Review of Part 6 of the Retail Banking Market Investigation Order 2017

Final decision

4 December 2019

The Competition and Markets Authority has excluded from this published version of the market study report information which it considers should be excluded having regard to the three considerations set out in section 244 of the Enterprise Act 2002 (specified information: considerations relevant to disclosure). The omissions are indicated by [✂]. [Some numbers have been replaced by a range. These are shown in square brackets.] [Non-sensitive wording is also indicated in square brackets.]

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Summary

1. The CMA published its final report from its market investigation into retail banking services in August 2016. This concluded that retail banking competition in the UK was not working well and included a package of reforms to address the competition problems that it identified. These reforms were implemented largely through the CMA's Retail Banking Market Investigation Order 2017 (the Order) and included requirements, in Part 6 of the Order, on providers of personal current accounts (PCAs) to alert customers by mobile text message, or through a notification in a mobile banking application, to situations where they could take action to avoid charges for the use of an overdraft.

2. In the final report, the CMA also recommended that the Financial Conduct Authority (FCA) should carry out research into overdraft alerts generally. The FCA has announced that it will be introducing new rules on alerts on 18 December 2019. As a consequence of this work and these new rules, the CMA launched a review of Part 6 of the Order to determine whether the FCA's new rules will duplicate the provisions of Part 6 such that those provisions should be removed.

3. The CMA's review was launched on 1 July 2019. We published a provisional decision on 12 September 2019. In this we provisionally found that the forthcoming new FCA rules on consumer overdraft alerts constituted a change of circumstance. Consequently, we considered that from the time the FCA rules come into force, Part 6 (and associated provisions) of the Order will no longer be appropriate and that the Order should be varied. We consulted on

this provisional decision and a draft Variation Order, and respondents were content with our approach, subject to a clarification on the scope of the final compliance reporting obligation, which has been made in the Variation Order. Consequently, our final decision is to vary the Order to remove Part 6 as described in the Variation Order.

Introduction

Background

4. On 6 November 2014 the Competition and Markets Authority (CMA) Board made a reference for a market investigation into the supply of retail banking services to personal current account customers and to small and medium-sized enterprises (SMEs) in the United Kingdom (the market investigation). On 9 August 2016, the CMA published its report on the market investigation, entitled Retail Banking market investigation: Final report (the Final Report), in which it concluded that:

   (a) there were three separate (and, in certain circumstances, in combination) adverse effects on competition (AECs) in each of Great Britain and Northern Ireland in relation to PCAs, business current accounts (BCAs) and SME lending;

   (b) the CMA should take action to remedy, mitigate or prevent the AECs and detrimental effects flowing from them;

   (c) in order to address the AECs and resulting customer detriment, an integrated package of remedies should be imposed consisting of:

      (i) three cross-cutting foundation measures that will underpin increased competition in the reference markets which have the object of increasing customer engagement and making it easier for personal and business customers to compare the prices and service quality of different providers and of encouraging the development of new services;

      (ii) additional measures to make current account switching work better, including building on and improving the existing current account switch service;

      (iii) a set of measures aimed at PCA overdraft users, a group of customers who suffer particularly from the competition failures in the PCA market; and

(iv) a set of measures targeted at the specific problems in SME banking, enhancing SME access to information through new comparison tools, requiring banks to offer an indicative price quote and eligibility indicator tool, requiring banks to agree and adopt a core set of standards for SMEs opening a BCA and additional published information thereby reducing the hold that incumbent banks have in the market for BCAs and SME loans.

5. The Order was made as part of the package of remedies to remedy, mitigate or prevent the AECs and any customer detriment which had been identified in the Final Report. The Order implements, among other matters, a programme of overdraft alerts with grace periods for PCA customers. It requires qualifying providers to automatically enrol all their customers into an unarranged overdraft alert programme; and to offer, and alert customers to the opportunity to benefit from, grace periods during which they can take action to avoid or reduce all charges resulting from unarranged overdraft use. This programme of alerts is set out at Part 6 of the Order.

6. In addition to the Order, the CMA also made a number of recommendations to the FCA including that it:

(a) develops and tests prompts which are designed to encourage consumers to consider their banking arrangements; and

(b) researches, tests and implements measures to increase consumers' engagement with their overdraft use and charges.

7. The FCA completed its research and proposed a number of changes to rules in relation to overdrafts, as well as implementing rules concerning mobile text and other types of alerts for customers, with these rules being published in December 2018 to come into effect on 18 December 2019. As a result, the CMA decided to launch a review of Part 6 of the Order on 1 July 2019.

8. We published our provisional decision to vary the Order on 12 September 2019, and consulted on this until 15 October 2019. In this consultation, we received three responses to the provisional decision from PCA providers.

Legal framework

9. The CMA has a statutory duty to keep its enforcement orders under review.[1] From time to time, the CMA must consider whether, by reason of any change in circumstance an order is no longer appropriate and needs to be varied or

[1] Section 162 Enterprise Act 2002

revoked. The CMA is reviewing Part 6 of the Order to decide whether it remains appropriate in the light of the forthcoming new FCA rules.

Part 6 of the Order

10. The Order was made following the market investigation. Part 6 of the Order came into force on 2 February 2018, delivering the programme of overdraft alerts with grace periods for PCA customers. It requires qualifying providers automatically to enrol all their customers into an unarranged overdraft alert programme; and to offer, and alert customers to the opportunity to benefit from, grace periods during which they can take action to avoid or reduce all charges resulting from unarranged overdraft use.

11. Part 6 of the Order applies to providers of PCAs in the UK, but does not apply to providers of PCAs that had fewer than 150,000 Active PCAs,[2] excluding any PCA in which there is no charge or cost for exceeding or attempting to exceed a Pre-agreed credit limit (for example Basic Bank Accounts), in the UK.

The new FCA rules

12. On 13 December 2018 the FCA announced its intention to bring into force new rules on consumer overdraft alerts on 18 December 2019. The new rules will be brought into force through the Personal Current Accounts and Overdrafts (Information and Tools for Customers) Instrument 2018 (Instrument number FCA2018/52) [3] as amended, which will insert an additional section into the FCA handbook, specifically sub-section 'BCOBS 8.4 alerts'[4] (the New FCA Rules).

Consultation on our provisional decision

13. We published our provisional decision on 12 September 2019 in which we sought views from stakeholders on the substance of the variation to the Order. We received three responses from PCA providers, RBS, Barclays, and HSBC.

14. All three respondents supported the provisional decision, while HSBC and RBS both raised a question about the scope of the final compliance reporting obligation placed on PCA providers on the first working day after 31 January

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[2] An active PCA is defined in the Order as a PCA that has had at least one customer-generated payment or transfer (including standing orders and direct debits, but excluding charges and interest on the account) coming into, or leaving, the account in the previous 12 months.
[3] Personal Current Accounts and Overdrafts (Information and Tools for Customers) Instrument 2018
[4] FCA Handbook, BCOBS 8.4 alerts

2020. Specifically, they sought clarity on whether the final compliance reporting obligation would be the same as previous reporting obigations, in reporting only matters that had changed since the previous report, or a requirement to report all relevant matters as was required for the first compliance reports when Part 6came into force.

15. In response to these queries, we have clarified in the Variation Order that the scope of the final reporting obligation in 2020 mirrors that from previous compliance reports.

Change of circumstance

16. We now confirm that our final decision is that the introduction of the New FCA Rules constitutes a change of circumstance for the purposes of s.162 Enterprise Act 2002, as these rules are in the same policy area as those in Part 6 of the Order.

Variation to the Order

Substantive provisions

17. Having found a relevant change of circumstance in the New FCA Rules, and found that the Order will no longer be appropriate in its current form, we have considered the action which it is appropriate for the CMA to take. Given the duplication with the New FCA Rules is limited to Part 6, we consider it appropriate to vary the Order to remove Part 6. Further, relevant compliance and reporting obligations in other parts of the Order will also be varied to avoid duplication and to remove obligations that are no longer required.

18. As set out and consulted upon in our provisional decision, these changes will be achieved through a Variation Order described below.

19. In terms of the substantive provisions of Part 6, the Variation Order:

- removes Part 6 of the Order;
- describes the event (the coming into effect of the New FCA Rules) which will trigger this change taking place with immediate effect;
- describes the compliance requirements in relation to breaches of Part 6 of the Order which will continue following the coming into force of the New FCA Rules in order that providers undertake a final compliance reporting exercise in relation to Part 6 of the Order; and

- clarifies that providers are under an obligation to report to the CMA any breaches of Part 6 of the Order which may be discovered after the New FCA Rules have come into force.

Monitoring, compliance and enforcement

20. In relation to compliance and enforcement, we note that a number of providers have breached Part 6 of this Order, and notified the CMA of these breaches after the breach itself. Consequently, any CMA enforcement action may take place a number of months after the breach has occurred. On this basis, it is not appropriate for the compliance and reporting regime covering Part 6 of the Order to cease to have effect on the date the substantive provisions of Part 6 cease to have effect. We note that the Order accounts for the possibility of a breach being discovered after a provision has been varied and sets out at Article 7 that the variation of a provision will not affect the validity or enforceability of any rights or obligations that arose prior to such variation.

21. Our current monitoring and compliance regime includes:

- obtaining annual compliance reports from providers, described in Article 50 of Part 12 of the Order;
- an obligation on providers under Article 56 of the Order to report breaches within 14 days of becoming aware of such a breach; and
- seeking information on breaches from providers, which may be provided on a voluntary basis or involve the use of information gathering powers, either in Part 14 of the Order, or through the statutory powers from Section 174 of the Enterprise Act 2002.

22. In our provisional decision, we described changes to the Order that we considered appropriate to require PCA providers to submit a further compliance report in 2020 to ensure the CMA retains its ability to enforce Part 6 for the entire period in which it was in force. We considered this particularly important where compliance with Part 6 is reported by providers and is often only determined on an ex-post basis.

23. As highlighted above, two providers raised queries about the scope of this final compliance reporting obligation, but we did not receive any comments to indicate that this was disproportionately costly for providers. Consequently, we have retained this obligation and clarified its scope in the Variation Order.

Conclusion

24. Our conclusion is that the introduction of the New FCA Rules represents a change of circumstance relevant to the Order. In the absence of a review of the Order, the introduction of the New FCA Rules would result in firms facing duplication in the regulatory requirements on them. This could result in confusion among providers and would impose unnecessary costs of compliance with two potentially conflicting regulatory regimes, and may cause confusion among consumers. Consequently, we conclude is that it is appropriate to vary the Order to avoid such duplication by removing Part 6 of the Order.

25. In giving effect to this variation, we also ensure there are no regulatory gaps in the monitoring and compliance with Part 6 of the Order. Given that most of the breaches of the Order are uncovered ex-post, we are requiring PCA providers to send the CMA one final compliance report in 2020, and we are retaining the obligation on providers to report to the CMA any breaches of Part 6 that come to light subsequent to its removal.

Final decision and variation of the Order

26. Our final decision is that the New FCA Rules coming into force represents a change of circumstance, such that, from the time that the New FCA Rules come into force, the Order will be no longer appropriate and that Part 6 of the Order should be removed. We are also varying Part 12 of the Order to ensure that we retain the ability to monitor compliance with the Order during the transition to the FCA and that providers are required to report to the CMA any breaches of Part 6 that they subsequently uncover.

27. Consequently, we will vary the Order in the manner set out above. A Notice of Variation of the Order, and the Variation Order itself are published alongside this final decision.