

DIRECTIONS TO FIRST TRUST BANK PURSUANT TO CLAUSE 28 OF THE UNDERTAKINGS

Background

- i. Following an investigation into the supply of banking services by clearing banks to small and medium-sized enterprises ('SMEs') by the Competition Commission in 2002, AIB Group (UK) Plc (which trades under the name 'First Trust Bank' in Northern Ireland) gave the Secretary of State for Trade and Industry and the Chancellor of the Exchequer undertakings under section 88 of the Fair Trading Act 1973 and those undertakings came fully into force by 1 January 2003 (the 'Undertakings').¹
- ii. Pursuant to Clause 17 of the Undertakings, each of the Banks subject to the Undertakings shall not directly or indirectly require, agree (other than in respect of integrated products) or threaten to require, as a condition of the granting, maintaining or servicing of any business loan to, or the opening, maintaining or servicing of any business deposit account for any SME, that such SME should open or maintain any business current account with the Bank.
- iii. This is subject to the exemptions provided for under Clause 18 of the Undertakings.
- iv. According to Clause 28 of the Undertakings, if the Director is of the reasonable view that the Bank has failed to comply with any of its obligations under the Undertakings, it may from time to time, in respect of such obligations, give reasonable written directions to the Bank: (i) to take such steps within the Bank's competence as may be specified or described in the directions for the purpose of carrying out or securing compliance with these Undertakings or (ii) to do or refrain from doing anything so specified or described which it might be required by these Undertakings to do or to refrain from doing. On 1 April 2014, the Competition and Markets Authority ('CMA') assumed this power from the Office of Fair Trading ('OFT'), which had previously assumed this power from the Director.
- v. As part of the information acquired during the OFT's work on its then SME banking market study, the OFT received information suggesting that certain Banks may have failed in some instances to comply with Clause 17 of the Undertakings.

¹ These undertakings were termed the 'SME Banking – Behavioural Undertakings' and are available at: <https://www.gov.uk/government/publications/small-and-medium-sized-enterprise-sme-banking-undertakings>

- vi. In order to assess compliance with Clause 17 of the Undertakings, the OFT wrote to all Banks requesting information on each Bank's systems and procedures for ensuring compliance with the Undertakings. In the case of First Trust Bank, this letter was sent on 5 December 2013, with a further clarification letter being sent on 12 February 2014.
- vii. In response, the OFT received two letters from First Trust Bank dated 20 December 2013 and 24 February 2014. In its first letter to the OFT, First Trust stated that it had identified six cases where the bank's loan facility letters stipulated that the SME customer had to open a BCA in breach of Clause 17 of the Undertakings. These cases related to a specific lending scheme initiated at the bank and First Trust Bank advised the OFT that it would write to these six customers to clarify that they were not obliged to hold a BCA with First Trust Bank. In its second letter to the OFT, First Trust Bank confirmed that it had contacted the six affected customers previously identified. First Trust Bank also stated that, as far as it is reasonably practical, it was satisfied that the six cases previously identified represented the entirety of its affected SME customers.
- viii. On 11 March 2014, the OFT agreed with all the Banks a package of measures that sought to achieve two main objectives: that each Bank should provide staff dealing with SME customers with an annual written reminder on the obligations within Clause 17 of the Undertakings; and that each Bank should, via its internal audit function, review its compliance with Clause 17 of the Undertakings and submit a report to the CMA by 11 July 2014 (the 'Audit Report').
- ix. In the Audit Report, First Trust Bank stated that a further five cases of bundling (four of which were identified by the business) had been identified since its last correspondence with the OFT on this matter. First Trust Bank confirmed that it had commenced the written communication process to affected customers in order to advise that they were under no requirement to maintain their BCA with the bank in order to retain their loan.
- x. Having reviewed the contents of First Trust Bank's letters and the findings of the Audit Report, in accordance with the wording of Clause 28 of the Undertakings, the CMA is of the reasonable view that First Trust Bank has failed to comply with Clause 17 of the Undertakings prior to the OFT's initial investigation into this matter.
- xi. On Tuesday 30 September 2014, the CMA notified First Trust Bank that it had reached the reasonable view that it had failed to comply with Clause 17 of the Undertakings. On Friday 3 October 2014 the CMA provided First Trust Bank with draft directions specifying and describing steps to be taken by First Trust Bank for the purposes of securing future compliance with the obligations imposed by Clause 17.

- xii. Taking account of First Trust Bank's submissions, and all other relevant factors, the CMA has decided to issue the following directions.

Directions

The CMA in accordance with Clause 28 of the Undertakings hereby gives the following reasonable written directions to First Trust Bank:

1. To take all steps within First Trust Bank's competence that are reasonably necessary or desirable to achieve and maintain compliance with Clause 17 of the Undertakings, including (but not limited to) the full implementation of all recommendations made by the Audit Report **by 31 December 2014** and to confirm such implementation in writing to the CMA. The recommendations in the Audit Report include ensuring that the following Directions 3 to 9 are put in place (or, in the case of items already in place at the date of these Directions, ensuring that they remain in place).
2. To refrain, at all levels, either directly or indirectly, internally or publicly, in practice or by means of any internal guideline, manual, procedure, terms and conditions or any other similar information, from failing to comply with Clause 17 of the Undertakings.
3. To complete the written communication process to already affected SME customers outlining that there is no requirement for the SME customer to maintain its BCA with First Trust Bank.
4. To update (and properly maintain) all relevant internal policies and procedures to reflect the requirements of Clause 17 of the Undertakings.
5. To implement (and properly maintain) first and second line assurance models to regularly test, monitor and report compliance with Clause 17 of the Undertakings. This monitoring will include exception testing, breach reporting, complaints analysis and the testing of facility letters for evidence of bundling which would contravene Clause 17.
6. To incorporate (and properly maintain) the requirements of Clause 17 of the Undertakings into First Trust Bank's Business Lending Policy.
7. To ensure First Trust Bank's complaint management system incorporates (and properly maintains) a new category relating to potential breaches of Clause 17 of the Undertakings.
8. To review all breaches of Clause 17 of the Undertakings identified to date in order to identify the full extent of the issue and its underlying cause(s).

9. To implement (and properly maintain) a training programme which includes appropriate references to Clause 17 of the Undertakings to all staff who are responsible for the marketing and sale of business loans and business deposit accounts ('Relevant Staff') and repeat this training programme on an annual basis.
10. To conduct annually a review of First Trust Bank's compliance with Clause 17 of the Undertakings, specifically including the following elements:
 - a) the policies, practices and procedures (including those related to training) which First Trust has in place to secure compliance with Clause 17 of the Undertakings;
 - b) the awareness of Relevant Staff of the obligations created by Clause 17 of the Undertakings²; and
 - c) other evidence suggesting the presence or absence of actual or suspected non-compliance with Clause 17 of the Undertakings (including a file review of new-to-bank SME loans and business deposit accounts, a review of customer complaint data or data available from internal escalation processes for internal concerns).

Such a review must be conducted, outside the area of the Bank which is directly responsible for the provision of banking services to SMEs, by the internal audit function of First Trust Bank, in accordance with the Code of Professional Conduct of the Chartered Institute of Internal Auditors.

11. To contact any SME customer who becomes known to First Trust via its compliance review outlined in Direction 10 and has been affected by a failure to comply with Clause 17 of the Undertakings in order to advise that the SME customer is under no requirement to maintain its BCA with First Trust Bank in order to retain a loan or business deposit account.
12. To provide a copy of the review referred to in Direction 10 to the CMA with a statement of First Trust Bank's compliance with Clause 17 of the Undertakings.
13. To provide annually to each of First Trust Bank's Relevant Staff, a specific and direct written reminder (which covers no issues other than the subject matter of Clause 17 of the Undertakings) of First Trust Bank's obligations under Clause 17 of the Undertakings, stating that First Trust Bank considers that any breach of those obligations is a serious matter, and that appropriate action will be taken in the event that a member of its staff fails to comply with them. The text of this

² In undertaking such a review, an appropriate sample of staff should be assessed. Such a sample should be representative of staff at the various geographical locations and the range of sales/marketing channels available (e.g. in branch, online, by telephone).

written reminder to be provided to the CMA within a week of its provision to First Trust Bank's Relevant Staff.

Effective date

14. These Directions shall have effect from Wednesday 22 October 2014.

Interpretation

15. Words or expressions used in these Directions shall have the same meaning as they have been ascribed in the Undertakings.

Michael Grenfell

Senior Director

Person duly authorised by the CMA Board.

Tuesday 21 October 2014