

December 2009

# Memorandum of Understanding between the Office of Fair Trading and the Financial Services Authority







# Contents

Foreword by Hector Sants and John Fingleton	3
Memorandum of Understanding between the Office of Fair Trading and the Financial Services Authority	4
Annex A: Co-operation on competition issues: A concordat between the Office of Fair Trading and the Financial Services Authority	
Annex B: The Unfair Terms In Consumer Contracts Regulations 1999 and Enterprise Act 2002	
A concordat between the Office of Fair Trading and the Financial Services Authority	
Annex C: The Consumer Protection from Unfair Trading Regulations 2008 and Enterprise Act 2002	
A concordat between the Office of Fair Trading and the Financial Services Authority	
Annex D: Banking conduct regime: Consumer Credit Act 1974, Financial Services and Market Act 2000 and Payment Services Regulations 2009	
A concordat between the Office of Fair Trading and the Financial Services Authority	
Annex E: Information Exchange	



# Foreword

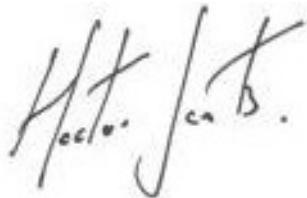
We – the Office of Fair Trading (OFT) and the Financial Services Authority (FSA) – have different, but complementary, powers and statutory objectives. Given our overlapping interests and jointly regulated businesses, it is important we work well together in order to maximise our effectiveness in dealing with consumers and businesses.



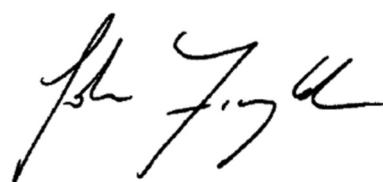
We have long worked closely together across a broad range of mutual interests, and in April 2006 published a *Joint Action Plan*. We are publishing today a final update to that Plan, which has substantial achievements to its credit. It is the final update, as we are moving to a new way of planning our joint working under this Memorandum of Understanding (MoU).

This new MoU establishes a framework for cooperation between the OFT and the FSA on financial services. Financial markets and the wider economy have changed dramatically since April 2006, and we need a more flexible approach that identifies and regularly updates key themes, and plans specific joint action around those. In particular, we wish to strengthen our co-operation on competition issues. We know that the Government<sup>1</sup> welcomes our plans in this area.

The MoU draws together the whole range of our mutual understanding and cooperation, annexing Concordats on Unfair Terms, Consumer Protection and Banking Conduct, as well as the new Competition Concordat. It is both our statement of intent, and a working document of practical ways to achieve maximum effectiveness of regulation.



Hector Sants



John Fingleton

<sup>1</sup> The Treasury's document Reforming financial markets, July 2009, paragraph 9.37

# Memorandum of Understanding between the Office of Fair Trading (the OFT) and the Financial Services Authority (the FSA)

## Introduction

This MoU establishes a framework for cooperation between us – the OFT and the FSA for financial services. It sets out the role of each authority, and explains how they work together.

Its aim is to lay out procedures for discussing matters of common interest, to regularise joint meetings, generally facilitate contact and discussion and to prevent duplication of work. It is intended also to provide terms of reference for a rolling Joint Working Framework, an operational document that will set out specific joint initiatives within a given time period.

## Overview of the OFT's role

The OFT's mission is to make markets work well for consumers. It has a range of tools at its disposal to address market failures and make markets work well for consumers. In many cases, the OFT uses a combination of tools to address failures in a holistic way.<sup>2</sup> It also works in partnership with other organisations which have complementary powers or influence in relation to markets.

The OFT has a dual competition and consumer mandate and it has a broad remit. Most of its work consists of:

- analysing markets;
- enforcing consumer and competition law;
- administering the Consumer Credit licensing system and regulating the conduct of licensed businesses;
- undertaking advocacy; and
- working with partners to deliver education programmes to businesses and consumers.

The OFT's legal powers are conferred on it by several pieces of legislation including the Consumer Credit Act 1974; the Enterprise Act 2002; and the Competition Act 1998.

Under section 160 of the Financial Services and Markets Act 2000 (FSMA) the OFT has a duty to keep the FSA's regulations and practices under review on competition grounds. The OFT assesses the competition effects of new applications for recognition by exchanges and clearing

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<sup>2</sup> Subject to the OFT's prioritisation principles



houses (under section 303 of FSMA). The OFT also has a duty to keep under review the regulatory provisions and practices of recognised bodies (under section 304).

## The FSA's responsibilities

The FSA's powers and responsibilities are set out in FSMA. This gives it four statutory objectives: maintaining market confidence; promoting public understanding of the financial system; the protection of consumers; and the reduction of financial crime.

Within the scope of FSMA, the FSA has the power to propose new rules and guidance which are binding on regulated firms. In this role, the FSA is required, to have regard to the Principles of Good Regulation, which include the need to minimise the impact on competition and the desirability of facilitating competition. The FSA is also responsible for authorisation, supervision and enforcement of firms that undertake regulated financial market activities – including banks, building societies, investment firms, insurance companies, mortgage and insurance brokers and financial advisers.

## Benefits of joint working

The OFT and the FSA have different but complementary powers. By working closely and effectively together we can deliver greater benefits to consumers and businesses. Effective joint working ensures that we use our powers to the best possible effect to identify, analyse and find appropriate solutions to remedy problems in financial markets. It also helps to ensure that regulation in the sector is proportionate and does not result in unjustified costs to consumers or firms. At the same time it can help to reduce the burden on business by avoiding any duplication of effort. Finally, effective joint working can improve the way we make information available to consumers.

OFT/FSA joint working falls under these high-level themes:

- **Competition**

Well functioning, competitive markets are a key driver for delivering optimal outcomes. Competition drives suppliers to improve their performance, lower prices and deliver better quality products and services and provide greater choice to consumers to meet the diversity of their needs. These principles apply similarly within financial markets. However, there are market failures that may be inherent to financial markets, including information asymmetries that can lead to poor consumer outcomes. So it is necessary to ensure effective competition between financial services providers and to ensure consumers are able to make effective and appropriate cost/value comparisons.

Interaction between the two organisations under this theme arises under two key headings, which are also directly relevant to consumer protection: 1) interaction on market analysis and; 2) interaction on the design and development of regulation that has the potential to impact on competition. The latter also includes interaction on the impact of agreed international regulation on competition.

- **Consumer protection**

Both the OFT and the FSA's work under this theme have, at heart, the same outcome in mind – essentially ensuring that consumers are treated in a fair, considerate and responsible way in their dealings with financial services firms.

Consumer protection interventions by the OFT are designed to support the development of competitive, efficient and innovative markets, where standards of consumer care are high, consumers have choice and are empowered and confident about making choices, and where businesses are not unduly burdened by government regulations and are encouraged to offer benefits to consumers beyond the minimum standards of protection afforded by the law. The OFT superintends the working of the Consumer Credit Act (1974) and regulations made under it.

Interventions by the FSA to achieve an appropriate level of consumer protection are designed to address the market failures in the relevant financial market that have led to poor consumer outcomes. It does this in such a way that the costs are proportionate to the benefits, and to manage the risks that firms' conduct causes consumer detriment or damages consumers' confidence in financial services markets. Interventions in this area are carried out through the FSA's Conduct of Business rules and mainly target problems of asymmetric and imperfect information.

Interaction under this theme is wide ranging. It encompasses several concordats covering enforcement of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs), the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) the Enterprise Act 2002 (EA02) and the Banking Conduct regime.

In addition the OFT and the FSA are Competent Authorities<sup>3</sup> under the Consumer Protection Co-operation Regulation 2007 (CPC), which requires national bodies responsible for the enforcement of European consumer protection laws, designated as competent authorities, to help each other by exchanging information and cooperating on cases which harm the collective interests of consumers and contain a cross-EU border element. The Competent Authorities, including the OFT and the FSA agreed protocols setting out how they should work together to carry out their responsibilities under the CPC.

- **Financial capability**

The FSA has the lead role in financial education, in particular through the information available in its Moneymadeclear guidance. The OFT's activities support the programmes undertaken by the FSA.

To achieve our goal of working effectively together in these areas the following arrangements should be put in place, in addition to ad hoc work when an emerging or crystallised risk is identified.

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3 In addition the OFT is the UK's Single Liaison Office, responsible for ensuring requests are sent to the competent authority best placed to deal with them.



## Competition concordat

We have developed a concordat on competition (see Annex A). This sets out the working arrangements between the OFT and FSA on competition issues falling under the theme identified above. It sets out the processes for identifying possible joint working at an early stage and throughout the life of a project.

The concordat does not cover working arrangements on EU regulation. However, the OFT and FSA will cooperate where regulatory decisions at a European level raise competition issues.

## Unfair Terms in Consumer Contracts and Consumer Protection Regulations

Both the OFT and the FSA have powers in relation to unfair contract terms under the Unfair Terms in Consumer Contracts Regulations. We coordinate enforcement action and cooperate to ensure the effective and consistent delivery of consumer protection in this area. Under the 'Unfair Terms' Concordat, we set out arrangements for consulting and liaising to reduce duplication of effort and to promote appropriate action by the body best placed to lead on an issue. See Annex B.

The OFT and the FSA have adopted a similar approach in the Consumer Protection Regulations, which can be found at Annex C.

## Banking

The OFT and the FSA will work together to ensure that a consistent and coordinated approach is taken under the Consumer Credit Act, the Financial Services and Markets Act, the Payment Services Regulations and the FSA's Handbook in relation to potential regulatory breaches and to agree which party is best placed to lead in each case.

All of this is set out in a Concordat which details the working relationship and division of responsibility between the OFT and the FSA, and which can be found at Annex D.

## Relationship managers

There will be a designated relationship manager within both organisations at official level. Responsibilities will include (not exhaustive):

- maintaining an overview of own organisation contacts from all areas of joint working/mutual interest; and
- holding regular meetings to identify potential new issues (covering all of the themes identified above) with a view to circulating information to appropriate individuals within each organisation.

The relationship managers will also ensure that they have an overview of joint projects and

that their own organisations think about where joint links would be useful. The existence of relationship managers does not preclude direct communication between other staff at the OFT and the FSA.

### Meetings and informal contact

The Chief Executive Officers (CEOs) will meet regularly to discuss matters of mutual interest. The meetings will aim to ensure that issues falling within all the themes identified above are discussed.

The outcomes of these meetings will be recorded and sent to appropriate people within each organisation and acted upon as appropriate.

These meetings will be underpinned by regular meetings at official level.

There will be bi-monthly meetings between official level relationship managers to discuss joint working processes, matters of mutual interest and scanning for future areas of joint working.

On specific work projects, the OFT and FSA teams will agree a process upfront for identifying key contacts, regularity and recording of meetings, and exchange of information. Any changes to these during the project should be communicated to the other organisation immediately.

### Annual business plans

In drawing up their annual business plans, both the OFT and the FSA will share thinking on future priorities at the planning round with a view to identifying possible areas of joint working, including the provision of information to consumers.

### Information exchange

We are both subject to restrictions on disclosing the information we receive in the course of carrying out our functions. Each organisation also has 'gateways', through which information which they receive can be lawfully disclosed. The FSA's and the OFT's shared understanding of both these areas is set out at Annex E.

### Investigations

Both organisations will work to ensure that any common interests in formal investigations conducted by the FSA and the OFT, for example where an authorised firm under investigation by the FSA also holds a Consumer Credit licence, are identified and information on the nature and eventual outcome of those investigations shared in an appropriate and timely manner, subject to legal constraints.

### Interchange



Both organisations will identify suitable opportunities for joint training of staff. Secondments of staff between them can provide valuable experience and both organisations will encourage such secondments when suitable opportunities arise and where consistent with priorities, taking into account resource implications.

### **Review of the MoU**

The senior directors responsible for relationship management between the organisations will review the effectiveness of these joint working arrangements at least annually.





## Annex A

# **Co-operation on competition issues: A concordat between the Office of Fair Trading and the Financial Services Authority**

## **Co-operation on Competition Issues: A Concordat between the Office of Fair Trading (OFT), and the Financial Services Authority (FSA)**

1. The OFT and FSA have different but complementary powers applicable to financial markets. By working together on issues related to competition in these markets we intend to optimise the benefits that competition can deliver to consumers.
2. The purpose of this statement is to record our agreement to co-operate on competition issues by sharing information and intelligence, and in other appropriate ways, both as set out in this Concordat and as we may agree from time to time.
3. We acknowledge, on a reciprocal basis:
  - The OFT's statutory duties, including the duty under section 160 of the Financial Services and Markets Act 2000 (FSMA) to keep the FSA's regulating provisions and practices under review on competition grounds;
  - The FSA's general duties under section 2 of FSMA, including its regulatory objectives and the factors to which the FSA must have regard under section 2(3);
  - Any regulatory objective relating to financial stability that may be given to the FSA.
4. The working arrangements summarised in the Annex are designed to achieve more efficient and effective joint working between us but are without prejudice to our respective powers, duties and obligations. They may be developed further by agreement between us and within the terms of this Concordat.
5. We will review these arrangements in 2011 and, if appropriate, agree changes to ensure their effectiveness.

This Concordat has effect from 8 December 2009.

  
Signed by..... Date..... 4-12-09,  
Sheila Nicoll, Director of Conduct Policy, Financial Services Authority

  
Signed by..... Date..... 7.12.09,  
Clive Maxwell, Senior Director, Markets and Projects, Services

## Annex

### Working arrangements

#### *Regular (quarterly) consultation*

1. Frequency: We will have quarterly meetings (but may agree to revise this frequency).
2. Agenda: The standing agenda items (subject to revision by agreement) will include:
  - a. Exchange of firms and markets information and intelligence;
  - b. FSA policy and rule-development having an impact on competition
  - c. Review of specific enforcement cases of mutual interest; and
  - d. Exchange of information on developments and projects, including potential OFT market studies.
3. Reporting to CEOs: The quarterly competition meetings will report to the regular meetings of our respective Chief Executive Officers, as provided for by our Memorandum of Understanding (MoU).

#### *Annual business planning round consultation*

4. We will consult each other, through the regular quarterly meetings or by ad hoc meetings, as necessary, on specific proposals as part of the annual business planning round, in order to feed into consideration of options for work we might prioritise in the coming year.

#### *Ad hoc consultation*

5. We may also consult each other on other proposals, on an ad hoc basis.

#### *Joint working on competition in financial markets*

6. The OFT and FSA may also carry out wider joint working on matters related to competition in financial markets, under the 'joint action' provisions of our MoU.

#### *Accountability – reporting*

7. We will include a specific report on the outcomes of our co-operation on competition issues in our respective Annual Reports.
8. In the case of the FSA's Annual Report, this will be within a dedicated section on competition and on the FSA's discharge of its responsibilities in this regard.





## Annex B

# **The Unfair Terms In Consumer Contracts Regulations 1999 and Enterprise Act 2002**

**A concordat between the Office of Fair Trading and the Financial Services Authority**

**The Unfair Terms In Consumer Contracts Regulations 1999<sup>1</sup> (UTCCRs) & Enterprise Act 2002 (EA02)**

**A Concordat between the Office of Fair Trading (OFT), and the Financial Services Authority (FSA)**

The purpose of this statement is to record our agreement to co-ordinate enforcement action and to co-operate in all ways permitted by law to ensure the effective and consistent delivery of consumer protection in relation to unfair terms in consumer contracts under the UTCCRs and the EA02. Working arrangements are summarised in the Annex, but may be developed further by agreement between the OFT and the FSA within the terms of this concordat.

We agree to co-operate, by sharing information, and in all other ways, as permitted by law, with each other and with other UK qualifying bodies responsible for the enforcement of the UTCCRs and EA02. We will have regard to any guidance on unfair contract terms which has been discussed with each other and published<sup>2</sup>.

We will ensure that in deciding upon any enforcement action in respect of a potential breach of the UTCCRs causing potential consumer harm, we will have regard to the principles that regulatory activities should be carried out in a way which is proportionate, consistent, transparent, accountable and targeted only at cases in which action is needed. The OFT will enforce the UTCCRs in line with published statements of enforcement principles; the FSA will enforce the UTCCRs in line with the Unfair Contract Terms Regulatory Guide in its Handbook.

The OFT and the FSA will work together to ensure that a consistent and co-ordinated approach is taken under the UTCCRs and the EA02 in relation to unfair terms in consumer contracts and to agree which of them is best placed to lead in each case. This will be the body best placed to deliver swift and effective protection of consumers having regard to its expertise, knowledge, and priorities among other matters.

The concordat has effect from 1 November 2009 and replaces the 2008 concordat between the ~~OFT and FSA~~<sup>3</sup>

Signed by.....  Date... 23.11.09  
Daniel F Waters, Director of Conduct Risk, Financial Services Authority

Signed by.....  Date... 26.11.09  
Clive Maxwell, Senior Director, Markets and Projects, Services, Office of Fair Trading

<sup>1</sup> SI 1999/2083

<sup>2</sup> Such as OFT's 'Unfair Contract Terms Guidance' (OFT 311), the FSA's May 2005 Statement of Good Practice on 'Fairness of terms in consumer contracts' and other sectoral guidance published from time to time

<sup>3</sup> [http://www.fsa.gov.uk/pubs/other/concordat\\_fsa\\_oft.pdf](http://www.fsa.gov.uk/pubs/other/concordat_fsa_oft.pdf)

## Annex

### The division of responsibilities between OFT and FSA

The FSA has agreed with the OFT that the FSA will consider the fairness within the meaning of the UTCCRs of standard terms in financial services contracts issued by authorised firms or appointed representatives when they are undertaking any regulated activity (as specified in Part II of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 and subsequent amending legislation (RAO)) in the United Kingdom.

This 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; and
- investments.

In addition, the FSA will consider the fairness within the meaning of the UTCCRs of terms in standard form contracts of payment service providers when providing payment services (as specified in Schedule 1 to the Payment Services Regulations 2009) save as set out in the paragraphs below.<sup>4</sup> The FSA shall also address any issues arising under the UTCCRs with firms to which it has issued a Small E-Money Issuer Certificate under Article 9C of the RAO.

The FSA will not have responsibility for considering the application of UTCCRs for firms it registers under the Friendly Societies Act 1974 or 1992 to the extent that they are not also authorised firms under FSMA.

The OFT will consider the fairness within the meaning of the UTCCRs of standard terms in financial services contracts where activities are governed by the Consumer Credit Act 1974 and subsequent amending legislation, including credit card agreements (unless the issues raised fall within the FSA's remit as competent authority under the Payment Services Regulations 2009), second charge secured loans, and unsecured loans. Further, the OFT may consider fairness under the UTCCRs in respect of financial services contracts where the firm concerned is **not** an authorised firm or an appointed representative under FSMA.

The body 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 body is responsible for most of the contract, or the particular focus of the term complained about, and whether either body is already considering the same or similar issues.

<sup>4</sup> The FSA, as competent authority, will also consider any issues arising under the revised Regulation on Cross Border Payments in Euro (Regulation (EC) No. 3665/09) when it is implemented in the United Kingdom.

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

### **Principles of working arrangements under UTCCRs/EA02 in relation to unfair contract terms to be followed by OFT and FSA**

Subject to any legal obligations and/or restrictions on disclosure and having regard to any overriding policy aims, we will follow the principles set out below in our working arrangements.

**FSA** will, in addition to its statutory obligations to the OFT under the UTCCRs and EA02:

- consult and liaise with the OFT to reduce duplication of effort and promote appropriate action by the body best placed to lead on the issue (subject to any legal requirements or restrictions);
- have regard to the Primary Authority Principle and/or any Home Authority arrangements applicable;
- consider the use of all appropriate methods of resolution, whether statutory or not, before taking formal enforcement action under the UTCCRs or the EA02;
- provide copies of material for publication on the Consumer Regulation Website (CRW) or OFT website if such publication is considered lawful and appropriate by the FSA and OFT;
- use its powers under the EA02 if it considers it necessary and appropriate and notify and consult with the OFT in accordance with the EA02;
- consult with the OFT on any new guidance issued on unfair contract terms; or change in policy on unfair contract terms where that would be relevant to the OFT's role under this concordat.

**OFT** will, in addition to its statutory obligations under the UTCCRs and EA02:

- consult and liaise with the FSA to reduce duplication of effort and promote appropriate action by the body best placed to lead on an issue;
- have regard to the Primary Authority Principle and/or any Home Authority arrangements applicable;
- provide training on the notification process;
- disseminate case and other material of wider interest, including: preparing, consulting on and publishing guidance from time to time on the application of the UTCCRs and the EA02, both generally and to particular sectors;
- publish details of successful enforcement action on the Consumer Regulation Website (CRW); and
- consult with the FSA on any new guidance issued on unfair contract terms; or change in policy on unfair contract terms where that would be relevant to the FSA's role under this concordat.



## Annex C

# **The Consumer Protection from Unfair Trading Regulations 2008 and Enterprise Act 2002**

## **A concordat between the Office of Fair Trading and the Financial Services Authority**

**The Consumer Protection from Unfair Trading Regulations 2008<sup>1</sup> (CPRs) and Enterprise Act 2002 (EA02)**

**A Concordat between the Office of Fair Trading (OFT), and the Financial Services Authority (FSA)**

The purpose of this statement is to record our agreement to co-ordinate enforcement action and to co-operate in all ways permitted by law to ensure the effective and consistent delivery of consumer protection in relation to unfair commercial practices under the CPRs and the EA02. Working arrangements are summarised in the Annex, but may be developed further by agreement between the OFT and the FSA within the terms of this concordat.

We agree to co-operate, by sharing information, and in all other ways, as permitted by law, with each other and with other relevant UK regulatory bodies responsible for the enforcement of the CPRs and EA02. We will have regard to any relevant guidance on unfair commercial practices which has been discussed with each other and published in interpreting the law.

We will ensure that in deciding upon any enforcement action in respect of a potential breach of the CPRs causing potential consumer harm, we will have regard to the principles that regulatory activities should be carried out in a way which is proportionate, consistent, transparent, accountable and targeted only at cases in which action is needed. The OFT will enforce the CPRs in line with published statements of enforcement principles. The FSA expects to address unfair commercial practices in financial services using its existing Handbook and other regulatory tools.

The OFT and the FSA will work together to ensure that a consistent and co-ordinated approach is taken under the CPRs and the EA02 in relation to unfair commercial practices and to agree which of them is best placed to lead in each case. This will be the body best placed to deliver swift and effective protection of consumers having regard to its expertise, knowledge, and priorities, among other matters.

The concordat has effect from 1 November 2009 and replaces the 2008 concordat between the OFT and FSA.

Signed by.....  Date..... 23.11.09  
**Daniel F Waters, Director of Conduct Risk, Financial Services Authority**

Signed by.....  Date..... 26.11.09  
**Clive Maxwell, Senior Director, Markets and Projects, Services, Office of Fair Trading**

## Annex

### The division of responsibilities between OFT and FSA

The FSA has agreed with the OFT that the FSA will consider the fairness within the meaning of the CPRs of commercial practices in financial services of authorised firms and appointed representatives when they are undertaking any regulated activity (as specified in Part II of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 and subsequent amending legislation (RAO)) in the United Kingdom.

This will include practices by such firms undertaking regulated activities in any of the following areas:

- mortgages and the selling of mortgages;
- insurance and the selling of insurance;
- bank, building society and credit union accounts;
- life assurance;
- pensions; and
- investments.

In addition, the FSA will consider the fairness of commercial practices within the meaning of the CPRs of payment service providers when providing payment services (as specified in Schedule 1 to the Payment Services Regulations 2009) save as set out in the paragraphs below.<sup>2</sup> The FSA shall also address any issues arising under the CPRs with firms to whom it has issued a Small E-Money Issuer Certificate under Article 9C of the RAO.

The FSA will not have responsibility for considering the application of CPRs for firms it registers under the Friendly Societies Act 1974 or 1992 to the extent that they are not also authorised firms under FSMA.

The OFT will consider complaints about unfair commercial practices relating to financial services contracts regulated by the Consumer Credit Act 1974 and subsequent amending legislation, including agreements for the issue of credit cards (unless the issues raised fall within the FSA's remit as competent authority under the Payment Services Regulations 2009), second charge secured loans and unsecured loans, and will consider unfair commercial practices relating to any matters governed by that Act. The OFT will also consider complaints about unfair commercial practices that raise issues of fitness to hold a licence under the same Act. Further, the OFT may consider complaints in respect of financial services where the firm concerned is **not** an authorised firm or an appointed representative under FSMA.

The body 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 body is responsible for regulation of the commercial activities being undertaken, or the particular focus of the activities complained about, and whether either body is already considering the same or similar issues.

If the FSA considers the OFT is better placed to deal with the matter, it will pass the case to the OFT for it to decide whether, in its view, action by the OFT is required and, if so, what

<sup>2</sup> The FSA, as competent authority, will also consider any issues arising under the revised Regulation on Cross Border Payments in Euro (Regulation (EC) No. 3665/09) when it is implemented in the United Kingdom.

action is appropriate. If the OFT considers the FSA is better placed to deal with the matter, the OFT will act reciprocally.

**Principles of working arrangements under CPRs/EA02 in relation to unfair commercial practices to be followed by OFT and FSA**

Subject to any legal obligations and/or restrictions on disclosure and having regard to any overriding policy aims, we will follow the principles set out below in our working arrangements:

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

- 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 any legal requirements or restrictions);
- consider using powers under FSMA where appropriate;
- have regard to the Primary Authority Principle and/or any Home Authority arrangements applicable;
- consider the use of all appropriate methods of resolution, whether statutory or not, before taking formal enforcement action under the EA02;
- provide copies of material for publication on the Consumer Regulation Website (CRW) or OFT website if such publication is considered lawful and appropriate by the FSA and OFT;
- use its powers under the EA02 if it considers it necessary and appropriate and notify and consult with the OFT in accordance with the EA02; and
- consult with the OFT on any new guidance issued in relation to the CPRs; or change in policy in relation to the CPRs where that would be relevant to the OFT's role under this concordat.

**OFT** will, in addition to its statutory obligations under the CPRs and EA02:

- consult and liaise with the FSA to reduce duplication of effort and promote appropriate action by the body best placed to lead with an issue (subject to restrictions in Part 9 EA 02);
- have regard to the Primary Authority Principle and/or any Home Authority arrangements applicable;
- provide training as appropriate on the use of the legislation and the notification process;
- disseminate case and other material of wider interest, including: preparing, consulting on and publishing guidance from time to time on the application of the CPRs and the EA02, both generally and to particular sectors;
- publish details of successful enforcement action on the Consumer Regulation Website (CRW);
- publish reports of completed cases on the CRW; and
- consult with the FSA on any new guidance issued on the CPRs that would impact on FSA firms; or change in policy in relation to the CPRs where that would be relevant to the FSA's role under this concordat.



## Annex D

# **Banking conduct regime: Consumer Credit Act 1974, Financial Services and Market Act 2000 and Payment Services Regulations 2009**

## **A concordat between the Office of Fair Trading and the Financial Services Authority**



## **Banking Conduct Regime**

### **CONSUMER CREDIT ACT 1974 (“CCA”), FINANCIAL SERVICES AND MARKET ACT 2000 (“FSMA”) and PAYMENT SERVICES REGULATIONS 2009 (“PSRs”).**

1. The purpose of this Concordat is to record our agreement to co-ordinate supervision and other actions to protect consumers and to co-operate in all ways permitted by law to ensure the effective and consistent delivery of consumer protection in relation to:
  - credit cards;
  - debit cards (but not prepaid debit);
  - current and any other accounts which offer overdraft facilities; and
  - access to payment systems (as defined in Article 28 of the Payment Services Directive (2007/64/EC)).
  

Division of responsibilities is summarised in the Annex and working arrangements may be developed further by agreement between the OFT and the FSA within the terms of this Concordat.

2. We agree to co-operate with each other, by sharing information and in all other ways as permitted by law, taking account of our duty to co-operate and exchange information under the PSRs.
3. We will ensure that, in deciding upon any actions by either of us in respect of a breach or potential breach of the PSRs or the FSA’s Principles for Businesses or Banking Conduct of Business Sourcebook causing potential consumer harm (or in respect of an actual breach - as aforesaid - that has already caused consumer harm), we will have regard to the principle that regulatory activities should be carried out in a way which is proportionate, consistent, transparent, accountable and targeted only at cases in which action is needed.
4. The OFT will exercise oversight over the CCA in line with its published statements of enforcement principles. The FSA expects to address breaches of the PSRs, the FSA’s Principles for Businesses or the Banking Conduct of Business Sourcebook using its powers under the PSRs and FSMA. The FSA’s approach to enforcement of its PSR and FSMA responsibilities is set out in

Enforcement Guide (EG) which may be found at the FSA's website. The OFT's approach to its responsibilities regarding access to payment systems in the UK is set out in Chapter 16 of the FSA's approach document: "The FSA's role under the Payment Services Regulations 2009" published at: [http://www.fsa.gov.uk/pubs/other/PSD\\_approach.pdf](http://www.fsa.gov.uk/pubs/other/PSD_approach.pdf).

5. The OFT and the FSA will work together to ensure that a consistent and co-ordinated approach is taken under the CCA, FSMA, the PSRs and the Handbook in relation to potential regulatory breaches and to agree which party is best placed to lead in each case. This will be the body best placed to deliver swift and effective protection of consumers having regard to its functions and powers, expertise, knowledge and priorities among other matters.
6. This concordat has effect from 1 November 2009.

Signed by.....*Sheila Nicoll*.....Date.....*29/10/09*  
Sheila Nicoll, Director of Conduct Policy, Financial Services Authority

*PP*

Signed by.....*Clive Maxwell*.....Date.....*30/10/09*  
Clive Maxwell, Senior Director, Markets and Projects, Services

## **Annex**

### **The division of responsibilities between the OFT and the FSA**

The FSA is responsible for prudential and conduct of business regulation in relation to all banks and building societies (in respect of their deposit taking and payment services activities), credit unions (in respect of their deposit taking) and other businesses which offer payment services (as defined in Part One of Schedule One to the PSRs) including the operation of payment accounts and the issuance of debit cards, and credit cards. Broadly speaking, where businesses offer accounts with overdrafts the FSA is responsible for regulation of deposit taking and payment services activities under FSMA and the PSRs (other than Part 8) and the OFT is responsible for regulation of the granting of credit under the CCA.

Under the CCA 1974, the OFT has the function to license and the power to take enforcement action against most businesses that offer goods or services on credit or which lend money to consumers. This includes overdrafts and the granting of credit in respect of credit cards.

The OFT has responsibility for enforcing Part 8 of the PSRs so as to ensure that firms can access relevant markets without any unnecessary barriers and to ensure that markets work well for consumers.



## Annex E

## Information Exchange

### *Restrictions on disclosure*

For both the FSA and the OFT, restrictions are subject to a number of exceptions, including where consent is given (by the provider of the information and, if different, by the person or business to whom the information relates), where the information has already and lawfully been disclosed to the public or where the information is in the form of a summary which does not allow individuals or firms to be identified.

### *Gateways*

In respect of information received by the OFT, these gateways include disclosure which is required for the purpose of a European Community obligation and disclosure for the purpose of facilitating the exercise by the OFT or, among others, the FSA, of their statutory functions. Before disclosing any information which it receives in the course of its functions, the OFT must have regard to a number of considerations set out in Part 9 of the Enterprise Act 2002.

As to disclosure of confidential information received by the FSA to the OFT, this is permitted where it is for the purposes of discharging the functions of the FSA.

Where the intended disclosure is for the purposes of enabling or assisting the OFT to discharge its own functions, the ability of the FSA to disclose depends on the type of information and from whom it was received.

If the information was received by the FSA in the course of discharging its functions as the competent authority under any of the single market directives or the conglomerates directive, as specified in the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001 (the Regulations), disclosure may only be made by the FSA to the OFT in relation to the supervisory powers of the latter (e.g. under the Consumer Credit Act 1974) over certain types of person or business. These do not include its powers under the Competition Act 1998 or the Enterprise Act 2002.

There is a dual regime for confidential information received by the FSA in the course of discharging its functions as an EEA competent authority under the markets in financial instruments Directive. In simple terms, where such information is received by the FSA from the competent authority (under that Directive) of another EEA Member State or from a third country regulator with whom a cooperation agreement has been concluded, save where the consent of that other authority or regulator is expressly given, the FSA may only disclose the information to the OFT in relation to the latter's supervisory powers, as described above.

Where such information is received by the FSA other than from such an authority or regulator, or where it is information which does not fall within any of the above considerations, the FSA may disclose it to the OFT to enable or assist the OFT to fulfill any of its functions (whether or not they are 'supervisory' functions as referred to above).

The FSA may also disclose any confidential information to the OFT in respect of the latter's powers to relating to criminal investigations and proceedings.





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