

CONCORDAT
REGARDING A FRAMEWORK FOR COMMUNICATION AND CO-OPERATION

between

THE GAS AND ELECTRICITY MARKETS AUTHORITY

and

THE FINANCIAL SERVICES AUTHORITY

-FRAMEWORK FOR DISCUSSION BETWEEN OFGEM AND THE FSA-

1. INTRODUCTION

- 1.1 The Office for Gas and Electricity Markets (**Ofgem**) carries out the day to day activities of the Gas and Electricity Markets Authority on its behalf, references in this Concordat to Ofgem shall be deemed also to be references to the Gas and Electricity Markets Authority.
- 1.2 The use of the term “FSA” in this Concordat shall be a reference to the Financial Services Authority.
- 1.3 References in this Concordat to the “agencies” means both Ofgem and the FSA and references to the “agency” means one or other of them.
- 1.4 References in this Concordat to relevant cases are to cases, circumstances or occasions in which functions of both agencies are or may be exercisable (i.e. where the cases, circumstances or occasions in question fall or potentially fall within the scope of both agencies’ functions).
- 1.5 References in the Concordat to an enactment includes, to the extent applicable, references to that enactment **as** amended, extended or replaced and any subordinate legislation made under that amendment as amended, extended or replaced.

2. THE AGENCIES’ POWERS, FUNCTIONS AND DUTIES

- 2.1 Nothing in this Concordat is intended in any way to restrict, extend or alter the powers, functions or duties of the agencies, or to limit either agency in the exercise of any discretion it may have in the discharge of its functions, and the expressions of intent in this Concordat are to be construed accordingly. In particular, references to information to be provided by an agency under this Concordat are limited to information which that agency is permitted by applicable law to disclose.

3. OBJECTIVES OF OFGEM AND THE FSA

- 3.1 The FSA’s function (when acting other than in its capacity **as** the **UK** Listing Authority) under the Financial Services and Markets Act 2000 (**FSMA**) is to regulate financial services and markets in the **UK** in a manner which is compatible with, and is most appropriate for the

purpose of meeting, its four regulatory objectives, taking into account its obligation to pay due regard to the statutory principles of good regulation. The four regulatory objectives are:

- 3.1.1 market confidence – maintaining confidence in the UK financial system;
 - 3.1.2 public awareness – promoting public understanding of the financial system, including awareness of the benefits and risks associated with different kinds of investments or other dealings;
 - 3.1.3 the protection of consumers of financial services – securing the appropriate degree of protection for consumers, having regard to, among other things, the differing degrees of experience and expertise which different consumers may have, and the general principle that consumers should take responsibility for their decisions; and
 - 3.1.4 the reduction of financial crime – reducing the extent to which it is possible for a business carried on by a regulated person or a person acting in breach of the general prohibition, to be used for a purpose connected with financial crime.
- 3.2 The FSA’s regulatory objectives as the **UK Listing Authority (UKLA)** are agreed with HM Treasury on a periodic basis. For the financial year 2002/03, the regulatory objectives of the FSA in its capacity as the UKLA are to formulate and enforce Listing Rules that:
- 3.2.1 provide an appropriate level of protection for investors in listed securities;
 - 3.2.2 facilitate access to listed markets; and
 - 3.2.3 maintain the integrity and competitiveness of UK markets for listed securities.
- 3.3 The primary function of Ofgem is to regulate the activities of entities within the gas and electricity industries in England, Wales and Scotland:
- 3.3.1 using the powers under the Gas Act 1986 and the Electricity Act 1989 (in each case, as amended) and including the powers under the Utilities Act 2000 (**Sector Legislation**) and in accordance with its principal objective, being the protection of the interests of consumers (respectively) of gas and electricity, wherever appropriate by the promotion of effective competition, and having regard to the need to meet reasonable demands for supply and the needs of licensees to finance their activities; and
 - 3.3.2 exercising the powers of the Director General of Fair Trading under the Competition Act 1998 and the Fair Trading Act 1973 (**Competition Legislation**) in certain circumstances where it has concurrent jurisdiction with the Director General of Fair Trading **as** set out in the Sector Legislation.

4. REASON FOR CONCORDAT

- 4.1 The agencies believe that they may be able to discharge their functions so as to better achieve their statutory objectives by working closely together both in areas where there may be a degree of overlap in the agencies’ respective functions, for example in the area of market abuse, and in certain areas of mutual interest where no such overlap exists, where the agencies may benefit from working in parallel **as** proposed in this Concordat.

¹ The regulator for the gas and electricity markets in Northern Ireland is the Office for the Regulation of Electricity & Gas, (OFREG).

- 4.2 In this context, the agencies have agreed to observe, whenever practicable, certain General Principles (set out in Section 8 below) in exercising their respective powers under the relevant statutes. This Concordat sets out the framework within which these General Principles will be applied and will operate in practice.

5. PUBLICATION AND REVIEW OF THIS CONCORDAT

- 5.1 The agencies propose to review the Concordat once a year, on the anniversary of its coming into force.
- 5.2 It is possible that the agencies' relationship may change over time as a result of various factors, for example statutory amendment. Accordingly either agency may initiate a review of the Concordat at any time, by written notice to the other. The agencies will endeavour to agree any revisions to the Concordat resulting from any such review in a timely manner.
- 5.3 Once the Concordat has been signed by both agencies, Ofgem will make copies of the Concordat available to the public. If the Concordat is revised, the mended version of the Concordat will be made available to the public by Ofgem.

6. LEGAL BACKGROUND

- 6.1 The following summary of the agencies' relevant statutory functions and powers is provided for information purposes and is not intended to be relied upon as a complete technical legal description.

6.1.1 *Statutory functions*

6.1.1.1 The FSMA contains an offence of engaging in "regulated activity" without authorisation or an exemption. "Regulated activity" is defined in the FSMA and includes specified activity which relates to an investment of a specified kind. The specified investments and activities are set out in the FSMA and statutory instruments made pursuant to the FSMA². The FSA is responsible for granting authorisations to engage in regulated activity. The FSA regulates authorised persons and, in certain circumstances, those who are exempt from the need for authorisation. The FSA also has investigation and enforcement functions in a number of other areas that are linked to the four statutory objectives specified in Section 3.1 above. In some areas, for example market abuse, the FSA's investigation and enforcement powers will extend to persons who are not authorised or exempt.

6.1.1.2 Ofgem's equivalent functions are found under the Gas Act 1986, the Electricity Act 1989 (and through these the Competition Act 1998 and the Fair Trading Act 1973), the Utilities Act 2000 and statutory instruments made pursuant to these Acts.

6.1.2 *Powers of information gathering*

6.1.2.1 FSA

6.1.2.1.1 The powers of the FSA to obtain information and carry out investigations are set out in Part XI of the FSMA. The FSA may use these powers at the request of an overseas regulator. Some of these powers are briefly outlined below. Section 177 of the FSMA contains enforcement and criminal offence

² In particular, the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001.

provisions that apply to persons who fail to comply or comply properly with a requirement imposed on them pursuant to the exercise of the powers contained in Part XI.

- 6.1.2.1.2 Under Section 168 of the FSMA, the FSA may, in specified circumstances, appoint a person to conduct an investigation on its behalf. This power can be exercised if circumstances suggest, for example, that one of the following has taken place: an offence of engaging in "regulated activity" without authorisation or an exemption, market abuse or an offence under Part V of the Criminal Justice Act 1993 (Insider Dealing). In specified circumstances, an investigator appointed under Section 168 may require any person to answer questions or otherwise provide information.
- 6.1.2.1.3 Under Section 176 of the FSMA, a justice of the peace may issue a warrant in relation to specified investigations being conducted pursuant to Section 168, authorising a constable to enter and search premises and take possession of documents.
- 6.1.2.1.4 Pursuant to Section 165 of the FSMA, the FSA (or an employee or agent authorised by the FSA) may ask a current or former authorised person, any person connected with the authorised person and certain others, to provide specified information or documentation reasonably required in connection with the exercise of the FSA's functions under the FSMA.
- 6.1.2.1.5 The FSA may also ask a current or former authorised person, or certain connected persons, to provide a report on any matter about which the FSA could require information or documents under Section 165.
- 6.1.2.1.6 Under Section 167, the FSA may appoint an investigator to conduct a general investigation into: (i) the nature, conduct or state of any part of the business of an authorised person or an appointed representative; (ii) a particular aspect of that business (including unregulated activity); or (iii) the ownership or control of an authorised person.
- 6.1.2.1.7 The FSA may also appoint an investigator to conduct an investigation, without necessarily giving written notice of the appointment to the person being investigated.
- 6.1.2.1.8 The FSA also has investigative powers as the UK Listing Authority, relating to suspected breaches of the listing provisions or rules.

6.1.2.2 Ofgem

- 6.1.2.2.1 The Sector Legislation relevant to Ofgem establishes a licensing regime in relation to specific activities and it is a common feature of such licences that they contain a general condition requiring the licensee to furnish information to Ofgem at such times as Ofgem may require for the purpose of performing its functions. This is normally accompanied by other specific obligations within the licence concerning the provision of information in particular circumstances. There is no material difference between the gas and electricity licensing regimes in this respect, although there is some variation between licensed activities (e.g. holding company provisions in electricity generation and distribution licence conditions). These rights to obtain information from a licensee are subject to exceptions relating to:

- (i) the licensee’s privilege against self-incrimination;
 - (ii) documents which could be required to be delivered up under civil proceedings; and
 - (iii) certain general functions³ of Ofgem.
- 6.1.2.2.2 Section 28 of the Electricity Act 1989 and Section 38 of the Gas Act 1986 also provide that Ofgem may serve notice on any person requiring delivery of specified information or documents where it appears that there has been a contravention of any relevant condition or requirement. The person in receipt of such a notice may also rely on the privilege against self incrimination. There are criminal consequences for a failure to comply.
- 6.1.2.2.3 To this power can be added Ofgem’s powers arising by virtue of Section 54 of the Competition Act 1998, which grants Ofgem concurrent powers with the Office of Fair Trading in relation to certain matters as defined in the Sector Legislation. Sections 25 to 28 of the Competition Act set out Ofgem’s powers of investigation under the Competition Act. An investigation may be conducted if there are reasonable grounds for suspecting infringement of the Chapter 1 or Chapter 2 prohibitions and Ofgem has powers to:
- (i) require production of documents/information;
 - (ii) enter premises with consent; and
 - (iii) enter premises without a warrant.
- 6.1.2.2.4 “Privileged communications”⁴ are exempted from those powers.
- 6.1.2.2.5 Finally, Ofgem has powers under Section 44 of the Fair Trading Act 1973 to require information where it appears that there are grounds for believing that a monopoly situation may exist.

6.1.3 The release of Information

The FSA

6.1.3.1 “Confidential information”

- 6.1.3.1.1 Under Section 348 of the FSMA, and subject to the gateways outlined in Section 349, the FSA is restricted from disclosing “confidential information”⁵ without the consent of the person from whom the information was received, or the person to whom the information relates (if different). This restriction

³ These “general functions” include: the modification of licences; the provision of information and advice; and the general regulatory monitoring obligations and functions.

⁴ “Privileged communications” are defined in the Competition Act 1998 to mean communications: (a) between a professional legal adviser and his client; or (b) made in connection with, or in contemplation of, legal proceedings and for the purposes of these proceedings; which in proceedings in the High Court in England and Wales, or the Court of Session in Scotland, would be protected from disclosure on grounds of legal professional privilege.

⁵ “Confidential information” is defined in Section 348 as information which relates to the business or other affairs of any person, was received by the primary recipient for the purposes of, or in the discharge of, any functions of the FSA, the competent authority for the purposes of Part VI of the FSMA or the Secretary of State under any provision made by or under the FSMA and is not prevented from being confidential information as a result of: (a) it having been made available to the public in circumstances where such disclosure is not precluded by Section 348; or (b) it is in such a form that it is not possible to ascertain from it information relating to any particular person.

also applies to anyone who has directly or indirectly obtained such information from the FSA. Investigators appointed by the FSA to conduct investigations are also under such duty of confidentiality. Anyone found in breach of Section 348 is guilty of an offence and liable to imprisonment and/or the imposition of a fine. The Section 349 gateways provide for the disclosure of such confidential information to prescribed recipients or classes of recipient and for prescribed⁶ public functions.

- 6.1.3.1.2 The details of these gateways are set out in The Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001⁷ (**Confidential Information Order**). The Confidential Information Order is permissive in effect, **as** it allows, but does not compel, persons carrying out official functions under the FSMA to disclose information in their possession for the purpose of enabling or assisting the carrying out of a public function by that person, the FSA, the Secretary of State or the Treasury.
- 6.1.3.1.3 Part IV of the Confidential Information Order applies to information that is not subject to European Union Directive restrictions⁸ and permits persons carrying out official functions under the FSMA to disclose information in their possession to specified persons for the purpose of enabling or assisting specified activities. Ofgem and its functions under any enactment are specified for the purposes of the gateway under Part IV.
- 6.1.3.1.4 Under regulation 12(2) of the Confidential Information Order, a person may disclose information received from the FSA to any person provided that the purpose of such disclosure is to enable or assist the person making the disclosure to discharge any of its statutory functions.
- 6.1.3.1.5 Disclosure under the Confidential Information Order may be made subject to conditions as to the use to which the information may be put. Using the information in breach of the conditions attached to its release constitutes an offence under Section 352(3) of the FSMA.

6.1.3.2 “Competition information”

- 6.1.3.2.1 The FSMA also makes it an offence for a person to improperly disclose “competition information”. As with a breach of Section 348, the penalties for breach of this Section involve imprisonment and/or the imposition of a fine. Under the relevant provisions⁹, it is not improper for the FSA to disclose competition information to Ofgem for the purposes of facilitating the performance by Ofgem of its functions under the Sector Legislation and the Competition Legislation.

Ofgem

6.1.3.3 Gateways under the Utilities Act 2000

⁶ “Prescribed” meaning prescribed in Treasury regulations.

⁷ SI2001/2188

⁸ Regulation 11 of the Confidential Information Order **sets** out the information that is subject to Directive restrictions.

⁹ “Competition information” is defined in Section 351 **as** information which relates to the affairs of a particular individual or body, is not otherwise in the public domain, and was obtained under or by virtue of a competition provision under the FSMA.

¹⁰ Section 351(2)(b) of the FSMA and Schedule 19 of the FSMA **as** amended by the Financial Services and Markets Act 2000 (Competition Information) (Specification of Enactment etc.) Order 2001.

Once Ofgem possesses information properly obtained for its own purposes under the Sector Legislation, it shall be able to release it in prescribed circumstances. Section 105 of the Utilities Act 2000 contains a provision prohibiting the disclosure of information obtained by virtue of the provisions of the Gas Act 1986, the Electricity Act 1989 and the Utilities Act 2000 unless the disclosure is made for particular purposes set out in that Section including:

- (i) to facilitate the performance of any functions of the Department of Trade and Industry, Ofgem, the Gas and Electricity Consumer Council or the Competition Commission under those Acts;
- (ii) if it is required for the revocation of a licence or changes in licence conditions;
- (iii) for the purpose of facilitating the performance by the FSA of any functions under the FSMA; or
- (iv) for the purpose of facilitating the discharge of any function by a person appointed under Section 97 (investigations into a breach of listing rules etc), 167 (general investigations) or 168 (investigations in particular cases) of the FSMA.

6.1.3.4 Gateways under the Competition Legislation

A similar gateway applies in relation to the release of information which has been obtained by Ofgem under the Competition Act 1998. Section 55 of that Act prohibits the disclosure of information obtained by virtue of the provisions of the Act. The prohibition is disapplied in a number of circumstances, such as where the disclosure is made for the purpose of facilitating the performance by a designated person (including the FSA) of any relevant function (which includes functions under the FSMA). The prohibition is also disapplied where the disclosure is made in connection with the investigation of a criminal offence. Equivalent provisions can be found in relation to the Fair Trading Act at Section 133 of that Act.

6.1.3.5 Additional limitations on the agencies' gateways

- 6.1.3.5.1 Each agency recognises that it is legally bound by Sections 348 and 349 of the FSMA and the regulations made thereunder, Section 105 of the Utilities Act 2000, Section 55 of the Competition Act 1998 and Section 133 of the Fair Trading Act 1973 as regards information obtained under or by virtue of the provisions of the FSMA and the Sector Legislation and Competition Legislation respectively. Accordingly, each agency acknowledges that the disclosure of information received under this Concordat to third parties is subject to the relevant provisions of the FSMA and the regulations made thereunder, and the relevant Sections of the Sector Legislation and Competition Legislation.
- 6.1.3.5.2 In addition to the limitations set out elsewhere in Section 6.1.3, the ability of either of the agencies to disclose confidential information under this Concordat may be subject to any personal or commercial confidentiality obligations which: (a) are undertaken by either party; and (b) arise under the general applicable law.

6.1.4 Powers of enforcement

- 6.1.4.1 The FSA has numerous enforcement powers under the FSMA, including the powers to impose financial penalties, make public statements of misconduct and request a court to impose a penalty.

- 6.1.4.2 The FSA also has powers to bring a prosecution for a variety of criminal offences, including insider dealing, misleading statements and practices and offences against the general prohibition, that are punishable by fine or imprisonment.
- 6.1.4.3 Ofgem has enforcement powers under statute and under the licences. Following the Utilities Act 2000 the Sector Legislation now contains powers to impose "reasonable" financial penalties on licensees who have breached a condition or failed to achieve the standard of performance. Breach of an enforcement order may also lead to revocation of a licence in accordance with the terms of the licence.
- 6.1.4.4 It should be noted that under the Sector Legislation, Ofgem has a duty to take enforcement action in relation to an ongoing or apprehended breach of a licence and other breaches (subject to certain exceptions).
- 6.1.4.5 Under its powers under the Competition Act 1998 (which powers are concurrent with the powers of the OFT under that Act), if there is a breach of the Chapter 1 or Chapter 2 prohibitions, Ofgem may: (i) fine a company any amount up to a ceiling of 10% of national turnover; or (ii) make a direction **as** to the cessation of infringing action which, if it is not complied with, may become the subject of a court order to the same effect.
- 6.1.4.6 Any person who fails to co-operate with Ofgem during an investigation may be liable to a fine, or, where the conviction is on indictment, to 2 years' imprisonment.

7. AIMS

- 7.1 The aims of the agencies in entering into this Concordat are **as** follows:
- 7.1.1 To foster mutual understanding and effective relations generally between the agencies;
- 7.1.2 To assist in the more effective and efficient performance of the agencies' statutory functions;
- 7.1.3 To ensure information is shared in relevant cases where appropriate and subject to statutory and any other limitations;
- 7.1.4 To ensure liaison in relevant cases;
- 7.1.5 To limit duplication of investigative effort by prior consultation where appropriate;
- 7.1.6 To co-ordinate enforcement action in relevant cases, where appropriate and subject to statutory and any other limitations.

8. GENERAL PRINCIPLES

- 8.1 The agencies have agreed to observe, where practicable, the following general principles:
- 8.1.1 Both agencies confirm their willingness to co-operate, where appropriate (particularly by sharing relevant information and communicating about the progress of investigations and of enforcement intentions).

- 8.1.2 Without restricting in any way the freedom of each agency to perform its functions as it sees fit and in accordance with any legal requirements, it is expected that each agency would seek to avoid, where possible, action which it is aware may unduly prejudice the other agency's position.
- 8.1.3 Each agency recognises that information provided by the other under this Concordat is likely to be of a commercially sensitive nature.

9. AGREED STRUCTURE AND PROCEDURES

9.1 Structure

- 9.1.1 The agencies will each nominate a liaison officer for the purposes of co-ordinating the action taken by the agencies under this Concordat.
- 9.1.2 The liaison officers will serve as the focal point for co-ordination of the agencies' relationship under this Concordat and each shall maintain a record of all information and documentation shared between the agencies.

9.2 Procedures

- 9.2.1 The agencies will adopt the following procedures, where appropriate.
- 9.2.1.1 It will be the responsibility of each agency's liaison officer(s) to allocate the status of all relevant cases or matters dealt with under this Concordat as either "urgent" or "non-urgent".
- 9.2.1.2 The liaison officers will meet at frequent intervals to be agreed from time to time, for the duration of the Concordat to discuss areas of mutual interest and deal (within agreed timescales) with all relevant cases or matters that have arisen in the period since the last meeting, that are not of an urgent nature.
- 9.2.1.3 Information, documentation or requests for such may be sent by the liaison officer of one agency to the liaison officer of the other at any time between regular meetings, but responses to any such information, documentation or requests shall generally be communicated or discussed at the regular meeting, unless any particular matter has been classified as urgent.
- 9.2.1.4 Urgent cases or matters shall be dealt with appropriately by the liaison officers on an ad hoc basis. The agency raising the matter shall notify the other by telephone, and thereafter confirm the matter in writing, or by fax or e-mail.
- 9.2.1.5 Notifications and requests for information should normally be in writing. However, where the agency giving notice or requesting information perceives a need for expedited action, such notice or request may be initiated in any form, but should be subsequently confirmed in writing.
- 9.2.1.6 Where one agency becomes aware of any information that it believes would be relevant to the discharge of the other's functions (including during the authorisation or licensing processes, during the period of ongoing supervision or during any specific investigation), that agency will (subject to any legal restrictions) disclose such information to the other via their respective liaison officers. Thereafter, in relevant cases, the agencies will liaise with each other

in relation to any significant developments in their investigations, any significant steps they propose to take, or have taken, and any relevant supervisory concerns.

- 9.2.1.7 Before initiating any action in a relevant case, each agency will, time permitting, liaise with the other via their respective liaison officers as to the action which it intends to take and any action already taken or intended to be taken by the other.
- 9.2.1.8 It is understood that each agency will decide on whether and what action it should take in a particular case, irrespective of the fact that it may have provided information relating to the case to the other agency or that the other agency may have initiated an investigation or taken any other action in the case.
- 9.2.1.9 In a case where both agencies are investigating the same matter, the agencies will liaise with a view to co-ordinating, as far as appropriate, their investigations. During the course of any investigation (whether carried out by only one agency or both) in a relevant case, the agencies will work together via their respective liaison officers to gather and (where permitted) share information.
- 9.2.1.10 Subject to any statutory restrictions, each agency will, where appropriate, consult with the other via their respective liaison officers before making any public announcements relating to: (i) any investigation being, or to be, carried out or enforcement action taken or to be taken in a relevant case; or (ii) the other agency or its activities.
- 9.2.1.11 Each agency will notify the other via their respective liaison officers of the outcome, in relevant cases, of any investigation or enforcement action taken or of any decision to take no further action as soon as reasonably practicable thereafter.
- 9.2.1.12 If any matter or issue remains outstanding after the regular meetings referred to in 9.2.1.2, the agency that originally raised the issue may set out its views formally in writing to the liaison officer of the other. The issue should then be progressed internally between the agencies as necessary.
- 9.2.1.13 The agencies recognise the likely commercial sensitivity of information provided under this Concordat as mentioned in the General Principles. Either agency may request a discussion with the other of the sensitivities of any particular information provided, or to be provided, by one agency to the other.
- 9.2.1.14 Subject to any statutory restrictions, each agency will, where appropriate, discuss the likely commercial sensitivity of any particular information provided under this Concordat with the other agency before passing such information on to any third party.

10. LEGAL STATUS OF THIS CONCORDAT

- 10.1 The purpose of this Concordat is to set out the procedures that the agencies intend to follow. This Concordat is not intended to create any rights enforceable in a court of law, or to fetter the discretion of either agency in any way in the discharge of their functions.

Signed for and on behalf of the

FINANCIAL SERVICES AUTHORITY by: *Ray Huey Evans*

Date: *23 April 2003*

Signed for and on behalf of the

GAS AND ELECTRICITY MARKETS AUTHORITY by: *Mark Carter*

Date: *29 April 2003*