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REVIEW OF THE NORTHERN IRELAND PERSONAL CURRENT ACCOUNT BANKING MARKET INVESTIGATION ORDER 2008

ISSUE

1. Under Section 162 of the Enterprise Act 2002 ('EA02') the Office of Fair Trading ('the OFT') has a duty to consider whether, by reason of any change of circumstances, an enforcement order[1] is no longer appropriate and needs to be varied or revoked. The OFT shall give such advice to the Competition Commission ('the CC') as it considers appropriate in relation to any possible variation or revocation by the CC. Pursuant to this duty, we have reviewed the Northern Ireland Personal Current Account Banking Market Investigation Order 2008 ('the Order').

CONCLUSION AND RECOMMENDATION

2. As a result of the coming into force of the Payment Services Directive[2] ('the PSD'), which is transposed into UK law by the Payment Services Regulations 2009[3] ('the PSRs'), we consider that there has been a change of circumstances relating to the Order, by reason of which it may be appropriate to vary or revoke parts of that Order. Similarly, the coming into force of the Consumer Credit Directive[4] ('the CCD'), transposed into UK law by several sets of Regulations,[5]

[1] 'Enforcement Order' means an order made under section 158, 160 or 161 EA02.
[2] Directive 2007/64/EC
[3] SI 2009/209
[4] Directive 2008/48/EC
[5] The Consumer Credit (Agreements) Regulations 2010 SI 2010/1014, The Consumer Credit (Disclosure of Information) Regulations 2010 SI 2010/1013, The Consumer Credit (Advertisements) Regulations 2010 SI 2010/1012, The Consumer Credit (Total Charge for Credit) Regulations 2010 SI 2010/1011, The Consumer Credit (EU Directive) Regulations 2010 SI 2010/1010

also constitutes a change of circumstances by reason of which parts of the Order are likely to be rendered unenforceable (aside from any effect on them of the PSD) and should be varied or revoked.

3. We conclude that parts of the Order are harmonised by the PSD, which has been transposed into UK law by specific Regulations, and as a result those parts are likely to be unenforceable.[6] Similarly, we also conclude that, insofar as provisions of the Order apply to situations in which a PCA product allows for the possibility of an overdraft, those provisions are harmonised by the CCD, which is transposed into UK law by specific Regulations, and as a result are likely to be unenforceable. We therefore recommend that the parts of the Order that may be unenforceable identified in paragraph 30 are revoked or, if the CC is able to find such a solution, varied in such a way as to remove the conflict with the PSD and CCD. Due to the fact that this advice arises from the need to avoid conflict with EU law, we have, in the main, been unable to suggest any practical way in which the offending provisions of the Order could be varied to avoid the apparent conflicts. An exception is the suggested new trigger for providing information on switching to customers (see paragraph 29).

4. While it appears that parts of the Order are likely to be unenforceable, there is no legal impediment to banks continuing to implement the initiatives specified in the Order on a voluntary basis. Indeed, although we have previously notified banks that we consider Article 8 of the Order is likely to be unenforceable, banks bound by the Order have voluntarily decided to implement the Annual Summaries that Article 8 specifies before or around the end of 2011, for the benefit of their customers.

5. We currently plan to publish this advice on our website to coincide with the publication by the CC of a provisional decision, should you decide to issue one.

BACKGROUND

6. On 26 May 2005 the OFT referred the supply of personal current account (PCA) banking services in Northern Ireland to the CC for investigation and report under section 131 of the EA02. The reference followed receipt of a super-complaint on 15 November 2004 from Which? and the General Consumer Council for Northern

[6] With certain exceptions (that are not relevant here) Article 86(1) of the PSD provides 'in so far as this Directive contains harmonised provisions, Member States shall not maintain or introduce provisions other than those laid down in this Directive'.

Ireland (GCCNI, now the Consumer Council for Northern Ireland) on the market for PCA banking services in Northern Ireland.

7. On 15 May 2007 the CC published a report which found a number of problems in the PCA market, and considered that in many cases these findings were indicators or outcomes of a lack of competition. The CC found that certain features of the market had an adverse effect on competition:

   - banks had unduly complex charging structures and practices
   - banks did not fully or sufficiently explain their charging structures and practices and
   - customers generally did not actively search for alternative PCAs or switch bank.

8. The report also proposed a package of remedies designed to address these concerns, to be implemented by Order. They are summarised here:

   - easy-to-understand terminology and descriptions of PCA services (Article 5)
   - explanations of the levels of charges and interest rates and how and when they are applied (Articles 6 and 7)
   - information on statements (Article 7)
   - Annual Summary and breakdown of charges and interest (Article 8)
   - advance notice of charges and debit interest incurred (Article 9)
   - regular 'switching rights reminder' (Article 10)
   - changes to the switching process (Article 11).

9. In this review we have not, on the whole, gone into detail on those Articles that do not, in themselves, provide protection to consumers of PCAs but which serve only to facilitate, explain, or monitor those Articles that do provide protection. These Articles are:

   - Article 1: covers the citation and commencement of the Order
   - Article 2: covers the general interpretation of the Order, and defines expressions used in the Order
   - Article 3: covers the delivery of the written communications specified in the Order. While this Article is primarily about the way in which consumer protection initiatives are delivered rather than the initiatives themselves, parts of it are also likely to be made unenforceable
   - Article 4: gives the CC powers of direction for compliance with the Order

- Article 12: covers the mechanism for an application for suspension of provisions of the Order. This Article has sunset clauses, the dates for all of which have now passed
- Article 13: covers the process for the CC to approve any application for suspension made under Article 12
- Article 14: covers the supply of information to the OFT and is not affected by the PSD or CCD
- Article 15: covers the duty to submit reports on compliance with the Order to the OFT, and is not affected by the PSD or CCD
- Article 16: covers the funding of costs of monitoring compliance.

10. The CC made the Order on 19 February 2008. Its provisions came into effect on 22 February 2008, except Articles 5 and Article 6 which came into force on 1 July 2008 and Articles 7 to 11 which came into force on 1 April 2009.

CHANGE OF CIRCUMSTANCES

11. We believe that certain provisions of the Order are likely to be unenforceable or partly unenforceable as a result of the entering into force of the PSD and the CCD. Both the PSD and the CCD are 'maximum harmonisation directives'. This means that national law cannot exceed or fall short of the provisions of either, save where there is an explicit derogation in the Directives. This refers to both the law transposing the Directives themselves, and any other national law, even if that national law pre-dates the Directive in question. If any national law contains provisions which are inconsistent with the provisions of a maximum harmonisation directive, it is considered unenforceable if it cannot properly be interpreted in conformity with the Directive. We therefore regard the coming into effect of the PSD and CCD as a change of circumstances which requires the OFT to provide advice to the CC on this Order.

12. In order to comply with Article 86 of the PSD and Article 22 of the CCD (prohibiting the maintenance or introduction of measures diverging from harmonised provisions in the Directives), and in order to comply with the general principle of EU law which requires legal certainty where EU legislation is transposed into national law, we recommend that the parts of the Order that are identified in paragraph 30 are revoked or, if the CC is able to find such a solution, varied in such a way to remove any conflict with the harmonising provisions of the Directives.

Payment Services Directive

13. The PSD provides the legal foundation for the creation of an EU-wide single market for payments. The PSD aims to establish a modern and comprehensive set of rules applicable to all payment services in the European Union ('the EU'). The target is to make cross-border payments as easy, efficient and secure as 'national' payments within a Member State. The PSD also seeks to improve competition by opening up payment markets to new entrants, thus fostering greater efficiency and cost reduction.

14. The EU first consulted publicly on what was then called 'The New Legal Framework for Payments' in December 2003. On 1 December 2005 the EU announced that it was putting forward proposals for a Directive which would bring down existing legal barriers to enable the creation of a 'Single Payments Area' in the EU that could save the EU economy €50-100 billion per year. On 24 April 2007 the European Parliament adopted the proposal for the PSD. Member States were required to transpose the provisions of the PSD into national law by 1 November 2009. In the UK, this was done by the Payment Services Regulations 2009 (the PSRs), which were made on 9 February 2009 and were in force in full by 1 November 2009.

15. The two main purposes of the PSD are to:

    - remove barriers to entry and ensure fair market access to enhance competition in payment services and

    - establish the same set of rules across the European Economic Area ('EEA') on information requirements and other rights and obligations that will be applicable to many payment services transactions in the EEA.

16. In establishing the same set of rules on information requirements, the PSD sets out conduct of business requirements for information to be provided to payment service users, and specific rules on the respective rights and obligations of payment service users and providers.

17. The rules fall into two main categories:

    - information to be provided to the customer before and after execution of a payment transaction

- the rights and obligations of both payment service provider and customer in relation to payment transactions.

18. The information requirements differ depending on whether the transaction concerned is carried out as part of an ongoing relationship under a 'framework contract' or as a single payment transaction. There are also different requirements for payment instruments that are limited to low value transactions.

Consumer Credit Directive

19. The CCD focuses on transparency and consumer rights and aims to fully harmonise the main elements of credit transactions across Europe. It applies to most consumer credit agreements including overdraft facilities and overrunning. An overdraft facility is defined as an explicit credit agreement whereby a creditor makes available to a consumer funds which exceed the current balance in the consumer's current account (ie an authorised overdraft). Overrunning means a tacitly accepted overdraft whereby a creditor makes available to a consumer funds which exceed the current balance in the consumer's current account or the agreed overdraft facility (ie an unauthorised overdraft).

20. The CCD requires information to be given to consumers in good time before an authorised overdraft agreement is concluded (Article 6(1)) and also as part of the agreement (Article 10(5)). In the case of current account agreements allowing for the possibility of overrunning, information must be included in the current account agreement, with regular reminders to the consumer (Article 18(1)). Regular statements must be provided in relation to authorised overdrafts (Article 12(1)), and notification of increases in interest rates or charges (Article 12(2)). If overrunning is significant and continues for more than one month, the consumer must be notified (Article 18(2)). There is no right of withdrawal from an overdraft agreement, but the creditor can require repayment in full at any time.

21. Regulations implementing the CCD were made by the Department for Business, Innovation and Skills (BIS) on 28 March 2010. Firms will not be required to comply with the new regulations until 1 February 2011, although may comply earlier if they choose. This depends upon whether pre-contract information is provided in compliance, or purported compliance, with the new regulations on or after 30 April 2010, in which case full CCD rules (other than in respect of advertising) will apply to that agreement from that date.

Effect of the PSD and CCD on the provisions of the Order

22. The Articles in the Order that are likely to be rendered unenforceable by the PSD are Articles 3, 7, 8 and 9. The Articles that are likely to be rendered partly unenforceable by the PSD are Articles 5, 6 and 10. More detail is provided at paragraph 30.

23. In respect of PCAs which allow for an authorised overdraft or for overrunning (ie an unauthorised overdraft), we believe that Article 9 is likely to be rendered unenforceable by the CCD and it is likely that Articles 3, 5, 6, 7 and 8 will be made partly unenforceable, to the extent that they relate to overdraft charges or debit interest or other aspects of any overdraft or overrunning. More detail is provided at paragraph 30.

Other relevant developments

Regulatory change

24. We have also considered whether the protection afforded by the Order is also provided to any extent by other regulations. Since the Order was made the FSA has introduced its Banking Conduct of Business Sourcebook (BCOBS) rules. While these rules do not render parts of the Order unenforceable, they do cover similar areas, such as switching between PCAs. However, the provisions of the Order and the BCOBS rules do not provide consumers with protection while switching in the same way. The Order covers switching at Articles 10 and 11.

Non-regulatory developments

25. While preparing this advice we also took the opportunity to establish whether any other initiatives could have the effect of duplicating or providing a close approximation to the provisions of the Order. We identified two initiatives outlined below, which do not have legal force but which are likely to lead to consumer protection being offered by banks to their customers:

    - the European Switching Principles, a voluntary initiative, are relevant to all banks bound by the Order in Northern Ireland. While not legally binding on banks, the Principles cover – to some degree – the Articles of the Order

relating to switching between PCAs (Articles 10 and 11)

- banks bound by the Order in Northern Ireland have each agreed to provide, on a voluntary basis, Annual Summaries (as required in Article 8 of the Order) even though the OFT has already informed banks that it considers that Article 8 may be unenforceable. Banks will introduce Annual Summaries before or around the end of 2011.

26. The OFT has also been undertaking work to improve the way that PCAs work for their customers across the UK. On 16 March we announced that discussions we had held with major PCA providers during the past three months led us to expect significant developments over the next two years, including:

- greater ability for customers to 'opt out' of being granted unarranged overdraft facilities and the charges associated with them
- more tools available for customers to control their balances and avoid going overdrawn
- better treatment of customers who do go overdrawn and get into financial difficulty.

27. The improvements will be supported by wider banking industry commitments, which the OFT welcomes:

- the development of minimum standards to apply when offering customers the ability to opt out of unarranged overdraft facilities
- the development by banks of best practice for customers in financial difficulty who incur unarranged overdraft charges
- an industry working group to develop ways of giving consumers greater control and access to real-time information on their account.

28. As the improvements listed in paragraphs 26 and 27 are not yet finalised they do not form part of any assessment here.

Summary of advice

29. In summary, the Articles of the Order which confer consumer protection that are at least partially enforceable are:

- Article 5(1)(a)(ii) is enforceable, and therefore relevant banks must test the text used in any written communication that is made for the purpose of

assisting a customer or a potential customer when choosing a PCA in one of the ways specified in Article 5(1)(c). However, it is not enforceable where the text refers to information relating to an overdraft facility or unarranged overdrafts

- Article 6, to the extent that the marketing material referred to in Articles 6(1)(a) and 6(3) does not cover information relating to an overdraft facility or unarranged overdrafts. Therefore, banks must refer to the existence of information and where it can be found, covering the existence of charges and interest rates (applied when the account is in credit), circumstances in which they would be applied, the time when each would be applied, and the way in which they are applied in direct marketing information, oral marketing and posters/billboards etc with the exception of information related to overdraft charges or debit interest

- Article 10, which requires the relevant banks to provide both wording on switching between PCAs in an Annual Summary (Article 10(1)), and a leaflet on switching with the Annual Summary (Article 10(2)). The CC could still require the relevant banks to provide this information and leaflets but a new 'trigger' for these obligations would have to be found, as Annual Summaries cannot be required and it would be inappropriate to tie the obligation to the voluntary provision of Annual Summaries

- Article 11 is enforceable. This mandates that each bank bound by the Order must, if it is the bank customers are moving to, offer an authorised overdraft at a level applying the bank's usual credit assessment criteria, and must take into account the expected number of direct debits and standing orders that a customer may make. It must also not levy interest or charges on such an authorised overdraft for a period of three months, and (if the overdraft is not taken or cannot be offered) must refund any interest or charges incurred as a result of a failure of the switching process. The Article mandates that the bank from which a customer moves must refund any interest or charges incurred as a result of a failure of the switching process.

OFT'S ADVICE TO THE COMPETITION COMMISSION

30. Our advice is that:

- Articles 3, 7, 8 and 9 are likely to be rendered unenforceable by the PSD and are likely to be rendered wholly or partly unenforceable, as appropriate, by the CCD. We think it likely that they will need to be amended or revoked accordingly

- Article 4 is concerned with the CC's Powers of Direction for the purpose of carrying out or ensuring compliance with the Order, and is therefore only relevant as far as the other Articles are enforceable

- Article 5 is likely to be rendered largely unenforceable by the PSD. The PSD is likely to render unenforceable every operative provision to which the definition in 5(1) of this Article relates, with the exception of 5(1)(a)(ii). This provision means that banks must, when providing a written communication made at the time a customer, or potential customer, is choosing a PCA, communicate clearly by using standard text which is easy to understand by the average customer. The CCD prevents Article 5(1)(a)(ii) from referring to information covering an overdraft facility or unarranged overdrafts

- Article 6 is likely to be rendered partly unenforceable by the PSD. The PSD is likely to render every provision of this Article unenforceable with the exception of Article 6(1)(a) and Article 6(3). Therefore banks must provide information covering the existence of charges and interest rates, the circumstances in which they would be applied, the time when each would be applied, and the way in which they are applied in direct marketing information, oral marketing and posters/billboards etc. The CCD prevents this information referring to an overdraft facility or unarranged overdrafts

- Article 10 could be amended in order to provide a new 'trigger' for the information requirements as the OFT considers that the requirement to provide Annual Summaries is rendered unenforceable by the PSD, and the Annual Summary provides the current trigger

- the practical effect of Article 11 may also be partially delivered by changes to the market caused by the EU Switching Principles

- the latest time by which a Bank may apply to the CC for a suspension of any of the relevant provisions of the Order has expired (1 February 2009). Consequently, Articles 12 and 13 of the Order are no longer relevant and can be revoked

- consequential changes to the definitions in Article 2 should be made, specifically deleting the definition of 'Annual Summary'. At the same time the CC may wish to change references to the Banking Code Standards Board to its successor body (in terms of monitoring compliance), the Lending Standards Board.[7]

[7] The Lending Standards Board has already taken over the compliance monitoring role from the Banking Code Standards Board following a letter from OFT dated 13 July 2009.