

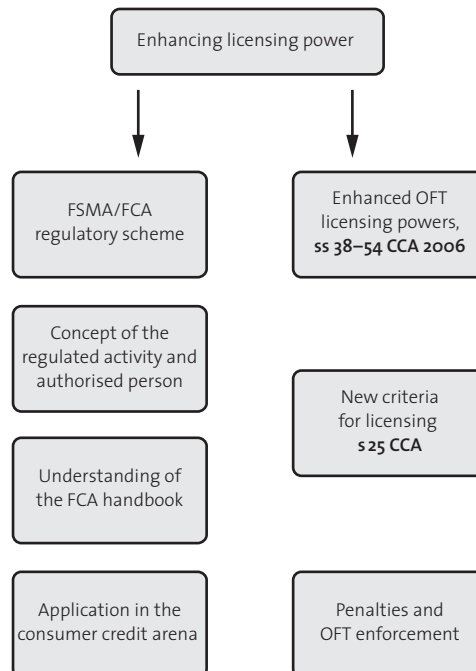
Bonus Question 2

Compare and contrast the consumer credit licensing rules as they existed before and after the **Financial Services Markets Act 2000** (as amended by the **Financial Services Act 2012**).

How to Answer this Question

This question requires an explanation of the two regimes, demonstration of understanding of the licensing powers previously granted to the Office of Fair Trading ('OFT') in relation to applicants for and holders of consumer credit licences by **ss 38–54** of the **CCA 2006** and the regime implemented through changes to **FSMA 2000** and overseen by the FCA. It is important to ensure that your answer is not purely descriptive and does seek to critically compare the two.

Applying the Law



ANSWER

INTRODUCTION

Despite revision just six years prior, the **Financial Services Act 2012** which creates the statutory powers to bring about the regime now contained in the **FSMA 2000** (coming into force on 1 April 2014) once again set about making substantial revisions to the consumer credit licensing regime. The key drivers on this occasion were in some ways the same as those of the past; however, the emphasis was as much on creating a more coherent system of regulation under a small number of regulators as possible.

THE CCA 1974 AND 2006

Part III of the **CCA 1974** required those operating a consumer credit, consumer hire or ancillary credit business to hold either a standard licence or be subject to a group licence.¹ Unlicensed lending was a criminal offence (**s 39** of the **CCA 1974**) and had minimal deterrents effect on fringe lenders.² In order to focus resources on enforcement of licensing enforcement, licences came to be granted for an indefinite period, avoiding the need to periodic renewal (**s 34** of the **CCA 2006**). The fitness criteria set out in **s 25** of the **CCA 1974** were expanded to allow the OFT to take into account the applicant's skills, knowledge and experience in relation to the relevant credit business and the practices and procedures the applicant proposes to implement in the conduct of the business (**s 29** of the **CCA 2006**), thus allowing perhaps greater focus on the proposed business plan and compliance mechanisms of sub-prime lenders. **Sections 44–51** of the **CCA 2006** give the OFT greater enforcement powers, in particular in relation to acquiring information from the business, and increased powers to enter premises to acquire information about breaches of the law. In addition to the rather cumbersome current procedure of revoking, varying or suspending a licence, the OFT was given wide powers under **ss 38–43** of the **CCA 2006** to impose *requirements* on licensees if dissatisfied with the way regulated business has been or is proposed to be carried on by a licensee or their associates. The OFT could also require the doing or ceasing from doing any act in relation to the licensee's business or proposed business (**s 38** of the **CCA 2006**). Extensive supplementary powers were granted to the OFT to specify the time or period within which the required action is to be taken). For example *Requirements Notice imposed on Creation Consumer Finance Ltd* (OFT Press Release 65/10, 17 June 2010) required the firm to stop issuing proceedings against Scottish debtors in English courts. The OFT regarded this practice as unfair because of the unfamiliar law and procedure involved in a court claim in a different jurisdiction, and any associated travel costs might deter consumers from defending such action. This practice was in breach of the OFT's Debt Collection Guidance.³

- 1 Providing a clear and complete explanation not only helps you to properly apply the law to the requirements of the question, it also shows your knowledge. Remember that accuracy is an important assessment factor.
- 2 FCA website has a lot of good information about licensing. This is an area where regulatory rulings of more importance than rather meagre case law on the area.
- 3 Showing that you have read more widely than simply learning the basic principles is a good way to attract marks.

A licensee who was unhappy with the imposed requirements had a right of appeal to the First Tier (Consumer Credit) Tribunal, with a further right to appeal to the Administrative Appeals Chamber of the Upper Tier Tribunal on a point of law (replacing the Consumer Credit Appeals Tribunal created by ss 55–58 of the **CCA 2006** under the unification of the Tribunal Service appeals structure created by the **Tribunal Courts and Enforcement Act 2007**). The OFT, again subject to a right of appeal to the First Tier (Consumer Credit) Tribunal, had the power to impose a civil penalty of up to £50,000 for failure to comply with the requirement (ss 52–55 of the **CCA 2006**). However, before imposing a penalty the OFT was bound to give the licensee the reasons for the imposition of the penalty, and give them a chance to respond.

Of course the ultimate sanction which the OFT could impose was revocation of a licence, the First Tier Tribunal held in *EEC Ltd v Office of Fair Trading* (Decision 01, 23 November 2009), that the onus of proving that it was legitimate to revoke a licence once granted rested on the OFT. Perhaps as presaging the more apparently aggressive regime that is now in operation, the OFT used its powers increasingly aggressively. In March 2012, for example, following the failure to follow requirements notices, the brokerage licence of Yes Loans was revoked under s 32 **CCA 1974**. Among the unfair business practices particularly targeted were using high pressure sales tactics to persuade consumers to provide their debit or credit card details on the false premise that they were required for an identity and/or security check; deducting brokerage fees without making it clear that a fee was payable and/or without the consumer's consent; failing to introduce some consumers to the product originally sought, frequently arranging short-term high interest loans instead; and misleading consumers into believing it was a loan provider rather than a credit broker.

THE FSMA 2000

The **FSMA 2000** was amended in 2012 to bring into its scope (from April 2014) consumer credit licensing. Rather than being treated as a discrete matter with a discrete regulator, consumer credit licensing was now to be treated as a 'regulated activity', meaning that it would be regulated in the same way as advising on investments, deposit taking, etc. Notwithstanding the powers of the OFT, the National Audit Office study of consumer credit regulation concluded that there was still more that could be done to reduce 'consumer harm'.⁴

Pursuant to this, consumer credit licensing has effectively been made subject to the same approved person scheme that operates in respect of regulated activities across the financial services sector. Therefore, carrying on a regulated activity 'by way of business' (s 22 **FSMA**), including activities relating to consumer credit, while not being a person authorised to do so may under **FSMA s 19** be a criminal offence punishable by up to two years in prison.

4 National Audit Office, *Regulating Consumer Credit*, 2012 (www.nao.org.uk/wp-content/uploads/2012/12/1213685.pdf).

In common with all regulated activities, the rules on who is a fit and proper person to act in relation to a regulated activity is set out in the **FCA Handbook**. There is therefore a shift in focus from the suitability merely of a firm to the suitability of individuals within it and particularly within its senior management. The **FCA Handbook (FIT 2.1–2.3)** sets out three well-defined headings each of which contains numerous criteria for determining the suitability of an individual applicant, including their honesty and integrity, financial soundness, competence and capability. There are echoes of the previous revisions but clearly the law goes much further here.

Once approved, an individual is then bound by the statements of principle found in **s 64 FSMA** reproduced in the **FCA Handbook (APER 2)** whereby a failure to meet these standards can lead to revocation of the person's licence. The licensing regime also of course extends to firms themselves. Here the FCA will consider the business model as a whole and how the firm embeds fair treatment of customers into its work, with particular focus on the governance and culture of the organisation, product design and transaction processes.

On the face of it, the burden imposed by the new regime is potentially very much greater than the one it replaces. This is almost certainly the case and reflects the perceived need to ensure higher levels of protection for consumers; however, in order to ameliorate what is in some circumstances an excessive regulatory burden, the FCA has essentially introduced differing levels of regulation for different levels of risk within the business carried on, that is to say they must still be authorised to carry on a regulated activity but Threshold Conditions, such as the number of approved persons required in a firm will be relaxed in order to ensure proportionality.

In respect of penalties, the **FCA Handbook** provides that the ultimate remedy for a breach of a licence is the suspension or restriction of that licence but also provides for financial penalties and public censure. The toolkit therefore is perhaps more varied than it was historically and the FCA has perhaps a more prominent platform and greater, wider expertise in enforcement than the OFT had.

CONCLUSION

The new regime is distinctly different from the old. Its accordance with provisions seen in financial services regulation more widely has usefully simplified the law, while the new rules allow for proportionate applications taking into account the size of a business and the risk inherent in the activities it carries on. The powers of the regulator being greater and the range of tools at the regulators disposal suggest that at last some of the structural weakness in UK consumer credit law may finally be being addressed.