

## Finalised guidance

# Statement on using Switching Terms in mortgage contracts under the Unfair Terms in Consumer Contracts Regulations 1999

January 2012



1. The FSA has been considering terms in interest-only mortgage contracts that allow firms to switch consumers from an interest-only mortgage to a repayment mortgage ('Switching Terms'). Here we set out why we believe some Switching Terms in standard consumer contracts may pose a risk of being considered unfair, or of not being expressed in plain and intelligible language, under the Unfair Terms in Consumer Contracts Regulations 1999 ('the Regulations').
2. If a court deemed a Switching Term to be unfair under the Regulations, the term would not be binding on the consumer. This might result in the firm being unable to switch the consumer from an interest-only mortgage to a repayment mortgage. Also, if a court deemed that a term was not written in plain and intelligible language, under the Regulations the court could interpret it in favour of the consumer.
3. The scope of this statement is limited to a consideration of the Regulations and firms should be aware that there may be other applicable Handbook rules that are beyond the scope of this paper. In relation to the Regulations, please note that the risks identified below are not intended to be exhaustive and instead represent what we currently regard as the most likely risks.
4. Under the Regulations a term is unfair if it causes a significant imbalance in the rights and obligations of the parties to a consumer's detriment, contrary to the requirement of good faith. In our view a Switching Term is likely to be unfair under the Regulations if it gives the firm too broad a discretion to determine when the Switching Term will apply.
5. Also, in our view, Switching Terms are unlikely to be expressed in plain, intelligible language where the terms (i) are not clear about when a firm's right to switch a consumer onto a repayment mortgage arises and/or (ii) fail to define key phrases in the contract which specify when the right to switch exists.

#### Action points for firms

6. Firms need to ensure that their contract terms are not unfair and that they are drafted in plain, intelligible language by considering the requirements of the Regulations. In doing so, firms should consider the large amount of information we have published on the fairness and clarity of contract terms. Firms may also consider guidance and undertakings published by the Office of Fair Trading and determinations by the Financial Ombudsman Service. It is important to note, however, that ultimately only a court can determine whether or not a term is unfair.