

2 April 2013

**Memorandum of Understanding
between the Office of Fair
Trading and the Financial
Conduct Authority**

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Foreword

The Office of Fair Trading (OFT) and the Financial Conduct Authority (FCA) have a shared purpose in making financial markets work well for consumers. Our roles in achieving this are different but complementary. The FCA is the conduct regulator, responsible for ensuring that markets operate with integrity, promoting effective competition, and requiring firms to put the well-being of their customers at the heart of how they run their business. The OFT is the UK's competition and consumer authority, responsible for enforcing and encouraging compliance with competition and consumer law, studying markets and recommending action where required and empowering consumers with the knowledge and skills to make informed choices and get the best value from markets.

It is vital that we work well together to make the best use of our powers, skills and experience so that we can maximise our effectiveness in making financial services markets work well for consumers. This means making sure that we share information so that problems are identified quickly and making sure that action, when needed to tackle problems, is either coordinated or taken forward by the organisation that is best placed to achieve results. Effective co-ordination between our organisations will not only deliver greater benefits for consumers, but will also benefit the businesses we regulate by minimising duplication in their dealings with us.

The OFT and the FCA (via its predecessor organisation, the Financial Services Authority (FSA)) have long worked closely together across a broad range of mutual interests. This new Memorandum of Understanding (MoU) builds on that experience, and extends it in the area of competition, where the FCA has a much stronger remit than the FSA previously had. As we move toward the expected transfer of responsibilities from the OFT in 2014 to the new Competition and Markets Authority and the expected transfer of consumer credit responsibilities to the FCA there will be further evolution in our cooperation.

The MoU draws together the whole range of our mutual understanding and cooperation, annexing Concordats on competition issues, Unfair Terms, Consumer Protection and Banking Conduct. It is both our statement of intent, and a working document of practical ways to achieve maximum effectiveness of regulation. It doesn't seek to set out in detail which organisation will take forward which kind of work, covering every circumstance that might arise - while that might generate clarity, we don't think it would generate an effective approach. Instead it sets out a clear framework of cooperation – this commitment to sharing information and insights and working out the best way forward in the circumstances will be key to delivering the greatest impact in terms of making financial services markets work well for consumers.



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Memorandum of Understanding between the Office of Fair Trading (the OFT) and the Financial Conduct Authority (the FCA)

Introduction

This MoU establishes a framework for cooperation between the OFT and the FCA. It sets out the role of each organisation, and explains how they work together.

Its aim is to convey our intention to proactively cooperate and 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. To the extent possible, it also aims to provide some indication of how the two organisations will work together where specific issues are raised.

This Memorandum of Understanding replaces the previous Memorandum of Understanding between the OFT and the Financial Services Authority. In the Annex to this MoU we have set out various Concordats on a range of issues where we have a mutual interest. Any references in these Concordats to the FSA, should be read as if they were references to the FCA.

Overview of the OFT's role

The OFT's mission is to make markets work well for consumers. We achieve this by promoting and protecting consumer interests throughout the UK, while ensuring that businesses are in open, fair and vigorous competition with each other for the consumer's custom.

Our job is to make sure that consumers have as much choice as possible across different sectors of the marketplace. When consumers have choice they have genuine and enduring power to influence markets. We achieve our mission through enforcement and advocacy, based on strong analysis and intelligence-led investigation. Our job is not just to find and describe problems in markets, but to tackle these problems as effectively as possible where we have the powers and expertise to do so, and work with our partners where we do not.

Our role is to: encourage businesses to comply with competition and consumer law and improve their trading practices through self-regulation, act decisively to stop hardcore or flagrant offenders, study markets and to recommend action where required, and empower consumers with the knowledge and skills to make informed choices and get the best value from markets.

We have a broad remit and a dual competition and consumer mandate. We have a range of tools at our disposal and, in many cases, we use a combination of tools to address market failures in a holistic way. We also work in partnership with other organisations which have complementary powers or influence in relation to markets.

Most of our 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.

To make the best use of our resources in terms of real outcomes for UK consumers, we need to make sure that we make appropriate decisions about which projects and programmes of work we carry out across all areas of our responsibility. These decisions are based on our Prioritisation Principles.¹

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. Our powers are set out in more detail in the various Concordats annexed to this MOU.

The FCA's responsibilities

The FCA's powers and responsibilities are set out mainly in FSMA. It is primarily the market conduct regulator in the financial services sector. It is also responsible for the prudential supervision of firms that are not PRA-regulated. Its strategic objective is to ensure that the financial services markets work well. To that end, it has a number of operational objectives including securing an appropriate degree of protection for consumers, protecting and enhancing the integrity of the UK financial system and promoting effective competition in the interests of consumers in the market for financial services.

Within the scope of FSMA, the FCA has the power to make new rules and guidance which are binding on FCA regulated firms. In this role, the FCA is required to have regard to the Principles of Good Regulation. The FCA, together with the Prudential Regulation Authority 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. The FCA is also a designated enforcer for the purposes of the Enterprise Act 2002 and is able to obtain court orders against businesses that do not comply with their legal obligations to consumers.

Benefits of joint working

The OFT and the FCA 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.

We propose to facilitate effective joint working by:

- meeting and communicating regularly – at appropriate levels of seniority – to discuss matters of mutual interest;
- consulting one another at an early stage on any issues that might have significant implications for the other organisation; and

¹ www.offt.gov.uk/shared_offt/about_offt/oft953.pdf

- sharing (for comment) at an early stage draft documents (such as consultation papers and briefings) that affect the other's functions.

Coordination and relationship management

We recognise the importance of meeting regularly to share information on what we perceive as risks or issues in financial services markets and to keep each-other abreast of work we are considering or currently undertaking

The OFT and FCA will meet regularly at all levels. As well as meeting to discuss specific issues as and when needed, regular meetings will be held between CEOs, Chairs and relevant relationship managers.

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

- maintaining an overview of their own organisation's 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 FCA.

Competition concordat

We have developed a concordat setting out the Principles of co-operation between the Financial Conduct Authority and the Office of Fair Trading on competition issues (see Annex A). This is particularly important given the parallel and complementary remits of both organisations in making competition in financial services markets work well for consumers. The Concordat aims to

- promote co-operation and coordination between the FCA and the OFT when dealing with competition issues and super-complaints in respect of which they have parallel functions or complementary roles. In particular, it aims to outline how the two agencies could work together on issues that may impact on both organisation;
- facilitate the effective treatment of competition issues and super-complaints within financial services markets, including instances where issues arising in related markets have implications for financial services markets, while minimising duplication of activity and burdens on business wherever possible; and
- improve transparency with respect to the respective roles of the FCA and the OFT for relevant third parties.

The Concordat sets out the working arrangements between the OFT and FCA on competition issues and replaces the concordat on competition that had previously been entered into by the Financial Services Authority and the OFT.

The concordat does not cover working arrangements on EU regulation. However, the OFT and FCA 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 FCA have powers in relation to unfair contract terms under the Unfair Terms in Consumer Contracts Regulations and under the enforcement mechanism under Part 8 of the Enterprise Act 2002. 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 FCA have adopted a similar approach in the Consumer Protection Regulations, which can be found at Annex C.

Banking Conduct Regulation

The OFT and the FCA 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 FCA's Handbook in relation to potential regulatory breaches and to agree which organisation is best placed to lead in each case.

The Government has signalled its intention to transfer regulatory responsibility for consumer credit to the FCA. The FCA and the OFT will work closely together to facilitate this transfer.

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

Information exchange

We recognise the importance of sharing information to ensure coordinated and consistent responses to issues and to keep each-other up-to-date on actions, but we also recognise the concerns of businesses and consumers about the protection of the information they provide to us.

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 FCA's and the OFT's shared understanding of both these areas is set out at Annex E.

We aim to cooperate by actively sharing information when required for the performance of their functions subject to the restrictions on disclosure of confidential information.

Investigations

We recognise the importance of avoiding unnecessary duplication and ensuring that work is taken forward by the organisation that is best placed to do so.

Both organisations will cooperate and involve in each other work to ensure that any common interests in formal investigations conducted by the FCA and the OFT 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

Sharing staff can assist both organisations in developing the knowledge and expertise of their staff. Secondments of staff between the OFT and the FCA can provide valuable experience to their staff, and this will be especially important in the transition period where regulatory responsibility for consumer credit will be transferred from the OFT to the FCA.

Both organisations will identify suitable opportunities for the interchange of staff and will encourage such secondments when suitable opportunities arise and where consistent with priorities and resources.

Review of the MoU

The senior directors responsible for relationship management between the organisations will review the effectiveness of these joint working arrangements as required.

Annex A

Principles of co-operation on competition issues

A concordat between the Office of Fair Trading and the Financial Conduct Authority

Principles of co-operation on competition issues: A concordat between the Office of Fair Trading and the Financial Conduct Authority

Introduction

This Concordat on competition issues outlines how the OFT and the FCA will work together in discharging their functions relating to competition in financial services markets. The changes to the Financial Services and Markets Act 2000 mean that the FCA and the OFT will have a shared objective of making financial services markets work well for consumers but different powers to investigate and remedy competition issues arising in financial services markets. The nature of this interface has heightened the need to ensure the OFT and FCA co-ordinate on issues that are relevant to both organisations.

The aim of providing this framework is to ensure that there is a clear and co-ordinated process for the OFT and the FCA to discharge their competition functions in relation to the financial services markets. In some cases this means identifying as quickly as possible which organisation will take the lead. In other cases it will involve us working effectively together.

While this Concordat aims to establish a generic framework for co-operation, it cannot set out in detail what each organisation will do in every situation. In some cases it will be clear which organisation should take the lead. For example, we would expect that the FCA would take the lead in dealing with issues where regulatory solutions are most appropriate, such as changes to the authorisation process to better enable new entry, using rule making powers to improve the way that products are distributed or taking supervisory or enforcement action against particular firms where existing requirements are not being met. Similarly, we would expect that OFT action would be more appropriate where the issue is best dealt with through enforcement of competition law (such as an investigation of cartel behaviour or abuse of dominance), or in situations where the competition problem is such that a Competition Commission (CC) investigation, and the type of remedies available to the CC, appear likely to be appropriate. It may also be more appropriate for OFT to take a lead where the competition problem is not unique to financial services markets. In other cases, it will be less clear which organisation is best placed to lead, and early discussion to avoid duplication and to make the best use of each organisation's information, expertise and powers will be key.

To ensure that a co-ordinated approach is taken to competition issues in the financial services markets, both organisations have committed to a 'no-surprises' approach, and have agreed to consult each other early on when considering taking action to address such issues, as appropriate. Where either organisation is considering action relating to competition in financial services markets, it will seek the other's views on the merits of any proposed action, as appropriate. A key aspect of a co-ordinated approach will be ensuring that both organisations have access to information that may be relevant to their respective functions. To this end the two organisations have

also committed to sharing information, to the extent legally permissible, which may be helpful and relevant to work being undertaken by the other, and to do so at the earliest possible opportunity.

The OFT has developed deep expertise in considering competition matters across a variety of sectors. Similarly the FCA has significant sectoral experience in the financial services sector. Effective co-ordination is key to ensuring that the respective organisation's expertise is optimised in any work undertaken. As part of this, the organisations will also provide technical assistance to each other where it may be helpful. This could take the form of collaborative working on joint projects, secondment opportunities or cross organisation referrals where necessary.

The aims and coverage of this document

1. The Financial Conduct Authority (FCA) and the Office of Fair Trading (OFT) have some parallel functions and complementary roles in relation to competition matters within the financial services sector. Specifically:
 - a. The FCA has an operational objective of promoting effective competition in the interests of consumers in the markets for regulated financial services and services provided by a recognised investment exchange, and an accompanying duty to discharge its general functions in a way which promotes effective competition in the interests of consumers (where that is compatible with its other operational objectives).
 - b. The OFT's mission is to make markets work well for consumers. It has a range of competition tools at its disposal to address market failures and make markets work well for consumers, and may use a combination of tools to address failures in a holistic way. It also works in partnership with other organisations which have complementary and parallel powers or influence in relation to competition in markets.
2. Given the parallel and complementary roles and functions of the FCA and the OFT, both organisations recognise that it is important that they work well together to maximise their effectiveness in dealing with consumers and businesses.
3. This concordat is, therefore, made between the FCA and the OFT and aims to:
 - a. promote co-operation and coordination between the FCA and the OFT when dealing with competition issues and super-complaints in respect of which they have parallel functions or complementary roles;
 - b. facilitate the effective treatment of competition issues and super-complaints within financial services markets, including instances

where issues arising in related markets have implications for financial services markets, while minimising duplication of activity and burdens on business wherever possible; and

- c. improve transparency with respect to the respective roles of the FCA and the OFT for relevant third parties.
4. It is not intended that this concordat be legally binding or create expectations whose non-fulfilment would give rise to rights at law.
 5. This concordat describes:
 - a. the respective roles of the FCA and the OFT that are relevant to competition issues and super-complaints in respect of financial services markets;
 - b. potential areas where the OFT and the FCA each have functions in relation to competition issues in financial services markets;
 - c. potential areas where the roles of the FCA and the OFT may be complementary in respect of competition issues in financial services markets;
 - d. the intentions of the FCA and the OFT in relation to their approach to handling competition issues involving the financial services sector where the respective agencies have parallel or complementary functions or powers; and
 - e. arrangements for the implementation of this concordat and its review.
 6. This concordat sits alongside other concordats between the FCA and the OFT on consumer protection as an Annex to a wider Memorandum of Understanding between the FCA and the OFT.

The role of the FCA

7. The FCA was established as the conduct regulator for financial services markets under the Financial Services and Markets Act 2000 (FSMA), as amended by the Financial Services Act 2012, and has a single strategic objective to ensure that the markets for financial services function well.
8. Three operational objectives support this. One of these operational objectives is the promotion of effective competition in the interests of consumers in the markets for financial services and services provided by recognised investment exchanges (FCA competition objective).
9. Where the FCA discharges its general functions (by making rules, giving guidance, developing policy or issuing codes) it is required, so far as is reasonably possible to act in a way which is compatible with its strategic

objective and advances one or more of its operational objectives, including the FCA competition objective.

10. The FCA additionally has a duty to discharge its general functions in a way that promotes effective competition in the interests of consumers (where that is compatible with its other operational objectives).
11. In discharging the FCA competition objective, the FCA has a range of powers and obligations outlined in FSMA. These include:
 - a. various rule making powers under part 9A of FSMA to, amongst other things, set standards for authorised firms; and
 - b. powers under section 234H of FSMA to request the OFT to consider whether a feature, or combination of features, of a market in the United Kingdom for financial services may prevent, restrict or distort competition in connection with the supply or acquisition of any financial services in the United Kingdom or a part of the United Kingdom.
12. The FCA also has obligations to receive and respond to super-complaints made under s234C of FSMA by designated consumer bodies.
13. Under section 140G of FSMA, the FCA must, within 90 days after the day on which it receives advice from the OFT under section 140B of FSMA, publish a response stating how it proposes to deal with the advice and in particular—
 - (a) whether it has decided to take any action, or to take no action, in response to the advice,
 - (b) if it has decided to take action, what action it proposes to take, and
 - (c) its reasons for its proposals.

The role of the OFT

14. 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;
 - undertaking advocacy; and
 - working with partners to deliver education programmes to businesses and consumers.
15. The OFT's legal powers are conferred on it by several pieces of legislation including the Enterprise Act 2002 (EA02) and the Competition Act 1998 (CA98). In particular, the OFT has powers to investigate businesses suspected of infringing the prohibitions in the Competition Act 1998 and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (formerly Articles 81 and 82 of the Treaty establishing the

European Community), against anti-competitive agreements (such as cartels) and abuse of a dominant market position.

16. When the FCA makes a request to the OFT under section 234H of FSMA, the OFT must, within 90 days after the day on which it receives the request, publish a response stating how it proposes to deal with the request and in particular—
 - (a) whether it has decided to take any action, or to take no action in response to the request, and
 - (b) if it has decided to take action, what action it proposes to take.
17. Pursuant to section 5 of the EA02, which sets out the OFT's general function of obtaining, compiling and keeping under review information about matters relating to the carrying on of its functions (including the power to carry out, commission or support research) the OFT may conduct market studies. Typically, market studies are examinations into the causes of why particular markets are not working well for consumers, leading to proposals as to how they might be made to work better. Many market studies take an overview of regulatory and other economic drivers in a market and patterns of consumer and business behaviour.
18. Under section 7 of EA02, the OFT has the function of making proposals, or giving other information or advice, on matters relating to any of its functions to any Minister of the Crown or other public authority (including proposals, information or advice as to any aspect of the law or a proposed change in the law). Section 140B FSMA sets out that the OFT may provide section 7 advice to the FCA which states that in the opinion of the OFT one or more regulating provisions or practices (alone or in combination) or a feature or combination of features of a market in the United Kingdom that could be dealt with by regulating provisions or practices may cause or contribute to the prevention restriction or distortion of competition in connection with the supply or acquisition of any goods or services in the United Kingdom, or may be expected to do so in future. Where the OFT provides section 140B advice to the FCA, the FCA's obligations under section 140G FSMA are engaged.
19. Under section 11 of the EA02, a designated consumer body can make a super-complaint to the OFT that any feature, or combination of features, of a market in the United Kingdom for goods or services is, or appears to be, significantly harming the interests of consumers. The OFT must then publish a reasoned response within 90 days after the day on which it receives the super-complaint stating how it proposes to deal with the super-complaint and in particular—
 - (a) whether it has proposed to take any action or to take no action in response to the super-complaint, and
 - (b) if it has decided to take action, what action it proposes to take.
20. Under section 131 of the EA02, the OFT may make a market investigation reference to the Competition Commission if the OFT has reasonable grounds for suspecting that any feature, or combination of features, of a

market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom.

Parallel functions and powers

21. Both the FCA and the OFT can exercise various functions in relation to competition issues arising in the financial services markets. Specifically, both the FCA and the OFT:
 - a. Have obligations to respond to super-complaints about a feature or a combination of features of a market in the United Kingdom for financial services which is or appears to be significantly harming the interests of consumers;
 - b. May take measures (other than those coming out of a super-complaint) to address competition issues in the financial services sector.
22. In the event that the either the OFT or the FCA (the relevant organisation) is approached by a designated consumer body to discuss the possibility of that consumer body submitting a super-complaint in relation to one or more financial services markets in the UK, the relevant organisation will discuss with the consumer body whether the consumer body considers it would be more appropriate for the super-complaint to be submitted to the other organisation, having regard to:
 - a. the nature of the features identified; and
 - b. the range of possible actions that could be taken by each organisation in response to the super-complaint.
23. Additionally, when the FCA or the OFT receives a super-complaint from a designated consumer body in relation to one or more financial services markets in the UK, the relevant organisation will follow the approach set out in paragraphs 28-33 below to ensure that the other organisation is informed about the receipt of the super-complaint.
24. It is hoped that the appropriate recipient can be identified before receipt of the super-complaint. Should this not be possible in any particular case, in the absence of concurrency arrangements it may be necessary, insofar as the subject matter and/or scope of the super-complaint allows, for the recipient to respond, swiftly, to the super-complaint by saying that it would be more appropriate for it to be submitted instead to the other organisation.
25. In relation to measures (other than those coming out of a super-complaint) that either organisation is considering taking to address competition issues in the financial services sector, the OFT and the FCA will follow the approach set out in paragraphs 28-33 below. This is aimed at ensuring

that there is effective co-ordination between the two agencies and that any duplication is minimised.

Complementary functions and powers

26. There are some areas where the FCA and the OFT have complementary functions with respect to competition issues arising in the financial services markets in general. These include:

- a. the power of the FCA under section 234H of FSMA to request the OFT to consider whether a feature, or combination of features, of a market in the United Kingdom for financial services may prevent, restrict or distort competition in connection with the supply or acquisition of any financial services in the United Kingdom or a part of the United Kingdom;
- b. the power of the OFT to provide section 7 advice to the FCA under section 140B FSMA in relation to one or more regulating provisions or practices (alone or in combination) or a feature or combination of features of a market in the United Kingdom that could be dealt with by regulating provisions or practices;
- c. the power of the OFT to take CA98 enforcement action; and
- d. the duty of the FCA under section 140G FSMA, to consider advice provided to it by the OFT under section 140B FSMA and, within 90 days after the day on which it receives the advice, to publish a response.

27. Where the OFT or the FCA considers taking action which may be complementary to the other organisation's role, it will follow the approach set out in paragraphs 28 to 33 below.

The FCA's and the OFT's intentions regarding managing their parallel and complementary functions

28. The FCA and the OFT will seek to achieve a complementary and consistent approach, so far as that is consistent with their independent roles by, within the bounds of any legal constraints on the sharing of information, as appropriate:

- a. sharing information at an early stage on specific super-complaints or other investigations or studies, policy proposals or developments;
- b. providing each other with technical, and/or policy assistance on projects that touch on matters of mutual interest;
- c. consulting one another at an early stage on any issues that might have significant implications for the other organisation;

- d. working collaboratively on the whole or part of an analysis of a particular market or set of related markets, insofar as this is compatible with the two bodies' different legal frameworks; and
 - e. where necessary, considering further agreement for co-operation on specific issues that may arise.
29. The FCA and the OFT will seek to ensure that investigation of, or action in response to, a competition issue is taken forward by the organisation that is best placed to do so, taking the following factors into consideration:
- a. Whether, on a prima facie assessment of the merits of the issue, either organisation has more appropriate powers to consider and/or respond to the issue; and
 - b. Whether the issue is more closely connected with existing work that either organisation is already undertaking or has previously undertaken.
30. The FCA and the OFT will seek to ensure that investigation of, or action in response to, a competition issue is taken forward in a way that minimises duplication of effort.
31. In particular, the FCA and the OFT will seek to consider whether they are best placed to investigate or take action at as early a stage as possible.
32. Subject to paragraphs 28 to 30, the FCA intends to:
- a. inform the OFT of super-complaints received under s234C of FSMA;
 - b. inform the OFT of formal references received under 234D of FSMA which could raise matters that could be considered by the OFT by way of a market study and/or under s131 EA02;
 - c. discuss with the OFT situations in which it considers that action by the OFT under any of the OFT's powers is more appropriate than regulatory enforcement action under FSMA, bearing in mind the FCA's operational objective and duty in relation to promoting effective competition set out in FSMA;
 - d. refer to the OFT complaints concerning competition issues to which the FCA cannot respond under its powers; and
 - e. inform the OFT of issues in financial services markets which it believes may have consequences for related non-financial services markets.
33. Subject to paragraphs 28 to 30, the OFT intends to:

- a. inform the FCA of super-complaints received under s11 of the EA02 where they relate to one or more financial services markets in the UK (or part thereof);
- b. discuss with the FCA situations in which it considers that regulatory enforcement action under FSMA is more appropriate than action under any of the OFT's powers, bearing in mind the OFT's mission to make markets work well for consumers.
- c. refer to the FCA complaints concerning financial services matters in the UK to which the OFT cannot respond under its powers; and
- d. inform FCA of competition issues in non-financial services markets which it believes may have consequences for financial services markets.

Complementary Skills

34. Both organisations currently also have developed significant expertise in their specific area. The OFT, in particular has significant experience and expertise on competition issues. The FCA also has significant expertise in regulating financial services.
35. Given the complementary skills of the respective organisations, both agencies will identify suitable opportunities for the interchange of staff and will encourage such secondments when suitable opportunities arise and where consistent with priorities and resources.

Review and Implementation

36. This concordat and the practices set out within will be reviewed as the need arises, or by written request of either party. Any changes will be subject of a further agreement.

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 Conduct Authority



OFFICE OF FAIR TRADING

The Unfair Terms In Consumer Contracts Regulations 1999¹ (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.

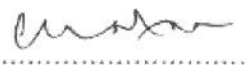
We agree to co-operate, by sharing information, and in all other ways, as permitted by law, with each other and with other UK qualifying bodies responsible for the enforcement of the UTCCRs and EA02. We will have regard to any guidance on unfair contract terms which has been discussed with each other and published².

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 FSA³

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

¹ SI 1999/2083

² 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

³ http://www.fsa.gov.uk/pubs/other/concordat_fsa_ofi.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 I to the Payment Services Regulations 2009) save as set out in the paragraphs below.⁴ 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.

⁴ 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 Conduct Authority



OFFICE OF FAIR TRADING

The Consumer Protection from Unfair Trading Regulations 2008¹ (CPRs) and Enterprise Act 2002 (EA02)

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

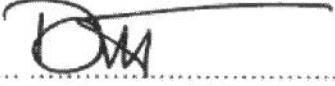
The purpose of this statement is to record our agreement to co-ordinate enforcement action and to co-operate in all ways permitted by law to ensure the effective and consistent delivery of consumer protection in relation to unfair commercial practices under the CPRs and the EA02. Working arrangements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

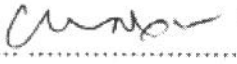
We agree to co-operate, by sharing information, and in all other ways, as permitted by law, with each other and with other relevant UK regulatory bodies responsible for the enforcement of the CPRs and EA02. We will have regard to any relevant guidance on unfair commercial practices which has been discussed 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.² 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

² 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 Markets Act 2000 and Payment Services Regulations 2009

A concordat between the Office of Fair Trading and the Financial Conduct Authority



OFFICE OF FAIR TRADING

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.

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.

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

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

Annex E

Information Exchange

Sharing information

The OFT and the FCA aim to cooperate by sharing information when appropriate for the performance of our functions, subject to the restrictions on disclosure of information.

We intend to keep each-other up-to-date on our actions and consult whenever necessary to ensure that both legislation and best practice are interpreted and applied in a coherent manner to achieve consistency of decision-making.

The OFT and the FCA may refer a matter for action if the other body is considered more appropriate to deal with the matter having regard primarily to its responsibilities under the legislation.

Disclosure of information

The OFT 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 duty of confidentiality and gateways

Section 348(1) of Financial Services and Markets Act 2000 (“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) 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) FSMA).

The restriction 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.

Section 349 of FSMA allows HMT 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 FSA to disclose information in certain circumstances, but does not compel the FSA to do so.

The Gateway Regulations generally permit the disclosure of confidential information to the OFT (in relation to current or former authorised person) under two main gateways:

- a) The first is where the disclosure is made for the purposes of enabling or assisting the FCA to discharge any of its public functions (see regulation 3(1)(a) the Gateway Regulations) i.e. its functions under FSMA and certain other legislation
- b) The second is where the disclosure is made for the purposes of enabling or assisting certain other bodies to discharge specified functions (see regulation 9(1) and 11 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 OFT in respect of the OFT’s functions under FSMA or under any other enactment where the OFT has supervisory functions over firms that are or were authorised under FSMA (See Part 1 of Schedule 1 to the Gateway Regulations). Also, where the information was obtained from another EEA competent authority under the Markets in Financial Instruments Directive, and that authority imposed restrictions on the FCA, the FCA may only disclose the information with the consent of the relevant EEA competent authority (see regulation 9(3A) the Gateway Regulations).

Before disclosing any confidential information, the FCA must have regard to any relevant restrictions on disclosure set out in the Gateway regulations.

When the FCA passes confidential information to the OFT, the OFT will be bound by the FSMA obligation on disclosing confidential information (see FSMA s348(1)).

OFT disclosure duties

OFT disclosure duties are strictly defined and limited by Part 9 of the Enterprise Act 2002 (“EA02”).

Under Part 9, information that comes to the OFT in connection with the exercise of its functions (as defined) is “specified information” (see section 238(1) EA02). Where specified information relates to the affairs of an individual or (of more relevance in this case) the business of an undertaking (see section 237(1) EA02) it can only disclose it under permitted gateways. Disclosure outside those gateways is a criminal offence.

Unless the information is already properly in the public domain (see section 237(3) EA02) or a power or duty to disclose it exists outside Part 9 EA02 (see section 237(6) EA02), in broad terms, the OFT may only disclose it where one of the following gateways exists:

- (a) where the OFT obtains consent from both those providing the information and those to whom it relates (section 239 EA02);
- (b) disclosure is required to meet an obligation under EC law (section 240 EA02);

- (c) disclosure facilitates the exercise of the OFT's statutory functions;
- (d) disclosure facilitates the exercise of any function another body has under certain specified statutes, including FSMA(section 241 EA02);
- (e) the disclosure is for certain purposes connected with criminal investigations and proceedings in the UK (section 242 EA02); or
- (f) the disclosure is to facilitate the performance of an overseas public authority's functions, in certain circumstances (section 243 EA02).

Even where a gateway exists, the OFT is also required to consider excluding from disclosure:

- (a) information whose disclosure the OFT thinks is against the public interest (see section 244(2) EA02); and
- (b) so far as practicable, information relating to the private affairs of an individual, or any commercial information relating to a business, whose disclosure might, in the OFT's opinion, significantly harm the individual's interests or the legitimate business interests of the business (see section 244(3) EA02)
- (c) The OFT 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) EA02).

Transfer of personal data

In receiving "personal data" through the gateways set out above, both the OFT and the FCA will comply at all times with the Data Protection Act 1988.

Process for sharing information

There is no prescriptive process for communicating to each other.

The OFT and the FCA have designated a Relationship manager to act as primary point of contact, as well as arranging for regular meetings at CEO level to discuss areas of mutual strategic interest

Communication between the organisations may happen at different levels to facilitate the efficient flow of information and intelligence between them.

Financial Conduct Authority

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