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Delivering better regulatory outcomes – December 2009 final update

The joint FSA and OFT Action Plan

OFFICE OF FAIR TRADING





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Foreword

The Financial Services Authority (FSA) and the Office of Fair Trading (OFT) launched a *Joint Action Plan* in April 2006. There have been three updates since then, detailing the substantial achievements of the Plan. These have been part of the continuing close joint working of the OFT and the FSA across a broad range of mutual interests.



This Update will be the last one for the *Joint Action Plan*, as we are moving to a new way of planning our joint working. Our aim is to be flexible in how we adapt and respond during these uncertain times. This will fit within the overall framework of the Memorandum of Understanding, which we are publishing today alongside this Update.

This final Update therefore summarises the achievements of the 2006 *Plan* as a whole and outlines the foundations that we have laid for future collaboration between the FSA and the OFT. This remains a key priority for us, so that we can continue to deliver benefits to consumers, businesses and the wider economy.

Hector Sants

John Fingleton

Introduction

Background

We – the Financial Services Authority (FSA) and the Office of Fair Trading (OFT) – first announced we intended to increase collaboration on matters of joint regulatory interest on 22 March 2006. We followed this in April 2006 with a *Joint Action Plan* that set out in more detail how we intended to do this and give annual updates on it.

This is the fourth and final formal update on our progress so far. In future we will publicise our ongoing joint work as and when it is appropriate to do so.

The FSA and the OFT

The FSA is the UK's primary financial regulator, and is responsible for the authorisation and supervision of financial services firms, including banks, building societies, investment firms, insurance companies and brokers, credit unions and friendly societies.

The OFT's mission is to make markets work well for consumers. It has a dual competition and consumer mandate, and a broad remit covering most of the UK economy, including some aspects of financial services. It also has powers in relation to the consumer credit and merger control regimes.

The OFT and the FSA have interests which overlap in a variety of areas. One example of this is that at the end of November 2009 there were around 15,000 businesses which held an OFT consumer credit licence as well as being authorised by the FSA. Both organisations have responsibilities under the Payment Services Regulations 2009, the Unfair Terms in Consumer Contracts Regulations 1999, the Consumer Protection from Unfair Trading Regulations 2008, the EC Consumer Protection Co-operation Regulation 2004, and other pieces of legislation.

Other areas in which we have shared interests include:

- authorisation and licensing requirements;
- financial advertising;
- communication with firms and consumers; and
- competition in financial services markets.

Summary of historical joint action

Since this will be the final formal update on this, we consider it is appropriate to include an overview of all of the joint work conducted under the *Joint Action Plan*.

Since 2006 we have explored the gateways for information exchange which exist between our organisations, and the potential synergies between us in a variety of areas.

In addition, within the framework of the plan we have clarified and in places altered our rules on dually-regulated advertising, coordinated our work on unfair contract terms, and produced concordats on various topics, including the Consumer Protection from Unfair Trading Regulations 2008. We also worked together to align the consumer credit jurisdiction with the existing Financial Ombudsman Service Compulsory Jurisdiction.

We have been working jointly on areas such as anti-money laundering, communications with both consumers and businesses, and significant projects such as payment protection insurance (PPI) and the investigation and test case on unauthorised overdraft charges on personal current accounts. In addition, we have worked together to ensure that any competition issues within the FSA's remit are handled consistently.

We have been able to share skills and experience through presentations, work shadowing and secondments.

Summary of current joint action

Since the last update of our *Joint Action Plan* in May 2008, we have been updating our Concordats on Unfair Terms in Consumer Contracts and Consumer Protection Regulations. We have also agreed a concordat on the Banking Conduct regime which covers joint working on the Consumer Credit Act 1974, the Financial Services and Markets Act 2000 and the Payment Services Regulations 2009.

We have published guides to dually-regulated advertisements and to sponsored links.

We continue to work together on significant projects such as on the OFT's work on unarranged overdraft charges and personal current accounts, and our respective work on PPI. The FSA also maintained close contact with the OFT as it reviewed the arrangements for regulating banking conduct in areas within its remit.

The progress on issues such as sale and rent back (including the FSA's development of an interim regime following joint participation in the cross-Government working group on the subject and the OFT's market study), demonstrates the continuing importance of joint work between our two organisations.

Through participation in workshops, regular meetings between the CEOs, working level meetings between the relevant teams and other communication, the two organisations have informed each other's thinking on a variety of areas – including mortgage arrears and repossessions handling, consumer campaigns, and the OFT's Financial Services Plan.

Progress on delivering better regulatory outcomes

Payment Protection Insurance

The FSA and OFT have worked closely with each other and the Competition Commission (CC) on the Remedies Package set out by the CC in January 2009, following its investigation into the supply of payment protection insurance (PPI). Our goal has always been to ensure that the combination of the FSA's work to improve sales conduct, and the OFT and the CC's work on competition, leads to lasting improvements in consumer outcomes in PPI markets.

In October 2009, the Competition Appeal Tribunal upheld the appeal by Barclays Bank in relation to the CC's proposed remedies following its January 2009 report on PPI. The appeal was upheld on one ground which related to the CC's assessment of the remedy prohibiting the sale of PPI at the point of sale of credit. The CC has been asked to reconsider the loss of convenience for consumers of not being able to buy PPI and at the same time as taking out credit. It is studying the judgment closely before deciding its next steps.

The FSA looks forward to helping the OFT where possible, with whatever remedies are put in place. The CC recommended that the FSA use the information provided to it under this remedies package to populate its PPI comparative tables with data on all PPI and short-term IP products. The FSA will follow this up.

We will continue to work closely together to ensure that our joint regulatory and competition interventions are effective, proportionate and complementary.

Personal Current Accounts

(i) Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) Investigation into the fairness of unarranged overdraft charges & Test Case

The OFT launched an investigation into the fairness of unarranged overdraft charging terms in April 2007. In July 2007 it entered into a litigation agreement with banks and the FSA to bring a test case to ensure an orderly and efficient process for resolving the relevant legal issues.

On 25 November 2009 the Supreme Court (formerly the House of Lords) handed down its judgment in the bank charges test case. The court allowed the banks' appeal and held that the banks' unarranged overdraft charging terms were not fully assessable for fairness under the UTCCRs.

The OFT liaised closely with the FSA throughout the test case process, with coordination arrangements in place at all levels. The FSA supported the test case in several ways – in particular by granting firms a waiver so that they would not have to deal with complaints about unarranged overdraft charges in the time specified under FSA rules.

The waiver lapsed on the Supreme Court's ruling. Firms can now resume dealing with consumers' complaints in line with the FSA's complaints-handling rules. The OFT is considering the detail of the judgment before it decides whether to continue its investigation into unarranged overdraft charging terms. The OFT is also seeking discussions with banks, consumer organisations, the FSA and the Government in the light of the judgment.

(ii) Personal Current Accounts market study

In addition, following the OFT's 2008 market study into Personal Current Accounts (PCAs) in the UK, which identified problems with the market, the FSA participated in the OFT's work to seek solutions to those problems. The FSA joined the OFT-chaired Transparency Working Group, offering an expert resource on the relevant Payment Services Directive requirements. The two authorities continue to cooperate closely on matters in this area of mutual interest, including on the provision of information to consumers on choosing and using PCAs.

In the follow-up report of October 2009, which announced solutions to these problems, the OFT quoted research showing that consumers would value a price comparison site run by a government body, to allow them to search the cost of a PCA. As a result, the FSA will launch a feasibility study into introducing such a site onto its 'Moneymadeclear' website.

Retail Banking Conduct of Business

Beginning in January 2008, the FSA reviewed the appropriateness of the regulatory arrangements for retail banking conduct for areas within its remit. Because aspects of the Banking Codes were also within the OFT's remit, the FSA maintained close contact with the Consumer Credit Team at the OFT on the review findings and policy development.

Payment Services Regulations (PSRs)

The FSA is the main competent authority for the Payment Services Directive in the UK. This Directive has been implemented through the Payment Services Regulations 2009 (PSRs), which took effect on 1 November 2009.

The PSRs include a non-Financial Services and Markets Act regime of authorisation and registration for relevant firms. The OFT has responsibility for enforcing Part 8 of the PSRs (access to payment systems), and the two organisations have been communicating as appropriate. The OFT contributed a chapter to the FSA's Approach Document – a guide for firms on the PSRs. Where the OFT investigates rules that could have an effect on the financial and operational stability of the payment system it must consult both the FSA and the Bank of England.

Banking Conduct Regime – Concordat

On 1 November 2009 the OFT and the FSA published a concordat that sets out our division of responsibilities in the new Banking Conduct regime. It sets out how we will coordinate our work and ensure effective and consistent delivery of consumer protection in relation to:

- credit cards;
- debit cards;
- current and any other accounts which offer overdraft facilities; and
- access to payment systems.

Advertising

Many firms choose to restrict their advertising to either FSA-regulated products and services or to consumer credit regulated products under the Consumer Credit Act 1974 (CCA). In such cases, the advertising is not jointly regulated.

However, several firms offer both types of product, and want to advertise both in the same advertisement. Since the *Joint Action Plan's* launch in April 2006 we have tried to clarify our requirements in this area, or in some cases alter them, with the aim that this will help firms produce compliant advertising and make advertising clearer and fairer for consumers.

(i) Mortgage advertising risk warning

Some mortgage advertisements in particular may be subject to both the Consumer Credit (Advertisements) Regulations 2004 and the FSA's financial promotion rules. In October 2006 the FSA changed its rules to allow firms to use only the CCA risk warning in jointly regulated advertising. Before this, firms had had to include two risk warnings in advertisements, both serving the same purpose – to put the consumer on notice that they may lose their home if payments were not kept up.

(ii) Dually-regulated credit advertisements

We agreed a joint position on dually-regulated advertisements, which we communicated through a series of meetings with trade bodies and their members.

In September 2008 we then published on the FSA and the OFT websites a guide to dually-regulated advertisements, replacing the 'Frequently Asked Questions' joint guide. The new guide included simple diagrams designed to help advertisers identify when an advertisement might be regulated by both the FSA and the OFT and understand how to make their advertising meet the requirements of both the Financial Services and Markets Act 2000 (FSMA) and CCA regimes.

(iii) Online sponsored links: A joint FSA and OFT guide to financial products and services

This guide, which was published on 25 August 2009:

- explains how advertisers can ensure that links returned from a search on key words do not mislead;
- describes which products and services come under the two regimes; and
- shows examples of mock advertisements for sponsored links which would give rise to regulatory concern.

Irresponsible lending

In April 2008, the OFT launched a project on ‘irresponsible lending’; the FSA contributed to this by taking part in stakeholder workshops. The aim of the project is to issue guidance on irresponsible lending practices that call into consideration a trader’s fitness under section 25 of the Consumer Credit Act 1974, and to establish a set of minimum standards of behaviour. The OFT issued its draft guidance for consultation in July 2009, with a view to issuing final guidance in January 2010.

Mortgages

(i) Second charge lending

First charge mortgage lenders are regulated by the FSA under the Financial Services and Markets Act 2000. Second charge lenders are regulated by the OFT under the Consumer Credit Act 1974.

A cross-Government review of second charge mortgage lending, chaired by the Department for Business, Enterprise & Regulatory Reform (now the Department for Business, Innovation & Skills), was commissioned in May 2008. The FSA and the OFT were part of a working group and contributed substantially to this. The November 2008 Pre-Budget Report announced the recommendations, including that the OFT bring forward detailed sector-specific guidance for second charge lending; this was published on 22 July 2009.

(ii) Mortgage arrears and repossessions handling

The FSA and the OFT are continuing to work closely in this area. In June 2009, the FSA’s Conduct Risk Department Mortgage Team gave a detailed briefing to the OFT’s Secured Lending Team on the findings of its second phase of mortgage arrears and repossessions handling work; the results of which were published on 22 June 2009. The OFT has in turn given the FSA a progress report on its ongoing review of second charge lending, which includes work on the handling of arrears, defaults and possession actions.

Regular dialogue between the two teams has enabled both to share experiences of their work and ensure that future work in this area remains joined up.

Sale and rent back

In October 2008 the OFT concluded a market study that it had launched in May 2008 looking at 'Sale and Rent Back' arrangements (SRBs). The main recommendation of its report was that there should be statutory regulation of the sale and rent back sector by the FSA.

The Government accepted this recommendation and at the beginning of June 2009 announced its intention to legislate to bring SRBs within the scope of FSA regulation. In parallel, the FSA consulted on a two-stage approach to regulation of the SRB market – an interim regime (which began on 1 July 2009) to address the most immediate problems for consumers, followed by a full regime starting on 30 June 2010. The FSA published its consultation on the full regime on 28 September 2009.

The OFT market study built on the initial work of the cross-government working group on SRBs, in which both the OFT and the FSA participated. Over the course of the OFT market study and the FSA's development of the interim regime, the OFT and FSA have remained in close contact.

Unfair Contract Terms

The OFT and the FSA co-ordinate their work on unfair contract terms to provide effective delivery of consumer protection under the Unfair Terms in Consumer Contracts Regulations 1999. This coordination ensures that the work of the OFT and the FSA is complementary and joined up. It avoids duplication of effort and ensures that action is taken by the body best placed to lead on any given issue by regular contact and joint access to the Consumer Regulation Website, where relevant information on unfair contract terms can be found and shared by enforcers.

In November 2009, we updated the Concordat on UTCCR's 1999 and Enterprise Act 2002 which details the working relationship and division of responsibilities between the OFT and the FSA.

Unfair Commercial Practices Directive

The Consumer Protection from Unfair Trading Regulations 2008 (the CPRs) came into effect on 26 May 2008. The Directive which these Regulations implement harmonises unfair trading laws in all EU Member States and introduces a general prohibition on traders treating consumers unfairly. The FSA's regulatory approach and Handbook already address unfair commercial practices by firms regulated by the FSA.

We have agreed how we will coordinate our work on unfair commercial practices. In particular, the FSA is more likely to use its existing powers under FSMA when taking action against regulated firms for unfair practices. A recently updated Concordat sets out a clear division of responsibilities and the respective powers available to the FSA and the OFT.

Anti-money laundering responsibilities

The FSA and OFT each have supervisory responsibilities under the EU's Third Money Laundering Directive and have been working jointly on this since its implementation into UK law. We liaise closely to share best practice and to eliminate duplication, bilaterally and through the supervisors' forum.

Competition within financial services

(i) Retail Distribution Review

One of the key priorities for the Retail Distribution Review (RDR), which the FSA launched in June 2006, was to consider the impact of incentives.

It was clear from the outset that any change in remuneration structures might have implications for competition in the retail investment market. So, at the end of 2006, the FSA sought the OFT's views to consider this in developing the RDR. Teams from each organisation have met at key points during the review to consider potential competition issues and established an ongoing relationship to continue taking this aspect of the work forward.

(ii) With-profits funds

We have discussed the conduct of financial services companies as part of a dialogue about the life and pensions market and the changes it has faced – such as demutualisations, mergers and acquisitions, closures to new business and new entrants. In 2008, we worked together to clarify the competition effects of life insurance companies using their With-Profits funds to provide capital support for writing new business. The FSA provided information to help the OFT prepare its submission to the Treasury Select Committee in April 2008 on this.

We will continue to work together to ensure that any competition issues are understood and consistently and appropriately handled.

Gateways

In the Joint Action Plan, we committed to exploring the possibility of expanding the gateways which existed for exchanging information. We have continued to do this and the current status of the gateways between our organisations is summarised in the Memorandum of Understanding also being published today.

Financial Ombudsman Service

(i) The Consumer Credit Jurisdiction

The Consumer Credit Act 2006 created the Consumer Credit Jurisdiction (CCJ), which allows consumers to access the Financial Ombudsman Service (FOS) for consumer credit complaints concerning businesses that are licensed by the OFT but not authorised by the FSA.

The FSA and FOS worked with the OFT to align the CCJ with the existing FOS Compulsory Jurisdiction (CJ), resulting in changes to the relevant FSA Handbooks. This ensured that jointly regulated firms' complaints-handling procedures are overseen by one regulator only, and that FSA-authorised firms only pay a single levy to fund the FOS.

In June 2007, the FOS and the OFT signed a Memorandum of Understanding¹ which set out how the two organisations would work together, including in relation to the CCJ.

(ii) The 'wider implications' process

Wider implications issues are those that affect a large number of consumers or businesses or common industry practice. The FSA and the FOS have had a published process in place since March 2005 to deal with complaints to the FOS that might have wider regulatory implications for firms and consumers. The OFT joined this process in June 2007, extending it to areas it regulates.

Communication with consumers

In the original *Joint Action Plan*, we identified some of the key areas of mutual interest the OFT and the FSA have in terms of communication with consumers, and concluded that there were areas where we could usefully combine our efforts.

We worked closely together when revamping our consumer websites, for example in highlighting each other's campaigns. The OFT also provided input to the FSA during development of the suite of online tools available on the site to help consumers make the most of their money – the financial health check, budget planner and debt test.

We also have regular working-level meetings to liaise on our respective campaigns to ensure that they do not conflict.

As we set out in the *Joint Action Plan*, we have explored the opportunities for synergies between our consumer contact centres, and protocols are in place to ensure that any enquiries relating to the other's area of regulation are referred appropriately.

¹ www.financial-ombudsman.org.uk/about/other_bodies.html

(i) Public registers

In the *Joint Action Plan* we committed to carrying out a feasibility study to consider whether the FSA and the OFT registers can be integrated to provide consumers and firms with a single point of information on FSA-authorized and consumer credit licensed firms.

We completed this feasibility study for the July 2007 update, and recommended that the planned use of navigational links between the FSA's and the OFT's online registers was, at this time, the most appropriate solution. This was because the cost of developing any of the other options considered far exceeded the benefits identified.

(ii) Credit card interest calculation

Following a super-complaint from the consumer body Which? about credit card interest calculation methods, the OFT worked to establish how to help consumers make effective comparisons.

In consultation with the FSA, the OFT recommended that the FSA create a price comparison website as part of its 'Moneymadeclear' consumer site. The central proposition, discussed between the FSA and the OFT, is a comparison table which would allow consumers to sort products by the actual cost of the card based on their predicted usage. The FSA then took forward key recommendations made in the Thorensen Review of Generic Financial Advice, which complement the OFT and FSA price comparison work.

We continue to work closely on this initiative, to overcome the remaining barriers to the FSA's production of such a table.

(iii) Christmas hamper schemes

In November 2006, Government ministers asked the OFT to work with the FSA and the then Department for Trade and Industry (DTI) (now the Department for Business, Innovation & Skills – BIS) to identify the issues raised by the collapse of Farepak Gifts and Foods Limited (Farepak) and consider the options for addressing them. Following discussions with the hamper scheme industry and others the OFT, with a significant contribution from the FSA, provided advice to the DTI. In March 2007 the government announced the consumer protection measures the DTI had agreed with the industry.

In the recent White Paper *A Better Deal for Consumers, Delivering Real Help Now and Change for the future* (July 2009) BIS explained that the Government will reassess the regulatory framework for prepayments in general, taking account of the advice from the OFT and the FSA, and of Consumer Focus' report on prepayments.²

On 1 June 2007, at the Treasury's request the OFT also launched the Save Xmas campaign to improve consumer awareness of the range of options available when saving for Christmas. The FSA has offered its advice and support for this campaign, as well as providing information on alternative forms of saving on its Moneymadeclear website.

2 Consumer Focus: Pay now, pay later. Consumer pre-payments and how to protect them August 2009

Independent evaluation of the first year of the Save Xmas initiative (published in October 2008) showed that the delivery of the campaign has been effective and money advisers and consumers were positive about the approach adopted and the impact and benefits of the campaign.

Communicating with firms

In 2006 we undertook to investigate the feasibility and potential benefits of combining our communications to firms. In 2007 we then rolled out a joint communication strategy primarily focusing on smaller firms, involving linking relevant sections of our websites, providing speakers at our roadshows, working together with trade bodies and sharing exhibition space.

Authorisation and licensing process

In 2006 the OFT and the FSA committed to carrying out a feasibility study to consider whether its authorisation and the OFT's consumer credit licensing processes could be aligned, for example by developing a single application form with separate processes, or by sharing common data for the relevant firms. We found that the number of firms affected would be relatively small, and that given this, the cost to the FSA and the OFT of pursuing this outweighed the benefits to these firms.

Changes to firms' standing data

For jointly regulated firms, both the FSA and the OFT hold certain items of 'standing data' (addresses, telephone numbers, etc). In 2006 the OFT and the FSA proposed to study whether we could reduce the administrative burden on these firms by making either the FSA or OFT solely responsible for collecting standing data changes, or by setting up a common interface for firms.

The findings of this study led us to believe that there was no clear cost benefit to jointly regulated firms to change the current arrangements and this position was endorsed by our industry user group.

Collection of revenue

In 2006 we announced our intention to consider the scope for rationalising the invoicing and collection of fees, so that in any one year a firm would receive a single invoice for fees due to the FSA, the OFT, the Financial Services Compensation Scheme and Financial Ombudsman Service.

The feasibility study found that there were legislative and administrative difficulties in aligning these processes, which presented significant and potentially costly barriers. The benefit would be a reduction in the number of invoices firms received, but the cost saving would be minimal, particularly because firms make payments to the OFT only when applying for a licence or on renewal of that licence (currently every five years). So the study did not propose any changes to the existing revenue collection processes.

Sharing skills and experience

When the Consumer Credit Act 2006 began to come into force in April 2007, the FSA agreed to second an experienced member of staff to the OFT to help with its implementation. That Act gave the OFT new powers and established new regulatory elements such as credit competence, irresponsible lending, unfair business relationships, intermediate sanctions and financial penalties. As the OFT developed its strategy for introducing the full regime from 2008, the secondee was able to offer the fresh view of a regulatory practitioner familiar with introducing changes in the retail sector.

Also in 2007, the teams at the OFT and FSA responsible for taking action on unfair contract terms (under the UTCCRs) undertook a programme of 'work shadowing' to help each learn from the issues the other faces.

In early 2009, presentations were given in each organisation explaining the other's role and highlighting areas in which we work together.

The OFT has responsibilities to prevent illegal money-lending and was invited to attend a recent seminar for FSA staff on this topic.

The OFT launched a consultation on its proposed financial services strategy in April 2009. As well as keeping the FSA involved and informed during the development of the strategy, the OFT also invited the FSA to attend the roundtable discussions it held with other stakeholders. The OFT published the strategy as its Financial Services Plan in July 2009. There is a clear need for the FSA to be aware of and contribute to the confirmation of the OFT's priorities in this area, and we will continue to work closely together on this issue.

Further roles and responsibilities

In January 2007, the Consumer Protection Co-operation Regulation (CPC) came into force, requiring 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 OFT and the FSA were both designated as Competent Authorities, and in addition the OFT is the United Kingdom Single Liaison Office, responsible for ensuring requests are sent to the Competent Authority best placed to deal with them. The Competent Authorities, including the OFT and the FSA, agreed a protocol setting out how they should work together to carry out their responsibilities under the CPC.



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