

July 2019

## **Memorandum of Understanding between the Competition and Markets Authority and the Financial Conduct Authority on the use of concurrent powers under consumer protection legislation**

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## **Foreword**

This Memorandum of Understanding (MoU) establishes a framework for cooperation between the Competition and Markets Authority (CMA) and the Financial Conduct Authority (FCA) in exercising our powers under consumer law. It sets out the role of each authority, and explains our intention to work together towards the shared purpose of making financial markets and the claims management industry work well for consumers.

Its aim is to convey our intention to cooperate proactively in matters of common interest, and to prevent duplication of work.

This MoU replaces the MoU between the CMA and the FCA dated 12 January 2016.

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## Purpose of this MoU

1. This MoU sets out working arrangements between the CMA and FCA in relation to their concurrent powers to enforce the following consumer protection legislation in the financial sector and the claims management sector in the UK('consumer law'):
  - (a) the Consumer Rights Act 2015 (CRA) and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs);<sup>1</sup> and
  - (b) legislation enforceable under Part 8 of the Enterprise Act 2002 (EA02) including the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).
2. This MoU is not intended to have legal effect.
3. This MoU and the practices which it provides for will be reviewed from time to time by the CMA and the FCA as the need arises or at the request of the CMA, the FCA, or other members of the consumer concurrency group. This MoU may be revised by agreement between the CMA and the FCA.

## Role of the CMA

4. The CMA is a non-ministerial department, established under the Enterprise and Regulatory Reform Act 2013 (ERRA) and works to promote competition for the benefit of consumers, both within and outside the UK, and to make markets work well for consumers, businesses and the economy.
5. The CMA's statutory responsibilities include:
  - (a) conducting market studies and market investigations in markets where there may be competition and consumer problems; and
  - (b) enforcing consumer law to tackle practices and market conditions that make it difficult for consumers to exercise choice.
6. The CMA will use its full range of powers to tackle market-wide consumer problems or issues which affect consumers' ability to make choices.
7. To make the best use of the CMA's resources to produce outcomes for UK consumers, the CMA has regard to its Prioritisation Principles.<sup>2</sup>

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<sup>1</sup> The UTCCRs apply only to contracts entered into before 1 October 2015.

<sup>2</sup> *Prioritisation principles for the CMA* (CMA16), April 2014.

## **Role of the FCA**

8. The FCA is established under the Financial Services and Markets Act 2000 (FSMA) as the market conduct regulator in the financial services sector. It is also responsible for the prudential supervision of firms that are not regulated by the Prudential Regulation Authority (PRA). In addition, it is responsible for the market conduct and prudential supervision of claims management companies.
9. The FCA has a single strategic objective which is to ensure that the relevant markets function well. It also has three operational objectives:
  - (a) to secure an appropriate degree of protection for consumers;
  - (b) to protect and enhance the integrity of the UK financial system; and
  - (c) to promote effective competition in the interests of consumers.
10. Within the scope of FSMA, the FCA has the power to make new rules and guidance in relation to FCA-regulated firms. In this role, the FCA is required to have regard to the Principles of Good Regulation. The FCA, together with the PRA (which is the prudential regulator for banks, building societies, credit unions, insurers and major investment firms), is also responsible for authorising, supervising and if necessary, taking enforcement action against firms that undertake regulated financial market or claims management activities. These include banks, building societies, investment firms, insurance companies, mortgage and insurance brokers, financial advisers, and claims management companies.
11. The FCA is also a designated enforcer for the purposes of EA02 and is able to obtain court orders against businesses that do not comply with their legal obligations to consumers.

## **General cooperation**

12. We propose to facilitate effective joint working by:
  - (a) meeting and communicating frequently, at appropriate levels of seniority, to discuss matters of mutual interest;
  - (b) consulting one another at an early stage on any issues that might have significant implications for the other authority; and

- (c) sharing (for comment) at an early stage draft documents (such as consultation papers and briefings) that affect the functions of the other authority.
13. The FCA and CMA will:
- (a) coordinate enforcement action and cooperate in all ways permitted by law to ensure the effective and consistent delivery of consumer protection in relation to breaches of consumer law;
  - (b) cooperate with each other and with other UK qualifying bodies responsible for the enforcement of consumer law by sharing information and in all other ways;
  - (c) have regard to any applicable guidance on breaches of consumer law; and
  - (d) in deciding upon any enforcement action in respect of a potential breach of consumer law causing potential consumer harm, have regard to the need for regulatory activities to be carried out in a way which is proportionate, consistent, transparent, accountable and targeted only at cases in which action is needed; and work together to:
    - (i) ensure that a consistent and coordinated approach is taken in relation to relevant investigations and enforcement action under consumer law; and
    - (ii) agree which of them is best placed to lead in each case, which will be the body best placed to deliver swift and effective protection of consumers, having regard in particular to its expertise, knowledge, and priorities, among other matters.
14. The CMA will enforce consumer law having regard to its published guidance<sup>3</sup>.
15. The FCA will enforce consumer law in line with its Handbook, regulatory guides and other regulatory tools.
16. Subject to any legal obligations and/or restrictions on disclosure and having regard to any overriding policy aims, the FCA and the CMA will follow the principles set out below in their working arrangements.

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<sup>3</sup> Such as CMA's Consumer Protection: enforcement guidance (CMA 58), or any other statement of principles that we may publish from time to time.

17. The FCA will (in addition to its statutory obligations to the CMA under consumer law):
- (a) consult and liaise with the CMA to reduce duplication of effort and promote appropriate action by the authority best placed to lead on an issue (subject to any legal requirements or restrictions);
  - (b) have regard to advice provided to businesses under the Primary Authority Principle and/or any Home Authority arrangements applicable;
  - (c) consider the use of all appropriate methods of resolution, whether statutory or not, before taking formal enforcement action under consumer law;
  - (d) provide copies of material for publication on the FCA, CMA and/or an appropriate third party website if such publication is considered lawful and appropriate by the FCA and the CMA;
  - (e) use its powers under consumer law if it considers it necessary and appropriate and will notify the CMA of its intention to seek any undertaking or enforcement order, and of the outcome of any such application, by placing details on the Trading Standards Sanctions Database; and
  - (f) consult with the CMA on any new guidance to be issued in relation to consumer law where it would be relevant to the CMA's roles under this MoU.
18. The CMA will (in addition to its statutory obligations under consumer law):
- (a) consult and liaise with the FCA to reduce duplication of effort and promote appropriate action by the authority best placed to lead on an issue;
  - (b) have regard to advice provided to businesses under the Primary Authority Principle and/or any Home Authority arrangements applicable;<sup>4</sup>
  - (c) provide advice to the FCA, as necessary, on how to comply with any statutory requirements in respect of notifications to the CMA;
  - (d) disseminate case and other material of wider interest, including: preparing, consulting on and publishing guidance from time to time on the application of consumer law;

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<sup>4</sup> Further information about the Primary Authority Principle and Home Authority Principle can be found on the Primary Authority Register Website.

- (e) publish details of successful enforcement action and completed cases on the CMA and/or an appropriate third party website; and
- (f) consult with the FCA on any new guidance to be issued on consumer law, and on any change in policy where it would be relevant to the FCA's role under this MoU.

## **The division of responsibilities between the CMA and the FCA**

19. The FCA will consider fairness within the meaning of:
- (a) the CRA and the UTCCRs, of standard terms, and the CRA of negotiated terms, in financial services and claims management contracts issued by authorised firms or appointed representatives; and
  - (b) the CPRs, of commercial practices in financial services and claims management services of an authorised firm or appointed representative.
20. Firms are required to be authorised when they are undertaking any regulated activity (as specified in Part II and Part 38 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 and subsequent amending legislation (RAO)), by way of business, in the United Kingdom or, in the case of a regulated claims management activity, in Great Britain. In this MoU 'authorised' includes having an interim or claims management temporary permission and a 'relevant permission' includes an interim or claims management temporary permission. The FCA's consideration of fairness under the CRA, UTCCRs and CPRs will include contracts for:
- mortgages and the selling of mortgages;
  - insurance and the selling of insurance;
  - bank, building society and credit union accounts;
  - life assurance;
  - pensions;
  - investments;
  - consumer credit;
  - consumer hire;
  - other credit-related regulated activities and

- claims management services.
21. In addition, the FCA will consider fairness within the meaning of:
- (a) the UTCCRs, of standard terms in contracts;
  - (b) the CRA, of consumer notices and standard and negotiated terms in contracts; and
  - (c) the CPRs, of commercial practices
- of payment service providers when providing payment services (as specified in Schedule 1 to the Payment Services Regulations 2009 (PSRs)) and e• money issuers (as defined by the Electronic Money Regulations 2011) with respect to the issuance, distribution and redemption of e-money.
22. In addition, the FCA may consider complaints, between consumers and FCA• authorised firms or appointed representatives, about the fairness within the meaning of:
- (a) the UTCCRs, of standard terms in contracts; and
  - (b) the CRA, of consumer notices and standard and negotiated terms in contracts.
23. The FCA will not have responsibility for considering the application of consumer law in relation to firms it registers under the Friendly Societies Acts of 1974 or 1992 to the extent that they are not also authorised firms under FSMA.
24. Where the firm concerned is not a firm with a relevant permission, the CMA may consider fairness:
- (a) under the CRA in respect of financial services contracts, claims management contracts and consumer notices; and/or
  - (b) under the CPRs in respect of financial services and claims management services.
25. The CMA may consider fairness, but will not usually expect to do so, where the firm concerned is an authorised firm, or an appointed representative under FSMA.
26. The authority to which the complaint has been referred will consider who is best placed to review the matter. In doing so consideration will be given to matters such as which authority is responsible for most of the contract, or the



particular focus of the term or practice complained about, and whether either authority is already considering the same or similar issues. The CMA will normally consider that the FCA is best placed to deal with matter where the firm concerned is an authorised firm, or an appointed representative under FSMA.

27. If the FCA considers that the CMA is better placed to deal with the matter, it will pass the case to the CMA for it to decide whether, in its view, action by the CMA is required and, if so, what action is appropriate. If the CMA considers the FCA is better placed to deal with the matter, the CMA will act reciprocally.

### **Sharing information - legal aspects**

28. The CMA and the FCA aim to cooperate by sharing information when appropriate for the performance of their functions, subject to any restrictions on disclosure of information and compliance with the law.
29. The CMA and the FCA intend to consult with each other when necessary, to ensure that legislation and best practice are interpreted consistently.
30. The CMA and the FCA may each refer a matter to the other for action, if the other is considered more appropriate to deal with it having regard to its particular legislative responsibilities.

### **Restrictions on disclosure of information**

31. The CMA and the FCA are each subject to restrictions on disclosure of information. These restrictions apply to the exchange of certain information between the two agencies.

### **FCA**

32. Section 348(1) of FSMA prevents the FCA from disclosing any 'confidential information' it receives except in certain circumstances. Confidential information is defined in section 348 and broadly is any information which is not in the public domain, relating to the business or other affairs of any person, which was received by the FCA for the purposes of, or in the discharge of, its statutory functions (see section 348(2) of FSMA). Where the information has lawfully been made available to the public or is in the form of a collection or a summary so that it cannot be attributed to a particular firm or individual, that information is not confidential information (see section 348(4))

of FSMA).<sup>5</sup> However, when the FCA receives information under Part 16A FSMA, for example, for the purpose or in the discharge of its concurrent competition functions, including its functions under CA98, Part 9 of the EA02 will apply to any disclosure of such information instead of section 348 FSMA. Paragraphs 39 to 43 below set out the framework for disclosure of information under Part 9EA02.

33. The restriction on the disclosure of confidential information under section 348 FSMA does not apply where the person from whom the information was received (and, if different, the person to whom the information relates) has consented to the disclosure of the material.
34. Section 349 of FSMA allows HM Treasury to make regulations to permit the disclosure of confidential information in certain circumstances. The Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (the Gateway Regulations) sets out the circumstances in which disclosure may be made. The Gateway Regulations are permissive, enabling the FCA to disclose information in certain circumstances, but do not compel the FCA to do so.
35. The Gateway Regulations generally permit the disclosure of confidential information to the CMA (in relation to current or former authorised persons) under two main gateways:
  - (a) The first is where the disclosure of confidential information is made for the purposes of enabling or assisting the FCA to discharge any of its public functions (see regulation 3(1)(a) of the Gateway Regulations), ie its functions under FSMA and certain other legislation.
  - (b) The second is where the disclosure of confidential information is made for the purposes of enabling or assisting certain other bodies to discharge specified functions (see regulations 9(1) and 12 of the Gateway Regulations). The bodies able to receive confidential information from the FCA, and the functions for which they may receive it, will depend on whether the FCA received it as a 'competent authority' under any of the single market directives. If so, regulation 9(1) prescribes a narrower set of gateways. In such cases, the FCA can only disclose information to the CMA in respect of the CMA 's functions under FSMA or under any other enactment where the CMA has supervisory functions over firms that are

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<sup>5</sup> Similar provision is made with respect to information received under the Payment Services Regulations 2017 and Electronic Money Regulations 2011 by those regulations.

or were authorised under FSMA (See Part 1 of Schedule 1 to the Gateway Regulations).

36. Before disclosing any confidential information, the FCA must have regard to any relevant restrictions on disclosure set out in the Gateway Regulations. Where the FCA contemplates disclosing confidential information under The Gateway Regulations which is also 'specified information' within the meaning of section 238(1) of the EA02, it will consider the matters mentioned in section 244 of the EA02 (see below).
37. When the FCA discloses confidential information to the CMA, the CMA will be bound by the statutory confidentiality regime in FSMA.

### **CMA**

38. CMA disclosure powers are strictly defined and limited by Part 9 of the EA02.
39. Under Part 9, information that comes to the CMA in connection with the exercise of its functions (as defined) is 'specified information' (see section 238(1) of the EA02). Where specified information relates to the affairs of an individual or any business of an undertaking (see section 237(1) of the EA02) the CMA can only disclose it, during the lifetime of the individual or while the undertaking continues in existence, under permitted gateways (see section 237 (2) of the EA02). Disclosure outside those gateways is a criminal offence.
40. Unless the information is already properly and lawfully in the public domain (see section 237(3) of the EA02), or a power or duty to disclose it exists outside Part 9 of the EA02 (see section 237(6) of the EA02), in broad terms, the CMA may only disclose it where one of the following gateways exists:
  - (a) where the CMA obtains consent from both those providing the information and those to whom it relates (section 239 of the EA02);
  - (b) disclosure is required to meet an obligation under EC law (section 240 of the EA02);
  - (c) disclosure facilitates the exercise of the CMA's statutory functions;
  - (d) disclosure facilitates the exercise of any function another body has under certain specified statutes, including FSMA (section 241 of the EA02);
  - (e) disclosure is for the purposes of, or in connection with, prescribed civil proceedings or prospective proceedings in the UK or elsewhere, or for the

purposes of taking legal advice in relation to them, or for the purposes of establishing, enforcing or defending legal rights that are or may be the subject of such proceedings (section 241A of the EA02);

- (f) the disclosure is for certain purposes connected with criminal investigations and proceedings in the UK (section 242 of the EA02); or
  - (g) the disclosure is to facilitate the performance of an overseas public authority's functions, in certain circumstances (section 243 of the EA02).
41. Where a gateway exists, the CMA is also required to have regard to the need to exclude from disclosure (so far as practicable):
- (a) information whose disclosure the CMA thinks is against the public interest (see section 244(2) of the EA02); and
  - (b) information relating to the private affairs of an individual, or any commercial information relating to an undertaking, whose disclosure might, in the CMA's opinion, significantly harm the individual's interests or the legitimate business interests of the undertaking to which it relates (see section 244(3) of the EA02).
42. The CMA must also consider the extent to which any disclosure under (b) above is necessary to fulfil the purpose for which it is made (see section 244(4) of the EA02).
43. When the CMA passes specified information to the FCA, the FCA agrees not to use the information for any purpose other than that for which it has been disclosed.

## **Transfer of personal data**

44. In receiving any 'personal data' through the gateways set out above or otherwise the CMA and the FCA will comply at all times with the Data Protection Act 2018 and the General Data Protection Regulation (EU Regulation 2016/679).