup> such as those that would comprise the bulk of the consumer credit sector, are considered to be 'low risk' individually but, when taken together, may pose a 'collective risk', so small firms do not have a specific risk assessment or risk mitigation programme as do larger firms, instead being monitored by a combination of baseline monitoring (e.g. RMAR regulatory returns (2 yearly) or questionnaires), data analysis to identify collective risks, and thematic or sector-wide reviews. By adopting this approach, the FSA thus considers that the behaviour of small firms can be improved on an industry basis, either through the rule making process or, by communicating the results of thematic or sector-wide results to the industry using the FSA website and other communications media such as FSA roadshows.<sup>45</sup> However, it is worth noting that the FSA has, in the past (2008-09), also adopted what has been referred to as the enhanced supervision strategy for (2,000) small firms which focused on increased supervision of, and contact with, small firms on a targeted, regional basis (Northern Ireland, North West, West Midlands and South West) with all four regions subsequently resulting in enforcement investigations.<sup>46</sup>

#### 5.4 **FSA referral criteria for enforcement**<sup>47</sup>

5.4.1 In addition to the supervisory process, FSA enforcement activity may be undertaken usually following a referral from FSA supervision. As with the ARROW risk framework, FSA supervisors are also guided by a set of referral criteria that flow from the FSA's 4 statutory objectives, with the referral criteria including the following:

- Has there been actual or potential consumer loss/detriment?
- Is there evidence of financial crime or risk of financial crime?
- Are there actions or potential breaches that could undermine public confidence in the orderliness of financial markets?
- Are there issues that indicate a widespread problem or weakness at the firm/issuer?
- Is there evidence that the firm/issuer/individual has profited from the action or potential breaches?
- Has the firm/issuer/individual failed to bring the actions or potential breaches to the attention of the FSA?
- Is the issue to be referred relevant to an FSA strategic priority?
- If the issue does not fall within an FSA strategic priority, does the conduct in question make the conduct particularly egregious and presenting a serious risk to one of the FSA's Objectives?
- What was the reaction of the firm/issuer/individual to the breach?

*Overall, is the use of the enforcement tool likely to further the FSA's aims and*

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<sup>44</sup> The FSA uses this approach to regulate its 20,000 small firms.

<sup>45</sup> <http://www.fsa.gov.uk/pages/Doing/Regulated/supervise/index.shtml>

<sup>46</sup> [http://www.fsa.gov.uk/pubs/annual/ar08\\_09/enforcement\\_report.pdf](http://www.fsa.gov.uk/pubs/annual/ar08_09/enforcement_report.pdf),

para 12, p.4

<sup>47</sup> <http://www.fsa.gov.uk/pages/Doing/Regulated/Law/criteria.shtml>

### *Objectives?*

Specific reference is also made to activity that may emanate from across borders or other jurisdictions.

- Does the suspected misconduct involve an overseas jurisdiction? If so, would enforcement action materially further investor protection or market confidence in that jurisdiction?

5.4.2 So, as with the supervisory process (underpinned by the ARROW framework), any potential enforcement activity is again prioritised according to the scale, severity and probability of the risk presented by firms' behaviour to the FSA's statutory objectives as they sit together as a whole.

### 5.5 **FSA withdrawal of approvals and financial crime**<sup>48</sup>

5.5.1 Similar to the OFT licensing provisions under the CCA, a key power available to the FSA where there are concerns about the "fitness and propriety" of an approved person, is to issue a prohibition order or withdraw FSA approval.<sup>49</sup> The criteria for assessing the 'fitness and propriety of an approved person are set out in FIT 2.1 (honesty, integrity and reputation) FIT 2.2 (competence and capability) and FIT 2.3 (financial soundness), alongside whether and to what extent the approved person has failed to comply with the FSA's Statement of Principles for approved persons (APER 2).<sup>50</sup> Listed below are examples of the types of behaviour which have previously resulted in the FSA deciding to issue a prohibition order or withdraw the approval of an approved person with example (5) being reflective s.25(2A)(e) of the CCA.

1. Providing false or misleading information to the FSA; including information relating to identity, ability to work in the United Kingdom, and business arrangements;
2. Failure to disclose material considerations on application forms, such as details of County Court Judgments, criminal convictions and dismissal from employment for regulatory or criminal breaches. The nature of the information not disclosed can also be relevant;
3. Severe acts of dishonesty, e.g. which may have resulted in financial crime;
4. Serious lack of competence; and
5. Serious breaches of the Statements of Principle for Approved Persons, such as failing to make terms of business regarding fees clear or actively misleading clients about fees; acting without regard to instructions; providing misleading information to clients, consumers or third parties; giving clients poor or inaccurate advice; using intimidating or threatening behaviour towards clients and former clients; failing to remedy breaches of the general prohibition or to ensure that a firm acted within the scope of its permissions

5.5.2 Of course, all of the above only really sets out the enforcement theory behind the FSA's enforcement approach, whereas for supervision and enforcement to be effective, it is important to be able to see how theory translates into practice, which is better illustrated by the following 2 case studies.

#### **Case study 1 – FSA enforcement in the mortgage sector**

5.5.3 An example of how the FSA's approach to enforcement has worked in practice is its recent high profile activity – and part of the FSA's intensive supervision and enforcement approach - aimed at tackling mortgage fraud, following the introduction of its Information

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<sup>48</sup> FSA Handbook, Enforcement Guide 01.08.11, paras 9.8 and 9.12, pp 52-53

<sup>49</sup> and where the FSA considers private warning, public censure or financial would be inadequate.

<sup>50</sup> Issued under s.64 of FSMA

from Lenders Scheme (ILS). The ILS is a voluntary scheme where mortgage lenders supply information to the FSA about dishonesty and other misconduct in the mortgage sector, which can be used to determine where enforcement action may lie.

FSA newsletter "Mortgage Lender's round-up", Issue 4, March 2010

"Over the last four years, IFL has generated 700 alerts about mortgage intermediaries. We have opened 100 enforcement cases, which has resulted in 80 mortgage intermediaries being banned and fines of over £1 million.

We will normally refer intermediaries who benefit from the proceeds of mortgage fraud to the police, as they pose the greatest risk to the financial system. However, we consider each case individually and work with law enforcement agencies so as many dishonest intermediaries are brought to justice as effectively as possible.

We use a risk based approach when choosing which IFL referrals to investigate as enforcement cases. We resolve many IFL alerts by working with you or by asking intermediaries to leave the industry. As more lenders share intelligence on intermediaries with us, we aim at making the mortgage market a more hostile place for criminals to operate."<sup>51</sup>

As well as lenders, the FSA has also collaborated with numerous police forces across the UK, resulting in successful police prosecutions. Failings have included: lying to the FSA, failing to take reasonable steps to prevent their businesses from being used to commit mortgage fraud, and a serious lack of competence and capability to run an FSA-authorized firm.

In January 2011, the numbers of mortgage intermediaries banned by the FSA had risen to 101 intermediaries, with the geographical breakdown being:<sup>52</sup>

London & South East – 53 prohibitions  
North West & Wales – 20 prohibitions  
Midlands – 6 prohibitions  
South & South West – 6 prohibitions  
Northern Ireland – 4 prohibitions  
Scotland – 2 prohibitions

### **Case study 2 - Financial crime and the FSA's unauthorised business department**

- 5.5.4 In addition, in the area of financial crime, which sits slightly to the side of the FSA's usual processes, although the FSA has no detailed rules in this area, the FSA nevertheless has responsibility for the obligations imposed on firms set out in the law, with the FSA recently launching a number of consultations to prioritise financial crime and to drive firms into tackling this 'from the inside'.

For the most part, this has been as result of the rise in criminal activity arising from overseas, the FSA thus considers that its current priorities are: (i) to examine the role of banks in countering money laundering and unauthorized business dependent on payments to and from the UK, and; (ii) protecting consumers through its unauthorized business department with the FSA taking actions in cases of large scale scams, namely, "fake" collective investment schemes and share sale fraud or overseas 'boiler rooms'.<sup>53</sup>

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<sup>51</sup> <http://www.fsa.gov.uk/pubs/newsletters/mlru4.pdf>

<sup>52</sup> CCL Compliance Review, January 2011

<sup>53</sup> See speech by Tracey McDermott, Acting Director, Enforcement and Financial Crime Division, 22 June 2011

In June this year, after a 2 year investigation, the FSA's unauthorized business department won its first criminal conviction for 'boiler room' fraud whilst civil proceedings in the High Court are being taken against a number of unauthorised land bank firms.<sup>54</sup> Along side criminal and civil enforcement actions, supplementary enforcement activity has also included issuing warnings to shareholders,<sup>55</sup> communicating through the media and consumer education, all considered important as preventative measures and to raise consumers' general awareness.

5.5.5 It is worth noting that the FSA's Enforcement Guide (ENF) has recently been amended in August 2011 to specifically include unauthorized firms.

## 5.6 **OFT and TSS targeted, local and risk based approach to regulation**

5.6.1 By contrast to the FSA's approach to supervision and enforcement, the CCA statutory provisions principally govern the *firm to consumer* relationship, and not with how the OFT interacts with the firms it regulates (i.e. to monitor the financial prudence or ongoing business viability of a firm). The OFT's primary responsibility then is to issue licenses, and to work with local TSS to ensure that firms' treatment of consumers adheres to the provisions of the CCA.

5.6.2 The CCA threshold conditions for award of a consumer credit licence historically focused on determining whether the applicant licensee is a 'fit and proper' person, verified primarily through public record checks and checks for criminal convictions.

5.6.3 With the introduction of new licensing provisions in 2006, however, the OFT has, more recently, been able to take into account applicant licensees' "skills, knowledge and experience in relation to the consumer credit market", and so has moved more towards a targeted, local approach to regulation; requesting additional information and intelligence from the relevant TSS each time it receives an application to see what information they, and the rest of the TSS network, hold on the firm and key individuals involved with it.<sup>56</sup> Firms who intend to operate 'high risk' activities are also effectively put on notice that they may be subject to an on-site inspection by the OFT and/or local TSS at any time.<sup>57</sup>

5.6.4 In resource terms, the OFT credit licensing regime is also self-funding, the OFT issuing approximately 7,000-8,000 new licences each year, and renewing between 6,000-7,000 (5-yearly) licences per year<sup>58</sup> with the cost of a credit licence being very low by comparison to other sectors:

*For sole traders*

£435- Consumer Credit Licensing Fee

£150 - CCJ Levy

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<sup>54</sup> FSA/PN/062/2011, 29 June 2011

<sup>55</sup> Warning to shareholders – Boiler Room Scams [www.fsa.gov.uk/pubs/other/scams\\_leaflet.pdf](http://www.fsa.gov.uk/pubs/other/scams_leaflet.pdf) and Carbon credit trading schemes [www.fsa.gov.uk/Pages/Consumerinformation/Scamsandwindles/investment\\_scams/Carbon-credit/index.shtml](http://www.fsa.gov.uk/Pages/Consumerinformation/Scamsandwindles/investment_scams/Carbon-credit/index.shtml)

<sup>56</sup> OFT estimate that roughly half of all the cases which were referred for further investigation at application stage were as a result of intelligence provided by TSS, with around half of these again leading to formal action by the OFT. However, the OFT point out that the data set contains a lot of noise so this could not be confirmed at the time of publication.

<sup>57</sup> [http://www.of.gov.uk/shared\\_of/business\\_leaflets/credit\\_licences/of147.pdf](http://www.of.gov.uk/shared_of/business_leaflets/credit_licences/of147.pdf)

See Consumer Credit Licensing – General guidance for licensees and applicants on fitness and requirements (OFT 969) for more information on OFT's categorization and approach to credit risk

<sup>58</sup> [http://www.of.gov.uk/shared\\_of/annual\\_report/2011/annexe-b.pdf](http://www.of.gov.uk/shared_of/annual_report/2011/annexe-b.pdf)

*For a partnership, company or other organisations*

£1075 - Consumer Credit Licensing Fee

£150 - CCJ Levy

- 5.6.5 Where a licence is breached, the OFT can either issue a notice to refuse or revoke a licence, impose licence “requirements” followed by a financial penalty of up to £50,000, or a warning letter should any “requirements” subsequently be breached.<sup>59</sup>
- 5.6.6 So, for example, and as resources would allow, the OFT has, in the past, taken a series of licensing related actions specifically to target the “rapid growth in new entrants in the fee-charging debt management sector,”<sup>60</sup> or those firms masquerading as charities and charging high fees for ‘debt solutions’ commonly referred to as ‘look-alike’ websites, between April 2008 and June 2010, the OFT taking 37 formal actions, either by issuing license requirements or the revocation and refusal of licences held or applied for.
- 5.6.7 Because the consumer credit market is so diverse, however, licence revocation can often be too lengthy a process when tackling industry or systemic problems, since this necessarily has to be undertaken on a firm by firm basis. In cases of severe detriment, such as when consumers are subject to aggressive trading practices or practices that border “on the margins”, licence revocation may also be an inappropriate response, instead calling for enforcement activity also at the local level; such that the identification of enforcement priorities and the resource implications these raise, assumes a greater significance.

## 5.7 National priorities and triggers for local enforcement

- 5.7.1 Local TSS have a range of contacts with consumers and inherent to the OFT and TSS targeted, local approach is strong collaboration, including the logging of consumer complaints, as well as all consumer contacts, onto the Consumer Direct database. Many consumers are often unwilling to complain when the sums involved are relatively small or because they are ‘too proud’ and don’t want to make a fuss. They may also view the complaints process as a ‘step too far’ which means that if complaints data were recorded on its own, this would only provide a small percentage of what is really happening in the consumer credit market as a whole.
- 5.7.2 Prior to 2004, the 197 individual TSS dealt with complaints and queries directly and all data was held locally, meaning that it could not be aggregated and was of limited use for intelligence purposes. The Consumer Direct database (soon to be transferred to Citizens Advice and adopt the TSS FLARE operating system), however, brings consumer complaints information, including consumer credit complaints, received by TSS into a single database and is now interrogated by a wide range of users.
- 5.7.3 The OFT Annual Report,<sup>61</sup> for example, lists 2 categories of credit complaint that in 2010-2011 amounted to:

Hire and unsecured credit	12,199
Ancillary credit	18,688

This was out of a total of 1.4 million contacts and 1.05 million recorded cases.

- 5.7.4 The Consumer Direct database also sits alongside the OFT’s National Intelligence Model (NIM), or pooled data intelligence, with the NIM being used to support OFT and TSS

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<sup>59</sup> the latter being relatively new powers designed to introduce flexibility into the CCA enforcement regime, and created by the amended CCA 2006.

<sup>60</sup> para 1.6 OFT Debt Management Guidance, Sept 2008

<sup>61</sup> [http://www.of.gov.uk/shared\\_of/annual\\_report/2011/annexe-f-comps.pdf](http://www.of.gov.uk/shared_of/annual_report/2011/annexe-f-comps.pdf)

operational collaboration through the provision of secure email facilities, electronic uploading of incident reports and the collection of other documentary evidence and intelligence about firms. The NIM based approach effectively means that CCA activity can be coupled with TSS intelligence more generally, given TSS responsibilities for such things as weights and measures, counterfeit goods, and car odometer readings/2<sup>nd</sup> hand car sales. For example, over the last year, there has been rising concern over the use of 'log book loans' or Bills of Sale usually secured on cars, which, as with the mobility aids market and s.75, has also served as an alert to TSS of the potential for other poor credit practices to exist in the credit sector.<sup>62</sup>

- 5.7.5 By sharing intelligence and interrogating the NIM, the OFT and the TSS are able to identify key enforcement priorities and to allocate resources accordingly with the local TSS network effectively being 'leveraged' to gain as broad intelligence and enforcement coverage as possible, especially now that consumer scams are becoming more easily scalable and operate across Local Authority boundaries. So, in practical terms,

*"[The OFT and the TSS] generally act in different ways and in different courts. The OFT takes largely civil cases, often relying on legislation such as the Unfair Terms in Consumer Contract Regulations 1999 (UTCCRs) which can only be used in the civil courts. By contrast the very large workload carried by the TSS consists overwhelmingly of criminal action in the magistrates and Crown courts. While TSS take hundreds of criminal prosecutions under consumer protection law each year, since 2006 only four cases have been taken by TSS solely under the UTCCRs. In comparison the OFT's cases have often sought to clarify law through the higher courts and even the European Court of Justice."*<sup>63</sup>

- 5.7.6 Under the CCA there are a wide range of criminal actions available to the OFT and TSS including trading without a consumer credit licence, advertising infringements and carrying on a business under a name not specified in a licence, with criminal sanction being used "save in exceptional cases, only after exhausting other options."<sup>64</sup> And, as there will always be those who operate illegally or "on the margins" only the threat of arrest and imprisonment is an effective deterrent,<sup>65</sup> civil rights of action on their own being unlikely to affect the economic viability of the scam or activity, especially where traders commit a string of similar, but different offences, each one being a 'first' offence; are aggressive towards consumers; and/or are targeting and exploiting vulnerable consumers.

- 5.7.7 It has been acknowledged that there is room to improve and clarify OFT and TSS intelligence and how cases that cut across OFT and TSS responsibilities are dealt with to minimise the risk of an enforcement gap at the regional or national level. A National Audit Office (NAO) report published in June this year, for example, found that only 50 per cent of the 197 TSS across England have committed to using the NIM database with 30 TSS committed to using an alternative. Yet, were the CCA were to be brought into the FSMA regime, it would still seem prudent to continue to leverage off the TSS network, given their wider range of consumer protection responsibilities and expertise in dealing with unscrupulous parts of the consumer credit market.

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<sup>62</sup> A voluntary Code of practice for Bills of Sale is administered by the Credit Services Association. Whether there should be a mandatory Code of practice for Bills of Sale is being kept under review by the BIS.

<sup>63</sup> OFT response: Empowering and protecting consumers: consultation on institutional changes for the provision of consumer information, advice, education, advocacy, and enforcement, September 2011, para 4.2, p.31

<sup>64</sup> See Criminal Liability in Regulatory Contexts, Response to the Law Commission, November 2010, para 2.1, p.6

<sup>65</sup> as above at footnote 56, para 3.5, p.10

*Plugging enforcement gaps*<sup>66</sup>

5.7.8 With only 9 per cent of local TSS receiving more than 15 per cent of their annual budget from outside their local authority TSS enforcement can be fragmented by system incentives to deliver against local priorities, and not those identified via Consumer Direct and the NIM. To help plug these enforcement gaps, the BIS established a number of regional projects to operate across Local Authority boundaries, 3 of which are pertinent to consumer credit, as set out in the table below.

5.7.9 Excerpt from NAO report "Protecting consumers – the system for enforcing consumer law"<sup>67</sup>

Project	Aim	BIS funding cost
Illegal Money Lending (i.e loan sharks)	Curbing unsustainable lending to protect consumers from financial malpractice	£5.2 million per annum until March 2012
Scambusters	Targeting the hardest to tackle scams and rogue traders - doorstep crime - car sales and servicing - deceptive selling techniques - homeworking and other 'get rich' quick schemes - cowboy builders doing unnecessary and shoddy work - large scale organized counterfeiting operations	£2.7 million per annum until March 2012
E-crime	Enhancing the system capability to tackle online protection issues	£1.3 million in 2010-11 split between the TSS and OFT

5.7.10 With respect to Illegal Money Lending (i.e. loan sharks), the NAO report found that although consumer detriment was hard to quantify with individual complaints being rare, a recent estimate in light of the current economic climate, was in the region of £373 million annually, whereas the project had led to 500 illegal money lenders being arrested, 48 convictions for unlicensed trading and an estimated £18 million of financial savings.<sup>68</sup> Scambusters has also helped to maintain cross-border capability and highlighted that the interaction between TSS and other enforcement authorities is critical, particularly as local government funding for TSS activity is expected to decline from an estimated £213 million in 2009 to an estimated £140 –170 million in 2014. Spending on TSS across England has, for example, already started to fall by 11.4% and in Wales by 7.4%, and some TSS are starting to charge companies for regulatory advice<sup>69</sup> potentially creating a conflict for themselves and, more importantly, for consumers.

5.7.11 If the current enforcement gap is to continue to be closed and the effectiveness of national and cross-border enforcement for consumer credit improved, a longer term, intelligence-led enforcement strategy<sup>70</sup> with local elements is needed otherwise the types of detriment experienced by consumers "on the margins" such as those seen in the

<sup>66</sup> "Protecting consumers, the system for enforcing the law, National Audit Office report, June 2011 part 3, p.22 [http://www.nao.org.uk/publications/1012/protecting\\_consumers.aspx](http://www.nao.org.uk/publications/1012/protecting_consumers.aspx)

<sup>67</sup> at p.24

<sup>68</sup> See also BIS evaluation of illegal money lending projects undertaken in 2007 <http://www.bis.gov.uk/files/file37025.pdf>

<sup>69</sup> [http://www.icanet.org.uk/documents/HA\\_75\\_Aut11\\_final.pdf](http://www.icanet.org.uk/documents/HA_75_Aut11_final.pdf)

<sup>70</sup> See also <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/e/11-970-empowering-protecting-consumers-consultation-on-institutional-changes> para 34, p.11

mobility aids markets and arising out of section 75, will be left unchecked. TSS funding is undoubtedly a key issue but one where a 'distance' created by a third party could help to ensure the necessary detachment for impartiality.

5.7.12 Attached at Annex 3 is a diagram showing the actors involved in the enforcement of consumer credit

## 5.8 The Consumer Credit Jurisdiction and 'mass claims'

5.8.1 How firms handle consumer complaints is a key measure of whether they are operating effectively as firms, as well as whether there is a well functioning and competitive consumer market. As is also shown by the operation of the CCA, when consumers make complaints and seek compensation from a firm, this also brings into stark focus a necessary interdependency between private rights of redress on the one hand and public enforcement on the other; with one, in effect, giving rise to the other. When seeking to drive good firm behaviour then, supervision and enforcement is only one part of the equation.

5.8.2 In brief, the complaints of FSA authorised firms must be handled in accordance with FSA Principle 6 and its DISP rules. Where consumers are not happy with a complaint they make directly to a firm, they are further able to escalate their complaint to the Financial Ombudsman Service (FOS). In 2006, the CCA added to the FOS compulsory and voluntary jurisdictions, creating the 'consumer credit jurisdiction' (CCJ) for OFT firms with standard consumer credit licences not authorised by the FSA. While, the consumer credit complaints of those firms also authorised by the FSA, are (for the purpose of fee payment) still covered by the FOS 'compulsory' jurisdiction.

5.8.3 As firms process their complaints, the FOS, the FSA and the OFT must have close operational relationships because, under the FSMA:

- (1) The FSA has powers not only to make rules determining how most other types of financial services (save consumer credit) are sold but also rules determining how firms should manage their complaints when something goes wrong which thus includes those firms who sell consumer credit under a licence from the OFT but who are also authorized by the FSA.
- (2) Whilst, the FOS Ltd (with the consent/approval of the FSA) is responsible, among other matters for:
  - (a) making rules or standard terms for the CCJ and voluntary jurisdictions on complaint handling by respondents; activities covered; complainants eligible; time limits; and limits on awards;
  - (b) making rules or standard terms for the consumer credit jurisdiction and voluntary jurisdictions on: ombudsman procedures; awards of costs of interest and case fees; and
  - (c) determining the sums to be recovered by the OFT from licensees to be establish and operate the consumer credit jurisdiction"

with further co-operation over these as well as any issues arising out of the substance of consumers' complaints becoming particularly necessary in those situations where the FSA or OFT, "is considering supervisory or regulatory action, and at the same time, the FOS Ltd's ombudsman scheme is receiving a significant number of cases concerning the same issue".<sup>71</sup>

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<sup>71</sup> <http://www.financial-ombudsman.org.uk/about/MOU-april2007.pdf> FOS-FSA Memorandum of Understanding, 2007, para 10



5.8.4 To help develop this co-operation, the FSA and the FOS developed a process for handling these Issues with Wider Implications (IWI) - with the OFT joining shortly afterwards. The IWI process could be triggered by the FSA, the FOS or an interested party (a consumer or industry body) where they felt a particular issue was likely to impact a number of consumers of firms and better investigated or managed on an industry basis. For example, it was the growth in on-line consumer and electronic money payments,<sup>72</sup> and firms' uncertainty about how to resolve their complaints that led to the FSA and the FOS examining whether s.75 of the CCA gives a credit-card holder a claim against the card-issuer when the card is used to fund a payment through an electronic money institution, such as a purchase through eBay, and the person ultimately receiving the payment details.

5.8.5 In other words, the FSA, the OFT and the FOS not only have a role in ensuring complaint resolution for consumers on an individual basis, but also on a broader or industry-wide basis when complaints raise IWIs.

*The FSA expects firms to analyse and reconsider their approach to handling complaints in light of the decisions that the ombudsman service has given them on similar previous cases. It is not acceptable behaviour for firms to reject complaints they receive, despite knowing that these would be upheld if referred to the ombudsman service, as consumers would be treated unfairly.*

*The primary role of the ombudsman service is to resolve the complaints that are referred to it. However, the ombudsman service also provides feedback to firms and consumers and, in particular, regulators about the lessons learned from the cases it deals with. This helps firms and consumers resolve cases themselves and encourages the elimination of the sources of complaint<sup>73</sup>*

5.8.6 Since FOS decisions are also determined on the basis of what the FOS considers to be "fair and reasonable in all the circumstances". As such, the FOS does not set legal precedent but regulated firms will nevertheless want to have some idea of the approach FOS may adopt. The FOS already issues technical notes on key issues such as the one copied below on new s.75A of the CCD, and it is currently giving consideration to how it can best publish its decisions without these being perceived as setting legal precedent.

#### **Case study – FOS technical note - section 75A<sup>74</sup>**

Section 75A applies from 1 February 2011 – through the implementation of the *Consumer Credit Directive*. It supplements section 75, rather than extending it. This note is not intended to provide a full explanation of the law. But put very simply, section 75A will normally have effect where all of these things apply:

- the goods or services were purchased under a credit agreement specifically arranged for the purchase of these goods or services. Credit card payments will not normally be covered by section 75A, because the credit agreement under which a credit card is provided does not relate to the supply of *specific* goods or services – the card can be offered in payment for *anything* the consumer chooses;
- the credit agreement is *within* the scope of the *Consumer Credit Directive*, but *outside* the scope of s.75;

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<sup>72</sup> [http://www.financial-ombudsman.org.uk/publications/technical\\_notes/goods-and-services-bought-with-credit.html](http://www.financial-ombudsman.org.uk/publications/technical_notes/goods-and-services-bought-with-credit.html)

<sup>73</sup> FSA DP10/1: Consumer complaints (March 2010), paras 3.29-3.30, p.12  
[http://www.fsa.gov.uk/pubs/discussion/dp10\\_01.pdf](http://www.fsa.gov.uk/pubs/discussion/dp10_01.pdf)

<sup>74</sup> [http://www.financial-ombudsman.org.uk/publications/technical\\_notes/goods-and-services-bought-with-credit.html](http://www.financial-ombudsman.org.uk/publications/technical_notes/goods-and-services-bought-with-credit.html)

- the amount of the credit agreement is not more than £60,260; *and*
- there has been a breach of contract by the supplier, involving the goods or services not being provided *at all*, only being supplied *in part*, or not being supplied as specified in the contract.

Before making a claim against the credit provider under section 75A, the borrower must first take reasonable steps to get the provider of goods or services to settle the claim.

5.8.7 It is notable that a review of the FOS undertaken by Lord Hunt in 2007<sup>75</sup> concluded that it is in the interests of consumers that “there should be a presumption of transparency”<sup>76</sup> and that the FOS should publish its decisions unless there is a good reason not to.

## 5.9 FSA complaints-led strategy

5.9.1 Over the last few years, the FSA has, more generally, increased its regulatory activity in the area of complaint handling following concerns that not enough was being done by senior management to prioritise complaints, push up their firm’s standards or identify systemic issues by learning from complaint outcomes.

5.9.2 The FSA’s Discussion Paper DP 10/1 Consumer complaints (emerging risks and mass claims) and subsequent feedback statement<sup>77</sup> forms a key part of this increased activity, setting out how the FSA is strategically repositioning itself to respond to the rise in consumer mistrust as a result of the banking crisis and subsequent economic downturn. Wider work has included a review of complaint handling in banking groups, published in April 2010, consideration of how best complaint data should fit into FSA regulatory policy and consideration of how various regulatory authorities should work with the FOS to prevent emerging risks and/or manage mass claims, most notably individual complaints about the mis-selling of PPI.

5.9.3 The FSA (and FOS) approach on the handling of such mass claims, however, has not been without its controversy, not least because it considers “it [is] appropriate (from Treating Customers Fairly considerations under Principle 6) for the firm to further consider the position of non-complainant consumers who may have suffered detriment from such failings .... since failings that firms have identified through root cause analysis [which must be diligent and robust] are an important part of our complaints-led strategy for dealing effectively but proportionately with the consumer detriment caused by PPI mis-selling”.<sup>78</sup>

5.9.4 In October 2010, the British Bankers’ Association (BBA) initiated a Judicial Review of the FSA and the FOS on the grounds that they were using the provisions in DISP around root cause analysis and Principle 6, in place of a redress scheme under s.404 of FSMA (a ‘s.404 review’), which amounted to using them for a purpose other than for that intended.

5.9.5 Under s.404, if there is evidence of widespread or regular failure to comply with the rules, the FSA can ask the Treasury to authorise a past business review that would require all firms to take action in regards to all sales within the scope of the review, whether or not the customer has made a complaint (and as distinct from a firm-by-firm review of past sales as was previously undertaken, for example, in the context of

<sup>75</sup> Detail’s of the Hunt Review Terms of Reference can be found here: [http://www.financial-ombudsman.org.uk/news/updates/openness\\_accessibility.html](http://www.financial-ombudsman.org.uk/news/updates/openness_accessibility.html)  
[http://www.thehuntreview.org.uk/updates/FOS\\_Report.pdf](http://www.thehuntreview.org.uk/updates/FOS_Report.pdf)

<sup>76</sup> Paras 6.1-6.5, p.54, Hunt Review, 2008

<sup>77</sup> [http://www.fsa.gov.uk/pages/Library/Policy/DP/2011/fs11\\_02.shtml](http://www.fsa.gov.uk/pages/Library/Policy/DP/2011/fs11_02.shtml)

<sup>78</sup> DP 10/01 para 2.15 [check], p.27

mortgage endowments). The Act further required the Treasury to proceed by way of specific Order, which had to be approved by both Houses of Parliament.

- 5.9.6 S.404 was recently amended (on the 11<sup>th</sup> October 2010) to remove the need for the FSA to apply to HMT before setting up a scheme, s.14 of the Financial Services Act 2010 now replacing the provisions of s.404 of the FSMA. The FSA consulted on the changes it would make to its Handbook and rules to bring new s.14 into effect in its Quarterly Consultation CP 11/7<sup>79</sup> and stated that it considers “the new power will facilitate redress for a large number of consumers and should act as a credible deterrent”<sup>80</sup>
- 5.9.7 Up to June this year, FSA regulated firms have paid more than £200 million in redress to consumers who have complained about how they were sold PPI.<sup>81</sup>
- 5.9.8 In the light of these developments, the IWI process, which was initially used as a mechanism to encourage co-operation and bring the regulatory authorities and the FOS together, has now also been evolved into a standing committee known as the FSA Co-ordination Committee<sup>82</sup>. Strengthening the co-ordination and intelligence sharing of the FSA, OFT and the FOS through a formal FSA committee is further meant to ‘concentrate minds’ on the potential consumer detriments previously unseen but readily ‘scalable’ that may arise from technology driven financial services, and their blurring into products, in the future.
- 5.9.9 This is because social networking websites, mobile phones and other interactive technologies are set to ‘make or break’ reputations, and financial firms are starting to realise that the ‘conversations’ enabled by social media and the semantic web can no longer be ignored; that it is only those businesses with consumer loyalty or ‘stickiness’ who will be able to compete effectively, irrespective of the markets they inhabit.<sup>83</sup> Or, in other words, since good service is cheaper than poor service, so providers are increasingly cognisant that consumer complaints should be given proper and genuine consideration.
- 5.9.10 The complaint handling landscape for financial firms then fundamentally relies on a set of mutually reinforcing regulatory and other relationships that operate across different layers or tiers of complaint handling. These relationships are operationally interlinked with one another. But, more importantly, the complaints themselves for which the FSA, OFT and the FOS have oversight, have the potential to become substantively interlinked with one another through mass claims. It is these inter-linkages over process and ‘common substance’ that can subsequently drive firm behaviour and secure good outcomes for consumers, something which the FSA is starting to feature more prominently in its regulatory approach for its consumer sectors. Were responsibility for consumer credit to be passed to the FCA, further consideration would need to be given to how mass claims across the consumer credit sector would be handled in the future.

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<sup>79</sup> [http://www.fsa.gov.uk/pubs/cp/cp11\\_07.pdf](http://www.fsa.gov.uk/pubs/cp/cp11_07.pdf)

<sup>80</sup> as above, para 8.1

<sup>81</sup> [http://www.fsa.gov.uk/Pages/consumerinformation/product\\_news/insurance/payment\\_protection\\_insurance\\_ppi\\_redress/index.shtml](http://www.fsa.gov.uk/Pages/consumerinformation/product_news/insurance/payment_protection_insurance_ppi_redress/index.shtml)

<sup>82</sup> The Co-ordination Committees’ Terms of Reference can be found here: [http://www.fsa.gov.uk/pubs/other/cc\\_tor.pdf](http://www.fsa.gov.uk/pubs/other/cc_tor.pdf) along with key statements on the purpose of the FOS and FOS guidance. [www.fsa.gov.uk/pages/Library/Communication/PR/2010/074.shtml](http://www.fsa.gov.uk/pages/Library/Communication/PR/2010/074.shtml).

<sup>83</sup> Consumer Focus response to Law Commissions’ joint consultation on consumer redress for misleading and aggressive practices (CP 199 and DP 149), May 2011, page 4

## 6. Conclusions

### *FCA future approach to regulation*<sup>84</sup>

- 6.1 In June this year, the FSA published its initial thinking on the approach the new FCA, in the wake of the banking crisis and subsequent economic downturn, will take to deliver on its objectives. Whilst, the UK financial regulatory architecture remains in a state of flux, it is clear that the FCA is keen to shift towards a culture of transparency, tackling the root causes of problems and not just the symptoms; the “traditional focus on firm conduct at the point of sale [having] limitations. In particular when poor conduct is discovered, detriment has already occurred. If this is on a significant scale, market confidence can be damaged.”<sup>85</sup>
- 6.2 The FCA therefore seems committed to basing its regulatory interventions on a deeper understanding of underlying commercial and behavioural drivers, including reaching up the distribution chain, as well as to adopting a differentiated approach where regulation is tailored to particular sectors. If, and when, there may be a need for large-scale consumer redress, the government has further proposed that there is a clear process in place to ensure that the issue is tackled by the FCA thoroughly and promptly. This would provide for a range of organisations, including the FOS and consumer groups, to make a referral where they think that there may be mass consumer detriment<sup>86</sup>.
- 6.3 With respect to the future regulation of consumer credit, the above comparative analysis of the CCA and FSMA regimes, and investigation into their respective enforcement approaches suggests that the FCA’s initial thinking, if taken together with multi-agency and localized enforcement, would be a step in the right direction. Yet equally, since it also appears as if the FSA’s ARROW risk framework will remain central to the new FCA’s approach, the FCA will need to give far greater consideration to its internal operations and processes from a consumer, intelligence-led perspective than it has hitherto.
- 6.4 In conclusion:
- The legal provisions governing threshold conditions for market entry in the FSMA regime are more stringent than those found in the CCA regime, suggesting there would be benefit to consumers of adopting an FSA Handbook approach here.
  - The CCA regime has as its focus the form and function of a credit agreement rather than the services they could receive from a financial adviser. Conduct of Business (COB) requirements for pre-contractual and other consumer information are therefore more prescriptive in the CCA regime than they are in the FSMA regime.
  - The CCA goes to the substance of the credit bargain and where only the civil courts can make a Time Order to compel firms to alter or vary contractual terms of credit agreements and accommodate a consumer’s financial distress. By contrast, the FSA may only impose a fine or other sanction on firms should they breach any of its Handbook or COB rules.
  - Many of the CCA COB requirements have been given effect by the Consumer

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<sup>84</sup> Under the draft Financial Services Bill 2011 (which principally makes amendments to the FSMA 2000) published on the 16<sup>th</sup> June, the UK Government intends to adopt a ‘twin peaks’ model of financial regulation, dividing up the ‘conduct’ and ‘prudential’ responsibilities of the Financial Services Authority (FSA) and passing these across to a new regulatory authority, the Financial Conduct Authority (FCA), and to the Bank of England respectively. As discussed throughout this paper, responsibility for regulating providers of consumer credit may also be passed from the Office of Fair Trading (OFT) to the FCA.

<sup>85</sup> The Financial Conduct Authority: Approach to Regulation, June 2011, para 4.6, p.22

<sup>86</sup> As indicated in HM Treasury’s June 2011 White Paper: A new approach to financial regulation: the blueprint for reform, and as above, para 5.42

Credit Directive 2008 (CCD), which is a maximum harmonising Directive of those areas that are 'in scope'. They are also implemented through primary legislation and statute, so it would seem perverse to adopt a FSA COB rules based approach for consumer credit.

- CCA s.75 and other consumer rights bring into stark focus the interdependency between private rights of redress and public enforcement; with one often giving rise to the other. The interaction of private rights of redress and public enforcement is integral to the operation of the CCA regime in protecting consumers. This is not currently as evident in the FSMA regime, but is starting to become more so with the FSA's adoption of complaints-led strategies.
- Enforcement in the CCA regime has a narrower scope and its range of powers is also more limited than in the FSMA regime. The FSMA regime is able to curb malpractice on an industry wide basis as well as to compensate consumers across the piece, which is especially of benefit to networked consumers.
- The FSA already has powers under the Unfair Terms in Consumer Contracts Regulations (UTCCRs) 1999 and the Consumer Protection from Unfair Trading Regulations (CPRs) 2008 since these apply across all financial services. Were consumer credit to be passed across to the FCA, it would be sensible for the FCA to give further consideration to the approach it would adopt in applying these to providers of consumer credit; and, similarly, to the CCA 'Unfair relationships' test since this also closely interacts with the provisions of the UTCCRs and CPRs.
- OFT Guidance is produced under s.4 and s.25A of the CCA and in response to a diverse and fast moving sector that requires a greater degree of handholding. Industry Codes of practice also help to interpret different parts of the CCA but are treated differently by the FSA and the OFT. Were consumer credit to be passed across to the FCA, further consideration of this area would also be sensible.
- The nature, diversity and changing face of the consumer credit market suggests capitalisation requirements would be of benefit to consumers provided these were flexible enough to accommodate a wide range of business models. The Payment Service Provider (PSP) model of regulation could provide useful lessons for the future regulation of consumer credit.
- The FSA style and culture of regulation is set by the FSMA statutory objectives, yet there is a tension that operates across the FSMA statutory objectives that works to the detriment of consumers in allocating resources and forming priorities for enforcement. The FSA has started to address this through its intensive approach to supervision and enforcement but, as is the case for mortgages, this relies heavily on the co-operation of larger firms or firms of 'scale' but where there is a greater diversity of firms in the consumer credit market.
- Given the nominal values of some credit agreements as well as technological innovations, under the ARROW risk framework there is also a danger that the types of consumer detriments that are "on the margins" as well as those experienced by vulnerable consumers, will fail to be detected and subsequently prioritised. Better integrated, local Trading Standards Services (TSS) input provide a ready means by which to plug this gap, and equally help to drive good firm behaviour at the local level.
- Under the FSMA regime, supervisors have a lot of direct contact with firms but unlike local TSS, there is little to no direct contact with consumers.
- As evidenced by the recent Payment Protection Insurance (PPI) scandal, it is in the interests of consumers to ensure that there is a regulator capable of taking

action where there is evidence of consumer detriment in the market place. Contacts and complaints intelligence, or consumer 'feedback loops', can provide useful triggers that would ensure that it is the concerns of consumers, and not just those considered as threats by regulators, that are being addressed.

- The FSA's complaints-led approach suggests there is merit in adopting an intelligence and complaints-led strategy for consumer credit but further work will need to be done internally to ensure this is integrated into the wider culture of the new FCA. If done well, this could form the cornerstone of any 'preventative' approach to regulation.
- Given their experience of TSS operational issues, were consumer credit to be passed to the FCA, it would be desirable for former OFT staffers to play a role in the new FCA.
- To rebuild consumer confidence in the financial services industry, any future regulatory regime for consumer credit will need to be capable of both protecting the most vulnerable as well as being 'flexed' around the behaviours of an ever more diversified consumer credit market, and consumer, in the future. There is a need for a longer-term strategy for multi-agency, regional and localized enforcement for consumer credit so that any future regime is fit for the modern era.

Samantha Mitchell  
November 2011  
- ENDS-

## Annex 1

### Comparative analysis of the FSMA and CCA regulatory regimes

(i) threshold conditions for market entry

Found in both CCA and FSMA	FSMA or FSA Handbook provision	CCA provision	Only found in FSMA	Handbook provision	Only found in CCA	CCA provision
<b>Threshold conditions</b>						
Scope		(CCA 2006) Financial limit of £25,000 was removed and raised to £60,260 by the CCD. Hire purchase and pawnbroking agreements are not covered by the CCD but are 'in scope' of the CCA				
Authorisation or licensing	Adequate resources and suitability (see FIT) Fit and Proper Test for Approved Persons	s.25 'fit and proper'				
		(CCA 2006) Appeals tribunal also introduced				
Fairness	Principle 6 – 'A firm must pay due regard to the interests of its customers and treat them fairly'	Contractual obligations arising under contract – (CCA 2006) s.140A-s.140C unfair relationships test (see also CPRs)				
			Capitalisation	(FIT) financial prudence and MIPRU 4.2.11 for home finance mediation activity		
			Professional Indemnity Insurance (PII)	MIPRU 3.2.2		

			Regulatory reporting	Small firms - every 6 months via RMAR, for e.g., Balance Sheet, Profit & Loss Account, Regulatory Capital, Supplementary Product Sales Data, etc		
			Financial Services Compensation Scheme	COMP part of the FSA Handbook		



## Comparative analysis of the FSMA and CCA regulatory regimes

(ii) Conduct of Business requirements – form and content, post-contract, collections and recoveries i.e. the ‘product life cycle’

Found in both CCA and COBs	COBs provision	CCA provision	Only found in COBs	e.g. COBs provision	Only found in CCA	CCA provision
					Ban on canvassing of debtor-creditor agreements (e.g. cash loans) off trade premises. Any breach is a criminal offence	S.49 of the CCA, and includes prohibition for solicitation following a previous visit where there is no signed request for a further visit.
<b>Pre-sale/contract (SIs, CPRs, Rules/Code)</b>						
Advertising	MCOB 3 Financial Promotions for real and non-real time.  Also MCOB 10 (Annex 1) for APR calculation	Consumer Credit (Advertising) Regulations 2010* - representative APR = at least 51% of agreements. And Total Charge for Credit Regulations 2010				
Initial disclosures	MCOB 4 Initial disclosures of status and fees	(CCD Art.21) Disclosure of intermediary status in advertising or documentation s.160A(3)-(5) CCA.  See also s.3.7.i OFT Guidance on Credit Brokers and Intermediaries, November 2011				
					(CCD) Pre-contractual information: Standard	Provide SECCI to consumer “in good time”.

					European Consumer Credit Information – SECCI.	The Consumer Credit Disclosure of Information Regulations 2004 provided for similar information and is now updated in the Consumer Credit (Disclosure of Information) Regulations 2010. See Schedule 1
Pre-contractual information	<p>MCOB 5 Pre-application disclosure (e.g. illustrations)</p> <p>MCOB 6 Disclosure at the offer stage (offer documents)</p>	Consumers must be provided with contractual information. Current requirements are set out in the Consumer Credit (Agreements) 1983 Regulations now updated by the Consumer Credit (Agreements) Regulations 2010				
					Telephone and distance sales	(CCD Art.5(3)) May provide consumer with SECCI after conclusion of the contract. Regulation 4 of the Consumer Credit (Disclosure of Information) Regulations 2010
			Responsible lending	MCOB 11.3 Record that have taken into account customer's ability to repay and put in place a responsible lending policy	Adequate explanations	(CCD – Article 5(6)) To enable consumer to assess whether is adapted to his needs. Regulation 3 of the Consumer Credit (EU Directive) Regulations 2010 inserts a new s.55A into the CCA
					Irresponsible lending	See OFT Guidance on Irresponsible Lending, March 2010, updated Feb 2011, and OFT Guidance on brokers, intermediaries, the

						consumer credit and hire businesses, November 2011
					Re-assessment of credit worthiness before increase amount of credit available	Regulation 5 of the Consumer Credit (EU Directive) Regulations 2010 inserts a new s.55B into the CCA
					Overdrafts – pre-contractual information to enable consumer to ‘shop around’	Regulations 10 and 11 of the Consumer Credit (Disclosure of Information) Regulations 2010
					Credit reference agencies	(CCA 2006) Ss.157-159 provides for licensing of credit reference agencies
Rights of withdrawal	MCOB 6.4.11(5) No right of withdrawal which must be disclosed to consumer pre-contract	W/in 14 days (CCD). Regulation 13 of the Consumer Credit (EU Directive) Regulations 2010 inserts new ss 66A (1,2,3) and 66A (7)(a) into the CCA			When declined contact details of credit reference agency to be given to consumer	Regulation 40 of the Consumer Credit (EU Directive) Regulations 2010 inserts new section 157 (A1) and (2A) into the CCA
			Limitations on charges	High level requirement that charges should not be excessive and MCOB 5 and 12.5		
<b>Post-contract (rules/SIs/Code)</b>						
Statements	MCOB 7.5 and 11	(CCA 2006) Post contract information under s.77B for statement of account				
					Overdrafts – ongoing information re: statement of account	Already largely covered but Regulation 63 of the Consumer Credit (EU Directive) Regulation 2010 amends the 1983 Regulations to achieve full compliance

					Overdrafts overruns	Regulation 21 of the Consumer Credit (EU Directive Regulations 2010 inserts new section 74A into the CCA
Prior notification of interest rate changes	MCOB 7.6 Consumer must be given notice	CCD adopts similar approach to Consumer Credit (Notices of Variation of Agreements) Regulations 1977. See s.78A of the CCA. nb: PSD also has provisions				
					Early repayment	CCA s.94 – right to complete payments ahead of time. Early repayment provisions extended from full early repayment also to partial early repayment under the CCD. See also Time Orders below
Arrears charges	MCOB 13.3 Dealing fairly with customer's in arrears – policy and procedures  MCOB 13.4 also	(CCA 2006) Statement of arrears and charges under s.86B  See also Time Orders below.				

Default notice	MCOB 13.4 To be issued before commence repossession proceedings	S.87 CCA				
<b>Collections and recoveries (CPRs)</b>						
					Debt sold on. Creditor who buys debt must ensure consumer is notified	Regulation 36 of the Consumer Credit (EU Directive) Regulations inserts new s.82A into the CCA
					Debt collection	(CCA 2006). Licensing for ancillary business s.145 CCA. See also OFT Debt Management Guidance, September 2008, revised June 2011, and OFT Debt Collection Guidance, November 2011

Nb: (CCD art.7) pre-contractual information requirements do not apply to suppliers of goods and services who act as credit intermediaries only in an ancillary capacity. In UK law, the creditor, in any event, is responsible for producing pre-contractual information.

## Comparative analysis of the FSMA and CCA regulatory regimes

### (iii) CCA consumer rights and obligations

Only found in CCA	CCA provision
Access to details of credit reference agency	Ss.157-159 - right to request details of credit reference agency used to access consumer's credit file
Time orders (CCA 2006 w.e.f 1 October 2008)	S.129 of the CCA provides that a court can make a Time Order, giving the consumer more time to repay a debt under a regulated consumer credit or consumer hire agreement, if the court considers it 'just' to do so. <i>In addition, s.136 provides that an agreement may be amended as a consequence of a Time Order, for example, by reducing the rate of interest or extending the term of the agreement.</i> The consumer can apply for a Time Order following receipt of a default notice, or a notice of enforcement action under the Act. The court can also make a Time Order as part of proceedings brought by the lender for enforcement of the agreement or to recover possession of goods or land (for example, mortgage repossession). A consumer can also apply for a Time Order following receipt of an arrears notice, provided that s/he first gives notice to the lender and submits an alternative payment proposal, and at least 14 days elapse before an application is made to the court.
Extortionate credit agreements	On application to the court, these could be set aside. These have now been replaced by the unfair relationships test ss.140A-140C (which replace ss.137-140 of the CCA).
Unenforceable credit agreements	Under s.40 any loans made by a trader lending without the right sort of licence cannot be enforced except with leave of the OFT. By comparison, s.19 FSMA states that trading without authorisation is illegal and any agreement made by the unauthorised person/firm is unenforceable. S.20 states that trading without the correct permission is not an offence, and does not make agreements unenforceable.
'Unfair relationships' test	Introduced by the CCA 2006 under s.140A-140C of the CCA. See also OFT Guidance on Unfair Relationships – Enforcement Action under Part 8 of the Enterprise Act 2002 (May 2008, revised August 2011).
Voluntary termination rights	Ss.99-100 of the CCA - consumers with hire purchase agreements limits consumers' liability against the possibility of substantial indebtedness should their circumstances change and they need to give up the goods.
S.75 (CCD introduces s.75A)	Ss75 and 75A connected lender liability and reasonable attempt to settle with supplier first.

## Comparative analysis of the FSMA and CCA regulatory regimes

(iv) enforcement and restitution

Found in both FSMA and CCA	FSMA or FSA Handbook provision	CCA provision	Only found in FSMA	Handbook provision	Only found in CCA	CCA provision
<b>Enforcement</b>						
Sanctions or Regulatory tools)	Part XIV ss.205-211 FSMA Information requests Injunctive actions Criminal actions Fines (unlimited) Remove authorisation/ban approved person Rule changes On going supervision Specialist review	s.25 and s.33A CCA Information requests Criminal actions Fines for breach of requirements (up to £50k) Revoke licence  See also s.11 of the EA 2002 <sup>1</sup>				
<b>Restitution</b>						
Action in the collective interests	old s.404 new section 14 FS Bill - industry review of past business s.382 powers of restitution	Attached also to Part 8 of the EA 2002				

<sup>1</sup> S.11 of the EA 2002 gives a designated consumer body (such as Citizen's Advice and Which?) the right to make a super-complaint to the OFT. A super-complaint is defined under s.11(1) of the Act as a complaint where 'any feature, or combination of features, of a market in the UK for goods or services is or appears to be significantly harming the interests of consumers'. Under s.11(2), the OFT is further required, within 90 days after the day on which it receives a super-complaint, to publish a response saying whether it has decided to take any action, or take no action, in respect of the complaint and what action, if any, it proposes to take.

## Annex 2

### Industry Codes of Practice and guidance

(i) the 'standing' of industry Codes and related guidance

Vehicle	FSMA	PSD	BCOBs	CCA CCA 2006 CCD 2008	OFT Co-regulatory Codes e.g Advertising Standards and Premium rate telephone lines	Self-regulatory Codes e.g. BBA and FLA Lending Codes
Primary legislation	FSMA/Finance Bill sets out role and responsibility of the FSA/FCA along with high level requirements for firms; made through FSA Handbook	Sets out the obligations of firms when making electronic payments to consumers		Sets out role and responsibility of the OFT as well as 'rights and obligations' of both firms and consumers for consumer credit		
Secondary 'legislation' and/or other Authority rules and Guidance	COB rules	Payment Services Regulations Statutory Instruments - only for non-bank account payments (not cash or cheques)	TCF Principle 6 and BCOBs rules for payments (not cash or cheques) through bank accounts	Statutory Instruments		
Industry Guidance – Authority 'Approved or confirmed'		BBA/BSA/Payments Council Guidance on the Banking Conduct of Business sourcebook <sup>2</sup> This is FSA confirmed industry Guidance				
Industry Codes and guidance			[Payments Council Payment Services	OFT Guidance,	Sets out industry code of practice and	Sets out industry code of practice and

<sup>2</sup> Expires December 2012



			Regulations Industry Best Practice <sup>3</sup> [nb: this has not been confirmed by FSA]	including Debt management; Brokers and credit intermediaries; Unfair relationships test	corresponding guidance - how firms agree to behave under oversight of the scheme and, by implication, a regulatory body	corresponding guidance - how firms are to behave on a <i>voluntary basis</i> under oversight of the scheme only (e.g. the Lending Code Standards Board)
Governance	HMT Minister FSA Board by public appointment	HMT Minister Payments Council Board appointed according to scheme rules	HMT Minister FSA Board by public appointment	BIS Consumer Affairs Minister OFT Board by public appointment	Code Boards - appointed according to scheme rules	Code Boards or Committees - appointed according to scheme rules
Consultative process <sup>4</sup>	Statutory requirement that FSA consult on changes to FSA Handbook and COB rules	According to scheme rules	Statutory requirement that FSA consult on changes to FSA Handbook and COB rules	Parliamentary process	OFT criteria includes an obligation for adequate consultation with consumer, enforcement and advisory bodies as Code is prepared	Led by scheme - wider stakeholder consultation when Code is reviewed
Monitoring	Appointed FSA supervisor. On-going, formal supervision on a risk assessed basis.	FSA by adopting a complaints-led strategy	Appointed FSA supervisor. On-going, formal supervision on a risk assessed basis.	Consumer civil court actions (public record) or reports to TSS and escalate to OFT who may impose a sanction	Undertaken by the scheme	Undertaken by the scheme
Consumer information	FSA, FOS, FSCS and consumer groups	May be provided by scheme members	FSA Handbook and rules	Widely available via OFT, TSS, FOS, advice agencies and consumer groups	May be provided by the scheme and scheme members	May be provided by the scheme and scheme members. Some guidance not available to the public
Sanctions					OFT may undertake investigation/action if breach the Code	Peer pressure Naming and shaming Revoke membership

<sup>3</sup> nb: - the Payments Council Payment Services Regulations Industry Best Practice adopts a 'rights and obligations' approach akin to that of the CCA. The Payments Council has not asked that this (non-COBs) guidance be confirmed by the FSA

<sup>4</sup> No rule-making powers – defects in legislation amended by primary legislation.

Formal regulatory tools and sanctions	Information requests Injunctive actions Criminal actions Fines Remove authorisation/ban approved person Rule changes Specialist review/review past business	See ** below which sets out the relationship status between FSA enforcement and confirmed industry guidance	Information requests Injunctive actions Criminal actions Fines Remove authorisation/ban approved person Rule changes Specialist review/review past business	Information requests Injunctive actions Criminal actions Fines Revoke licence Behavioural requirements  OFT will undertake investigation/action on basis that no longer fit to hold a licence		
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### The practical effect of FSA confirmation for firms' compliance

As now, a firm's defence against us is in essence the same whether they follow FSA guidance or FSA confirmed Industry Guidance – our rules say 'The FSA will not take action against a person for behaviour that it considers to be in line with guidance, other materials published by the FSA in support of the Handbook or FSA-confirmed Industry Guidance, which were current at the time of the behaviour in question.' (DEPP 6.2.1(4)G). Similarly, as Industry Guidance is not mandatory (and is one way, but not the only way, to comply with requirements), we do not presume that because firms are not complying with it they are not meeting our requirements. However, where a breach has been established, Industry Guidance is potentially relevant to an enforcement case. The ways in which we may seek to use Industry Guidance in an enforcement context are similar to those in which we may use FSA Guidance or supporting materials. As set out in Chapter 2 of the new Enforcement Guide, these include:

- Help assess whether it could reasonably have been understood or predicted at the time that the conduct in question fell below the standards required by the Principles.
- Explain the regulatory context.
- Inform a view of the overall seriousness of the breaches e.g. we could decide that the breach warranted a higher penalty in circumstances where the FSA had written to chief executives in that sector to reiterate the importance of ensuring a particular aspect of its business complied with relevant regulatory standards.
- Inform the consideration of a firm's defence that we were judging the firm on the basis of retrospective standards.
- Be considered as part of expert or supervisory statements in relation to the relevant standards at the time.
- However, we are conscious that our use of Industry Guidance in this context should not create a second tier of regulation and that guidance providers are not quasi-regulators. We will take the specific status of FSA confirmation into account when we make judgements about the relevance of Industry Guidance in enforcement cases.

### NB: Our confirmation wording

The FSA has reviewed [this Industry Guidance] and has confirmed that it will take it into account when exercising its regulatory functions. [This Industry Guidance] is not mandatory and is not FSA Guidance. This FSA view cannot affect the rights of third parties.

(ii) **Comparison of 'Lending' Codes and their relevance to the CCA**

(nb: OFT Guidance on brokers, intermediaries, consumer credit and hire businesses; status and fees under CCD)

Area covered	[Ref note]	BBA Lending Code <sup>5</sup>	++Finance and Leasing Association <sup>6</sup> – credit brokers and intermediaries e.g. 2 <sup>nd</sup> hand car dealerships	Consumer Credit Association <sup>7</sup> e.g. doorstep lenders/home credit	Consumer Finance Association e.g. subprime lenders – Payday loans and pawnbrokers	Standing Committee on Reciprocity (SCOR) - data sharing
<b>Scope</b>						
Communications	COBs	•				
Fairness	COBs	•	•		•	
Financial promotions	COBs		•			
Give details of Credit reference agencies	CCA 2006/CCD	•	•	•		
Credit assessment	CCA/CCD/COBs	•	•	•	•	•
Personal privacy	Codes	•		•		•
Calculation of interest rates	CCA/CCD, MCOB and industry guidance					
Current account overdrafts	L Code	•				
Credit card	L Code	•				
Loans	L Code	•				
T and c's	L Code	•				
Statements	CCA 2006/MCOBs		•			
Financial difficulties	CCA/MCOBs	•	•		•	
Repayment	CCA/courts	•	•		•	

<sup>5</sup> <http://www.lendingstandardsboard.org.uk/docs/lendingcode.pdf> Published in March 2011

<sup>6</sup> [http://www.fla.org.uk/consumers/The\\_Lending\\_Code](http://www.fla.org.uk/consumers/The_Lending_Code) Published in 2006. Finance leasing, operating leasing, hire purchase, conditional sale, personal contract purchase plans, personal lease plans, secured and unsecured personal loans, credit cards and store card facilities - account for a third of the UK's unsecured lending and half of all car purchases.

<sup>7</sup> <http://www.ccauk.org/consenquiries.htm>

rescheduling						
Common financial statement		•	•			
Early settlement	CCA/CCD		•			
Complaints handling	COBs	•	•	•		
Data sharing	SCOR					•
Membership		Major banks and building societies	115 Full Members and 92 Associate Members (who provide access services to full members)	6 lenders account for approximately 90% of the market. Provident Financial plc has a 60% market share	Approx 29 Members	BBA,BRC,BSA,CallCredit,CCA,CCTA,CML,CSA,ERA,Equifax,Experian,FLA,Teletrack,UKCardsAssociation

**(ii) Comparison of 'Collection and Recoveries' Codes and their relevance to the CCA**  
 (nb: - OFT Debt Management Guidance and OFT Debt Collection Guidance)

	Credit Services Association <sup>8</sup> Debt collection, debt sale and purchase	Debt Managers Standards Association Code <sup>9</sup> (DEMSA)	Association of Professional Debt Solution Intermediaries <sup>10</sup>
Membership		OFT Approved 17 Full Members	Pentagon founding member
Advertising and marketing		•	
Consumer information		•	•
Methods of customer contact	•		•
Oppressive practices	•		•
Collections	•		
Default and repayments	•	•	•
Common Financial Statement	•		•
Data protection	•		
Purchased debt	•		•
Complaints	•	•	•
Vulnerable consumers		•	

- ENDS-

<sup>8</sup> <http://www.csa-uk.com/media/editor/file/Code%20of%20Practice%202009.pdf>

<sup>9</sup> <http://www.demsa.co.uk/code-of-conduct/>

<sup>10</sup> <http://www.apdsi.co.uk/conduct.asp>

## Annex 1a

### Consumer Credit (Disclosure of Information) Regulations 2010

#### SCHEDULE 1

#### PRE-CONTRACT CREDIT INFORMATION

(Standard European Consumer Credit Information)

##### 1. Contact details

Creditor. Address. Telephone number(s).* E-mail address.* Fax number.* Web address.*	[Identity.] [Geographical address of the creditor to be used by the debtor.]
If applicable Credit intermediary. Address. Telephone number(s).* E-mail address.* Fax number.* Web address.*	[Identity.] [Geographical address of the credit intermediary to be used by the debtor.]

\* This information is optional for the creditor. The row may be deleted if the information is not provided.

Wherever "if applicable" is indicated, the creditor must give the information relevant to the credit product or, if the information is not relevant for the type of credit considered, delete the respective information or the entire row, or indicate that the information is not applicable.

Indications between square brackets provide explanations for the creditor and must be replaced with the corresponding information.

##### 2. Key features of the credit product

<i>The type of credit.</i>	
The total amount of credit. This means the amount of credit to be provided under the proposed credit agreement or the credit limit.	[The amount is to be expressed as a sum of money. In the case of running-account credit, the total amount may be expressed as a statement indicating the manner in which the credit limit will be determined where it is not practicable to express the limit as a sum of money.]
How and when credit would be provided.	[Details of how and when any credit being advanced is to be drawn down.]
The duration of the credit agreement.	[The duration or minimum duration of the agreement or a statement that the agreement has no fixed or minimum duration.]
Repayments. If applicable: Your repayments will pay off what you owe in the following order.	[The amount (expressed as a sum of money), number (if applicable) and frequency of repayments to be made by the debtor. In the case of an agreement for running-account credit, the amount may be expressed as a sum of money or a specified proportion of a specified amount or both, or in a case where the amount of any repayment cannot be expressed as a sum of money or a specified proportion, a statement indicating the manner in which the amount will be determined. [The order in which repayments will be allocated to different outstanding balances charged at different rates of interest.]
The total amount you will have to pay. This means the amount you have borrowed plus interest and other costs.	[The amount payable by the debtor under the agreement (where necessary, illustrated by means of a representative example). The total amount payable will be the sum of the total amount of credit and the total charge for credit payable under the agreement as well as any advance payment where required. In the case of running account credit, where it is not practicable to express the limit as a sum of money, a credit limit of £1200 should be assumed. In a case where credit is to be provided subject to a maximum credit limit of less than £1200, an amount

	<p>equal to that maximum limit.</p> <p>The total charge for credit is to be calculated using the relevant APR assumptions set out in Schedule 2 to the Consumer Credit (Disclosure of Information) Regulations 2010 and the Total Charge for Credit Regulations, and where appropriate the relevant components of the debtor's preferred credit.]</p>
<p>If applicable</p> <p>[The proposed credit will be granted in the form of a deferred payment for goods or service.]</p> <p>or</p> <p>[The proposed credit will be linked to the supply of specific goods or the provision of a service.]</p> <p>Description of goods/services/land (as applicable).</p> <p>Cash price.</p>	<p>[A list or other description]</p> <p>[Cash price of goods or service.]</p> <p>[Total cash price.]</p>
<p>If applicable</p> <p>Security required.</p> <p>This is a description of the security to be provided by you in relation to the credit agreement.</p>	<p>[Description of any security to be provided by or on behalf of the debtor.]</p>
<p>If applicable</p> <p>Repayments will not immediately reduce the amount you owe.</p>	<p>[In the case of a credit agreement under which repayments do not give rise to an immediate reduction in the total amount of credit advanced but are used to constitute capital as provided by the agreement (or an ancillary agreement a clear and concise statement) where applicable, that the agreement does not provide for a guarantee of the repayment of the total amount of credit drawn down under the credit agreement.]</p>

### 3. Costs of the credit

<p>The rates of interest which apply to the credit agreement</p>	<p>[Details of the rate of interest charged, any conditions applicable to that rate, where available, any reference rate on which that rate is based and any information on changes to the rate of interest (including the periods that the rate applies, and any conditions or procedure applicable to changing the rate). Where different rates of interest are charged in different circumstances, the creditor must provide the above information in respect of each rate.]</p>
<p>Annual Percentage Rate of Charge (APR).</p> <p>This is the total cost expressed as an annual percentage of the total amount of credit.</p> <p>The APR is there to help you compare different offers.</p>	<p>[% if known. If the APR is not known a representative example (expressed as a %) mentioning all the necessary assumptions used for calculating the rate (as set out in Schedule 2 to the Consumer Credit (Disclosure of Information) Regulations 2010, the Total Charge for Credit Regulations and, where appropriate, the relevant components of the debtor's preferred credit). Where the creditor uses the assumption set out in regulation 6(g) of the Total Charge for Credit Regulations, the creditor shall indicate that other draw down mechanisms for this type of agreement may result in a higher APR.]</p>
<p>If applicable</p> <p>In order to obtain the credit or to obtain it on the terms and conditions marketed, you must take out:</p> <ul style="list-style-type: none"> <li>— an insurance policy securing the credit, or</li> <li>— another ancillary service contract.</li> </ul> <p>If we do not know the costs of these services they are not included in the APR.</p>	<p>[Nature and description of any insurance or other ancillary service contract required.]</p>
<p>Related costs</p>	
<p>If applicable</p> <p>You must have a separate account for recording both payment transactions and drawdowns.</p>	<p>[Details of any account or accounts that the creditor requires to be set up in order to obtain the credit together with the amount of any charge for this.]</p>
<p>If applicable</p> <p>Charge for using a specific payment method.</p>	<p>[Specify means of payment and the amount of charge.]</p>
<p>If applicable</p>	<p>[Description and amount of any other charges not</p>

Any other costs deriving from the credit agreement. If applicable Conditions under which the above charges can be changed.	otherwise referred to in this form.] [Details of the conditions under which any of the charges mentioned above can be changed.]
If applicable You will be required to pay notarial fees.	[Description and amount of any fee.]
Costs in the case of late payments.	Either [A statement that there are no charges for late or missed payments.] Or [Applicable rate of interest in the case of late payments and arrangements for its adjustment and, where applicable any charges payable for default.]
Consequences of missing payments.	[A statement warning about the consequences of missing payments, including: a reference to possible legal proceedings and repossession of the debtor's home where this is a possibility, and the possibility of missing payments making it more difficult to obtain credit in the future.]

#### 4. Other important legal aspects

Right of withdrawal.	Either: [A statement that the debtor has the right to withdraw from the credit agreement before the end of 14 days beginning with the day after the day on which the agreement is made, or if information is provided after the agreement is made, the day on which the debtor receives a copy of the executed agreement under sections 61A or 63 of the Consumer Credit Act 1974, the day on which the debtor receives the information required in section 61A(3) of that Act or the day on which the creditor notifies the debtor of the credit limit, the first time it is provided, whichever is the latest.] Or [There is no right to withdraw from this agreement – if there is a right to cancel the agreement this should be stated.](1) [If the right to cancel is under the Financial Services (Distance Marketing) Regulations 2004 refer to section 5 of the form.]
Early repayment. If applicable Compensation payable in the case of early repayment.	[A statement that the debtor has the right to repay the credit early at any time in full or partially.](2) [Determination of the compensation (calculation method) in accordance with section 95A of the Consumer Credit Act 1974.]
Consultation with a Credit Reference Agency(3).	[A statement that if the creditor decides not to proceed with a prospective regulated consumer credit agreement on the basis of information from a credit reference agency the creditor must, when informing the debtor of the decision, inform the debtor that it has been reached on the basis of information from a credit reference agency and of the particulars of that agency.]
Right to a draft credit agreement(4).	[A statement that the debtor has the right, upon request, to obtain a copy of the draft credit agreement free of charge, unless the creditor is unwilling at the time of the request to proceed to the conclusion of the credit agreement.]
If applicable The period of time during which the creditor is bound by the pre-contractual information.	[This information is valid from [—] until [—].]or [Period of time during which the information on this form is valid.]
If applicable	



## 5. Additional information in the case of distance marketing of financial services

(a) concerning the creditor	
If applicable The creditor's representative in your Member State of residence. Address. Telephone number(s). E-mail address.* Fax number.* Web address.*	[i.e. where different from section 1.] [Identity.] [Geographical address to be used by the debtor.]
If applicable Registration number.	[Consumer credit licence number and any other relevant registration number of the creditor.]
If applicable The supervisory authority.	[The Office of Fair Trading or any other relevant supervisory authority or both.]
(b) concerning the credit agreement	
If applicable(5) Right to cancel the credit agreement.  If applicable The law taken by the creditor as a basis for the establishment of relations with you before the conclusion of the credit agreement. If applicable The law applicable to the credit agreement and/or the competent court.  If applicable Language to be used in connection with the credit agreement.	[Practical instructions for exercising the right to cancel indicating, amongst other things, the period for exercising the right, the address to which notification of exercise of the right to cancel should be sent and the consequences of non- exercise of that right.]  [English/other law]  [A statement concerning the law which governs the contract and the courts to which disputes may be referred.]  [Details of the language that the information and contractual terms will be supplied in and used, with your consent, for communication during the duration of the credit agreement.]
(c) concerning redress	
Access to out-of-court complaint and redress mechanism.	[Whether or not there is an out-of-court complaint and redress mechanism for the debtor and, if so, the methods of access to it.]

\* This information is optional for the creditor. The row may be deleted if the information is not provided.

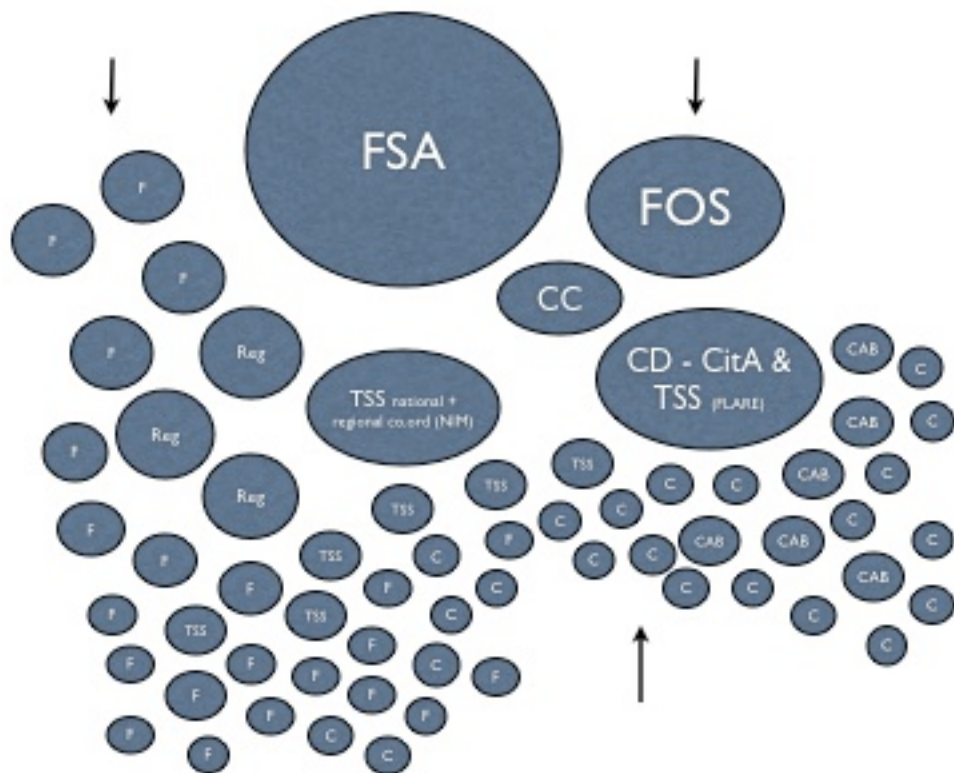
(1) i.e. if there is a cancellation right in respect of an agreement involving credit in excess of £60,260.

(2) the words "or partially" may be excluded in the case of agreements secured on land.

(3) this requirement does not apply in the case of agreements secured on land.

(4) this requirement does not apply in the case of agreements secured on land, agreements for credit agreements exceeding £60,260, pawn agreements and business purpose agreements.

(5) if the right to withdraw referred to in section 4 does not apply.



**KEY**

- C - Consumers
- CitA - Citizens Advice
- CD - Consumer Direct
- CC - Co-ordination Committee
- Reg - Regional enforcement programmes
- TSS - Trading Standards Services