

## Memorandum of Understanding between the Information Commissioner and the Financial Conduct Authority

### Introduction

1. This Memorandum of Understanding (MoU) establishes a framework for cooperation, coordination and information sharing between the Information Commissioner ("**the Commissioner**") and the Financial Conduct Authority ("**the FCA**"), collectively referred to as "**the parties**" throughout this document. In particular, it sets out the broad principles of collaboration and the legal framework governing the sharing of relevant information and intelligence between the parties. The shared aims of this MoU are to enable closer working between the parties, including the exchange of appropriate information, so as to assist them in discharging their regulatory functions.
2. This MoU is a statement of intent that does not give rise to legally binding obligations on the part of either the Commissioner or the FCA. The arrangements set out in this MoU are subject to what is permitted and required by law. The parties have determined that they do not exchange sufficient quantities of personal data to warrant entering into a separate data sharing agreement, but this will be kept under review.

### The role and function of the Information Commissioner

3. The Commissioner is a corporation sole appointed by Her Majesty the Queen under the General Data Protection Regulation and the Data Protection Act 2018 to act as the UK's independent regulator to uphold information rights in the public interest, promote openness by public bodies and data privacy for individuals.
4. The Commissioner is empowered to take a range of regulatory action for breaches of the following legislation:
  - Data Protection Act 2018 (DPA);

- General Data Protection Regulation (GDPR);
  - Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR);
  - Freedom of Information Act 2000 (FOIA);
  - Environmental Information Regulations 2004 (EIR);
  - Environmental Protection Public Sector Information Regulations 2009 (INSPIRE Regulations);
  - Investigatory Powers Act 2016;
  - Re-use of Public Sector Information Regulations 2015;
  - Enterprise Act 2002;
  - Security of Network and Information Systems Directive (NIS Directive); and
  - Electronic Identification, Authentication and Trust Services Regulation (eIDAS).
5. Article 57 of the GDPR and Section 115(2)(a) of the DPA 2018 place a broad range of statutory duties on the Commissioner, including monitoring and enforcement of the GDPR, promotion of good practice and adherence to the data protection obligations by those who process personal data. These duties sit alongside those relating to the other enforcement regimes outlined in paragraph 4 above.
6. The Commissioner's regulatory and enforcement powers include:
- conducting assessments of compliance with the DPA, GDPR, PECR, eIDAS, the NIS Directive, FOIA and EIR;
  - issuing information notices requiring individuals, controllers or processors to provide information in relation to an investigation;
  - issuing enforcement notices, warnings, reprimands, practice recommendations and other orders requiring specific actions by an individual or organisation to resolve breaches (including potential breaches) of data protection legislation and other information rights obligations;

- administering fines by way of penalty notices in the circumstances set out in section 152 of the DPA;
  - administering fixed penalties for failing to meet specific obligations (such as failing to pay the relevant fee to the Commissioner);
  - issuing decision notices detailing the outcome of an investigation under FOIA or EIR;
  - certifying contempt of court should an authority fail to comply with an information notice, decision notice or enforcement notice under FOIA or EIR; and
  - prosecuting criminal offences before the Courts.
7. Regulation 31 of PECR, as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011, also provides the Commissioner with the power to serve enforcement notices and issue monetary penalty notices as above to organisations who breach PECR. This includes, but is not limited to, breaches in the form of unsolicited marketing which falls within the ambit of PECR, including automated telephone calls made without consent, live telephone calls which have not been screened against the Telephone Preference Service, and unsolicited electronic messages (Regulations 19, 21 and 22 of PECR respectively).

### **Functions and powers of the FCA**

8. The FCA is responsible under the Financial Services and Markets Act 2000 for making and enforcing rules governing the conduct of firms authorised and regulated by the FCA, regulating standards of conduct in retail and wholesale markets and for supervising the trading infrastructures that support those markets. The FCA is responsible for the prudential supervision of firms that are not regulated by the Prudential Regulation Authority (PRA) and is also responsible for the regulation of primary securities markets, including via monitoring market disclosures, reviewing and approving prospectuses and operating the UK listing regime.
9. The FCA has a single strategic objective: to ensure that the relevant markets (as defined in section 6 (1F) Financial Services Act 2012) function well. Three operational objectives support this strategic

objective: securing an appropriate degree of protection for consumers (including wholesale consumers); protecting and enhancing the integrity of the financial system; and promoting effective competition in the interest of consumers in the markets for financial services.

10. The FCA does this via oversight and regulation of the UK financial markets which includes:
  - authorisation of individuals who carry on regulated activities;
  - a market-based approach to the supervision of firms in the financial services sector;
  - investigation and enforcement activity against firms and individuals who are carrying out or purporting to carry out regulated activities and financial services (with or without authorisation);
  - exercising powers under the Competition Act 1998; and
  - bringing criminal prosecutions, including, in appropriate cases, of market abuse, financial crime and serious unauthorised business.

### **Co-operation between the Commissioner and the FCA**

11. Subject to any legal or procedural restrictions on the disclosure of information (whether imposed by statute or otherwise) and at their discretion, both parties agree that they will alert each other to any potential breaches of the legislation regulated by the Commissioner, within the context of this relationship, discovered whilst undertaking regulatory duties, and provide relevant and necessary supporting information.
12. Similarly, although again subject to any legal restrictions on the disclosure of information, the Commissioner will, at her discretion, alert the FCA to any potential breaches of the legislation regulated by the FCA within the context of this relationship and provide relevant and necessary supporting information.

13. Subject to any legal restrictions on the disclosure of information (whether imposed by statute or otherwise) and at their discretion, both parties will:
  - Communicate regularly to discuss matters of mutual interest (this may involve participating in multi-agency groups to address common issues and threats); and
  - Consult one another on any issues which might have significant implications for the other organisation.
14. Both parties will comply with the general laws they are subject to, including, but not limited to, local data protection laws; the maintenance of any prescribed documentation and policies; and comply with any governance requirements in particular relating to security and retention, and process personal data in accordance with the statutory rights of individuals.
15. The FCA and the Commissioner will exchange information on relevant issues of interest to the extent permitted by law, and as appropriate and relevant to their respective objectives. This may include, but is not limited to:
  - information about investigations and notifying the other about any relevant action taken against a person or firm by one regulator which may be relevant to the functions of the other;
  - information held by either regulator regarding fraud/criminal or any other activity that might cast doubt on the fitness and propriety of an FCA-authorized firm, certified individuals or an approved person; or
  - information or intelligence held by the Commissioner which indicates that there may be a failure of an FCA-authorized firm's regulated activities (including the implementation or effectiveness of its systems and controls).
16. The FCA and the Commissioner may request information from each other and will include the details of the information sought and why it would assist them to carry out their functions. Each may suggest a reasonable deadline for response, including an explanation of any urgency.

17. The FCA and the Commissioner may consult and co-ordinate in respect of reviews, calls for evidence and recommendations directed towards both parties, where appropriate. In addition, if one regulator considers that information it has gathered will be materially relevant to the other, it will notify the other to enable the other to request disclosure of such information.
18. In the case of a major incident of mutual interest at an FCA regulated firm, the FCA and Information Commissioner will work together in line with agreed incident protocol in order to secure the best outcomes for consumers and ensure incidents are dealt with in a co-ordinated and efficient manner.

### **Purpose of information sharing**

19. The purpose of the MoU is to enable both the Commissioner and the FCA to share relevant information which enhances their ability to exercise their respective functions.
20. This MoU should not be interpreted as imposing a requirement on either party to disclose information in circumstances where doing so would breach their statutory responsibilities. In particular, each party must ensure that any disclosure of personal data pursuant to these arrangements fully complies with both the GDPR and the DPA 2018. The MoU sets out the potential legal basis for information sharing, but it is for each party to determine for themselves that any proposed disclosure is compliant with the law.

### **Legal basis for sharing information**

#### *Information shared by the FCA with the Commissioner*

21. Subject to any disclosure restrictions applicable to the FCA, the FCA may disclose confidential information to the Commissioner to facilitate the carrying out of a statutory function of the FCA under Regulation 3 of The Financial Services and Markets Act 2000 (Confidential Information) Regulations 2001 (SI 2001/2188) (the Disclosure Regulations), or a function of the Commissioner in relation to the provision of claims management services under Regulation 9 or 12 of the Disclosure Regulations (by virtue of the amendment to Schedule 1 of the Disclosure Regulations by Article

99 of the Financial Services and Markets Act 2000 (Claims Management Activity) Order 2018 ("the Order"). The FCA may also disclose confidential information to the Commissioner to facilitate the carrying out of a statutory function of the Commissioner.

22. The Commissioner's statutory function relates to the legislation set out at paragraph 4, and this MoU governs information shared by the FCA to assist the Commissioner to meet those responsibilities. To the extent that any such shared information is to comprise personal data, as defined under the GDPR and DPA 2018, the FCA is a Data Controller so must ensure that it has legal basis to share it and that doing so would otherwise be compliant with the data protection principles.
23. Section 131 of the Data Protection Act 2018 may provide a legal basis for the FCA to share information with the Commissioner. Under this particular provision, the FCA is not prohibited or restricted from disclosing information to the Commissioner by any other enactment or rule of law provided it is *"information necessary for the discharge of the Commissioner's functions"*.

#### *Information shared by the Commissioner with the FCA*

24. The Commissioner, during the course of her activities, will receive information from a range of sources, including personal data. She will process all personal data in accordance with the principles of the GDPR, the DPA 2018 and all other applicable legislation. The Commissioner may identify that information she holds, which may include personal data, ought to be shared with the FCA as it would assist them in performing their functions and responsibilities.
25. Section 132(1) of the DPA 2018 states that information obtained by the Commissioner in the course of, or for the purposes of, discharging her functions can only be shared with others if there is lawful authority to do so. Section 132(2) of the DPA 2018 sets out the circumstances in which the Commissioner will have the lawful authority to share that personal data with the FCA. In particular, it will be lawful in circumstances where:
  - The sharing was necessary for the purpose of the Commissioner discharging her functions (section 132(2)(c));

- The sharing was made for the purposes of criminal or civil proceedings, however arising (section 132(2)(e)); and
  - The sharing was necessary in the public interest, taking into account the rights, freedoms and legitimate interests of any person (section 132(2)(f)).
26. The Commissioner will therefore be permitted to share information with the FCA in circumstances where it has determined that it is reasonably necessary to do so in furtherance of one of those grounds outlined at paragraph 25. In doing so, the Commissioner will identify the function of the FCA with which that information may assist, and assess whether that function could reasonably be achieved without access to the particular information in question.
27. If information to be disclosed by the Commissioner was received by her in the course of discharging her functions as a designated enforcer under the Enterprise Act 2002, any disclosure shall be made in accordance with the restrictions set out in Part 9 of that Act.
28. Where information is to be disclosed by either party for law enforcement purposes under section 35(4) or s5(5) of the DPA 2018 then they will only do so in accordance with an appropriate policy document as outlined by section 42 of the DPA.
29. Where a request for information is received by either party under data protection laws or FOIA, the recipient of the request will seek the views of the other party as described in the FOIA section 45 Code of Practice, where the information being sought under the request includes information obtained from, or shared by, the other party. However the decision to disclose or withhold the information (and therefore any liability arising out of that decision) remains with the party in receipt of the request as Data Controller in respect of that data.

### **Policies, guidance and FCA rule-making**

30. Each regulator will make rules and / or policies in pursuit of their separate objectives. The parties will seek to understand and where appropriate collaborate and co-ordinate work on their respecting



policies that have a material effect on the other's objectives. This may include, but not be limited to, work on:

- regulatory policy;
  - industry standards and recommendations;
  - regulatory materials, such as codes of practice, rules and guidance;
  - assessments of the landscape and risk analysis to inform policy-making;
  - FCA consumer alerts concerning advertising;
  - competition in the financial advertising sector;
  - innovation initiatives; and
  - any other projects that may be identified on an ad hoc basis, particularly to aid understanding of how the two regulators work together.
31. The parties will liaise closely to ensure that their separate awareness activities are complementary. Where appropriate, both regulators will share communication and publication plans to facilitate joined up messages and effective resource planning.

### **Investigation and enforcement**

32. The parties recognise that there are areas in which they have complementary functions and powers. They will therefore endeavour to ensure that in these cases, the most appropriate body or bodies will commence and lead investigations. To the extent permitted by law and having regard to their respective powers, expertise and resources, they will seek to ensure that in cases of investigations, the parties will notify each other of significant developments where the other is likely to have an interest. Where appropriate, the parties will discuss the steps they propose to take and ensure co-ordination takes place in a timely manner, where possible, allowing for a proper exchange of views.
33. The parties may refer a matter for action if the other body is considered more appropriate to deal with the matter. Any such

referral will include the action sought and the legal powers it considers are available to the other. Where the other party determines not to proceed, an explanation will be provided, where possible.

34. Where the parties agree that an investigation should be carried out by both regulators, it will usually be appropriate that both investigations proceed in parallel. However, in appropriate circumstances, they will consider whether the particular facts of the matter, as they are known at that time, suggest that one party's investigation should proceed before the other's.
35. Where either party carries out any subsequent investigation and proceedings alone, that party will keep the other regularly updated on material aspects of the progress of the investigation.
36. If a decision is made by either party to take action against a subject, the FCA and the Commissioner should consider whether it is possible and would be appropriate to co-ordinate publication of applicable enforcement announcements so that both parties publish the outcome of their investigations simultaneously. In any event, the FCA and the Commissioner will endeavour to give the other appropriate notice of any press release or other public statement it intends to make relating to enforcement cases in which the other may have an interest, no later than 24 hours prior to publication unless there are overriding reasons which prevent or delay such notice.
37. Relevant FCA and the Commissioner's staff will, where appropriate, seek to maintain general awareness and understanding of each other's functions and needs and will liaise with each other to ensure that issues are appropriately identified.

### **Confidentiality and data breach reporting**

38. Appropriate security measures shall be agreed to protect information transfers in accordance with the sensitivity of the information and any classification that is applied by the sender.
39. Where confidential material is shared between parties it will be marked with the appropriate security classification.

40. Where one party has received information from the other, it will consult with the other party before passing the information to a third party or using the information in an enforcement proceeding or court case.
41. Where confidential material obtained from, or shared by, the originating party is wrongfully disclosed by the party holding the information, this party will bring this to the attention of the originating party without delay. This is in addition to obligations to report a personal data breach under the GDPR and/or DPA where personal data is contained in the information disclosed.
42. In accordance with relevant legislation, the FCA and the Commissioner will protect the confidentiality and sensitivity of all unpublished regulatory and other confidential information received from the other regulator, and maintain effective controls designed to minimise the risk of inappropriate disclosures.
43. Where one Party has received information from the other, it may use the information for purposes set out in requests for information or otherwise agreed, but will notify the other before passing the information to a third party unless the sending Party has placed additional restrictions.
44. The FCA and the Commissioner will liaise where relevant, to the extent permitted by law and having regard to their respective objectives, on responding to enquiries from the public, including FOIA requests and will consult each other before releasing information originally belonging to the other.



### **Duration and review of the MoU**

45. The Commissioner and the FCA will monitor the operation of this MoU and will review it biennially.
46. Any minor changes to this memorandum identified between reviews may be agreed in writing between the parties.
47. Any issues arising in relation to this memorandum will be notified to the point of contact for each organisation.

**Contact:**

48. The parties have both identified a key person who is responsible for managing this MoU. Those individuals will maintain an open dialogue between each other in order to ensure that the MoU remains effective and fit for purpose. They will also seek to identify any difficulties in the working relationship, and proactively seek to minimise the same.

**Signatories**

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