

Directions to Barclays Bank UK plc and Barclays Bank plc (Barclays) issued under the Small and Medium Sized Banking Undertakings

1. Introduction

- 1.1 The CMA is issuing Directions to Barclays Bank UK plc and Barclays Bank plc (Barclays) concerning two breaches of the Undertakings signed by Barclays¹ (Undertakings) that occurred between 2010 and 2018, and between 2014 and 2018. The breaches, which were notified to the CMA in 2018, related to two Barclays products; Business Premium Accounts (BPAs) and Notice Deposit Accounts (NAs). Both BPA and NA are deposit accounts.
- 1.2 Clause 17 of the Undertakings includes a prohibition on Barclays directly or indirectly requiring or threatening to require that SMEs that hold certain bank loans and deposit accounts also hold business current accounts (BCAs) with that bank. This is commonly known as 'bundling' products.
- 1.3 Barclays is subject to an annual reporting regime where it provides the CMA with an audit report of its compliance with the Undertakings on an annual basis.² The first breach relates to a requirement for customers to have a Barclays' BCA in order to access a Barclays' BPA and took place from 2014 to 2018 (BPA Breach). The second breach relates to product literature stating that a Barclays BCA was required to access a Barclays NA and took place from 2010 to 2018 (NA Breach).
- 1.4 Barclays has a legal obligation under the Undertakings not to bundle or to threaten to bundle deposit account products (including BPAs and NAs) with BCAs. These breaches took place over several years, and were not identified or reported to the CMA until August 2018. Combined, the breaches affected 816 customers.

¹ Undertakings by Barclays Bank Plc to the Secretary of State for Trade and Industry and the Chancellor of the Exchequer under Section 88 of the Fair Trading Act 1973.

² The CMA's 2014 Agreement with the Banks (Annex 3)

2. Background

- 2.1 On 20 March 2000 the Secretary of State for Trade and Industry and the Chancellor of the Exchequer referred to the Competition Commission (CC) under sections 47(1), 49(1) and 51(1) of the Fair Trading Act 1973 (1973 Act) the matter of the existence or possible existence of a monopoly situation in relation to the supply of banking services by clearing banks to small and medium sized enterprises (SMEs).
- 2.2 In 2002, following a CC investigation into banking services for SMEs, nine banks (two of which have since merged) including Barclays agreed that, other than in respect of integrated products, they would no longer require an SME customer to open or maintain a BCA to get a business loan or to open, maintain or service a business deposit account. This practice is commonly known as ‘bundling’. Barclays gave the Secretary of State for Trade and Industry and the Chancellor of the Exchequer undertakings under section 88 of the 1973 Act.
- 2.3 On 1 January 2003 the Undertakings came fully into force. They required Barclays not to, “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 the SME should open or maintain any business current account with the Bank”.³
- 2.4 Clause 17 of the Undertakings does not apply where the holding by the SME of any BCA with Barclays as a condition of the granting of a business deposit account is required by virtue of any technical constraint.⁴ However, Banks were required to take all reasonable endeavours to overcome or remedy technical constraints within 12 months of the publication of the CC’s report.
- 2.5 In Clause 28 of the Undertakings, if the Director General of Fair Trading (now the CMA) 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: (a) 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

³ Clause 17(1) of the Undertakings.

⁴ Clause 18(1)(b) of the Undertakings.

compliance with these Undertakings or (b) 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.

- 2.6 On 11 March 2014, the OFT agreed with the Banks who signed the Undertakings 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 (the 'Audit Report'). This is referred to below as the '2014 Agreement'.⁵
- 2.7 On 1 April 2014, the relevant functions of the OFT and the CC were transferred to the Competition and Markets Authority (CMA) under Schedule 5 to the Enterprise and Regulatory Reform Act 2013 and the Schedule to the Enterprise and Regulatory Reform Act 2013 (Commencement No. 6, Transitional Provisions and Savings) Order 2014.

3. Breaches of the Undertakings

- 3.1 As part of the annual reporting regime introduced to obtain compliance with the Undertakings in 2014, banks subject to the 2014 Agreement carry out an audit of their practices and procedures. These are then reported to the CMA by 31 July each year. On 3 August 2018 Barclays notified the CMA in its Audit Report that it had uncovered two breaches of the Undertakings in relation to BPAs and NAs. The CMA engaged with Barclays to seek information on the issues raised including in relation to the cause and extent of the breaches and steps Barclays proposed taking to rectify each breach.
- 3.2 During its engagement with Barclays, the CMA requested further information from Barclays between August 2018 and November 2018. Barclays provided further information between September 2018 and December 2018. Having carefully considered the contents of the letters and documents supplied by Barclays, together with the findings outlined in its Audit Report, the CMA is of the view that Barclays has breached Clause 17 of the Undertakings. On 4

⁵ The banks current subject to the Undertakings are AIB Group (UK) plc (known as First Trust Bank), Bank of Ireland, Barclays Bank plc; Clydesdale Bank plc; HSBC Bank plc; Lloyds Banking Group; Northern Bank Limited (known as Danske Bank) and the Royal Bank of Scotland (RBS).

February 2019, the CMA sent Barclays a letter explaining it was minded to issue Directions, and invited Barclays to make any representations in relation to the matter. Barclays provided its representations on 18 February 2019.

BPA Breach

- 3.3 Barclays informed the CMA that the ability for holders of a BPA to move funds to/from non-Barclays' accounts was removed by Barclays and therefore the BPA could only be accessed via a Barclays BCA. Barclays has therefore breached the Undertaking not to bundle products for SMEs and Barclays has confirmed that this restriction remained in place from 2014 until 22 October 2018, when a technical solution was implemented.
- 3.4 Barclays explained that the decision to remove access for non-Barclays BCAs was an attempt to manage the risk of fraud and that the consequential breach of the Undertakings was inadvertent. Barclays confirmed that a total of 255 BPA customers had been affected through unnecessarily having to hold a Barclays BCA (and paying transaction fees when transferring funds into and out of the BCA). Barclays confirmed that it paid refunds to all affected BPA customers by 17 April 2019 with the exception of five customers which Barclays is attempting to trace in order to issue refunds. Barclays will update the CMA on this.

NA Breach

- 3.5 Since 2010, potential holders of a NA were informed via their terms and conditions that, "To open the account, the Customer must hold a current account with Barclays in the same currency. The Customer may only deposit or withdraw funds by transfer to or from that current account".⁶ These terms and conditions remained in place until 31 October 2018 when they were updated so that they no longer contained this written requirement. On this basis, the CMA considers that Barclays has breached the Undertaking not to threaten to bundle products. This Breach took place between 2010 and October 2018.
- 3.6 Barclays has explained to the CMA that despite the terms and conditions it was possible to open and maintain a NA without also holding a Barclays'

⁶ Barclays Corporate Banking Notice Deposit Account Terms

BCA, and that some SME's managed to do so. Barclays has confirmed that a total of 561 NA customers had been affected by inaccurate wording in the product literature.

3.7 Barclays has informed the CMA of the following actions it has already taken and proposed further action it intends to take in order to rectify these breaches and to prevent further breaches:

- Barclays has implemented a technical solution which now allows BPA customers to transfer funds using the BCA of another bank. It has informed its customers of this;
- Barclays has amended the terms and conditions of its NAs so they no longer contain a requirement for customers to hold a BCA with Barclays. It has informed customers of this;
- Barclays aimed to complete remediation totalling £1,910.55 to affected BPA holders in respect of payments made that they should not have to have made. Refunds were paid to customers by 17 April 2019 with the exception of additional refunds totalling £38.55 which will be paid to five customers if they can be traced by Barclays.
- Barclays intends to put internal frameworks in place to ensure compliance with the Undertakings. The frameworks will include:
 - Updated online training for all relevant members of staff
 - A review of all client facing documentation
 - Improved product approval processes
- Barclays intends to deliver enhanced annual training to senior staff on compliance with the Undertakings; and
- Barclays internal audit function will test and review the compliance frameworks referred to above.

3.8 The CMA has decided to issue Directions to Barclays in relation to these breaches. In reaching this decision, the CMA has considered:

- (a) The explanation provided by Barclays for the BPA Breach and NA Breach and its subsequent engagement with the CMA including consideration of the information and documents supplied to the CMA.
 - (b) The severity of the breaches and detriment to Barclays customers. In particular, the CMA notes that the breaches affected over 816 SMEs over a period of either four years (BPA Breach) or eight years (NA Breach).
 - (c) The actions and proposed actions taken by Barclays to address the breach. In particular, the CMA notes that Barclays proposed to refund a total amount of £1,910.55 to SMEs affected by the BPA Breach and take other positive steps to ensure future compliance with the Undertakings. The CMA also notes that Barclays has engaged positively with the CMA throughout the process since notifying the CMA of the breaches in its Audit Report.
 - (d) Previous conduct/breaches. While the CMA is not aware of any previous breaches of the Undertakings by Barclays, it is concerned that the 2014 Agreement (introducing a heightened compliance regime) had been in place for four years before Barclays identified and reported the breaches to the CMA. It is also of concern that the breaches have been ongoing for a number of years before being identified by Barclays in 2018.
 - (e) A need for further action, including whether this is necessary to address risk of future breaches. The CMA considers that issuing Directions is a necessary and proportionate step when taking into account all of the factors in this case.
- 3.9 On 7 March 2019 the CMA provided Barclays with draft Directions specifying and describing the steps to be taken by it for the purposes of securing future compliance with the Undertakings. The CMA has taken into account Barclays' representations dated 2 April 2019, 10 June 2019 and 28 June 2019 on the draft Directions, and now issues these Directions.

The CMA gives these Directions (the Directions) to Barclays Bank UK plc with company number 9740322 and Barclays Bank plc (Barclays) with company number 1026167 and registered address at Churchill Place, London, E14 5HP under the Small and Medium Sized Banking undertakings (Undertakings)⁷

The CMA makes these Directions (Directions) to Barclays under Clause 28 of the Undertakings.

1. Commencement and Duration

- 1.1 The Directions come into force on 4 July 2019.
- 1.2 The Directions continue to remain in force until such time as they are varied or revoked by the CMA under the Order. The variation or revocation of these Directions does not affect the validity or enforceability of any rights or obligations that arose prior to such variation or revocation.

2. Interpretation

- 2.1 In the Directions terms have the same meaning as in the Undertakings, unless stated otherwise.
- 2.2 'Potential breach' for the purposes of these Directions, means any incident identified which is likely to impact on compliance with the Undertakings.
- 2.3 'Assurance Audit' – a process by which the Independent Body or internal audit function checks compliance with the Undertakings and should include the scope in Direction 3.2.
- 2.4 'Action Plan' – Barclays' document containing all actions to be conducted with timeframes to address the breaches and remediation by Barclays.
- 2.5 'Independent Body' - a body capable of carrying out an audit of processes, procedures and outcomes, and not part of the corporate group/company, and without conflicts of interest.

⁷ Undertakings by Barclays Bank Plc to the Secretary of State for Trade and Industry and the Chancellor of the Exchequer under Section 88 of the Fair Trading Act 1973.

3. Directions

The CMA gives the following Directions to Barclays:

- 3.1 To take all steps within Barclays' competence that are reasonably necessary or desirable to achieve and maintain compliance with Clause 17 of the Undertakings.
- 3.2 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.
- 3.3 Unless already effected, to write to all affected SME customers, within 30 days from the date of issue of these Directions, outlining that there is no requirement for the SME customer (other than in respect of integrated products) to maintain its business current account (BCA) with Barclays, in order to operate or maintain its Business Premium Account (BPA) and/or Notice Deposit Account (NA) and/or other deposit account.
- 3.4 To update (and properly maintain) all relevant internal policies and procedures to reflect the requirements of Clause 17 of the Undertakings.
- 3.5 To conduct annually, in accordance with Direction 3.6 to 3.17, a review of Barclays' compliance with Clause 17 of the Undertakings, specifically including the following elements:
 - the policies, practices and procedures (including those related to training) which Barclays has in place to secure compliance with Clause 17 of the Undertakings
 - the awareness of Relevant Staff⁸ of the obligations created by Clause 17 of the Undertakings

⁸ As defined in the CMA's 2014 Agreement with the Banks – <https://www.gov.uk/government/publications/sme-banking-2002-behavioural-undertakings-report-on-compliance> "THE BANK'S staff who are responsible for the marketing and sale of business loans and business deposit accounts..."

- other evidence suggesting the presence or absence of actual or suspected non-compliance with Clause 17 of the Undertakings

3.6 Barclays is directed to appoint a suitable Independent Body to carry out Assurance Audits of its procedures, processes and outcomes which constitute compliance with Clause 17 of the Undertakings, and submit to the CMA a report produced by that Independent Body of the Assurance Audit. The due date for the first report will be 31 July 2020 and subsequent reports are to be submitted to the CMA annually thereafter on the 31 July or the following working day.

The scope of the Assurance Audit includes:

- the policies, practices and procedures (including those related to training) which Barclays has in place to secure compliance with Clause 17 of the Undertakings
- the awareness of Relevant Staff of the obligations created by Clause 17 of the Undertakings
- other evidence suggesting the presence or absence of actual or suspected non-compliance with Clause 17 of the Undertakings

3.7 Barclays will submit to the CMA a description of the scope of the Assurance Audit to be carried out by the Independent Body (and which will form part of the contract with the Independent Body) in accordance with the timing set out in its Action Plan.

3.8 Barclays will confirm the appointment of the Independent Body to the CMA in accordance with the timing set out in its Action Plan.

3.9 Subsequent Assurance Audits must be carried out by an Independent Body until Barclays has completed all relevant actions to address all the recommendations from the initial independent Assurance Audit carried out in year 2020.

3.10 For each subsequent independent Assurance Audit, Barclays does not have to use the same Independent Body each year.

3.11 Barclays will submit the report by the Independent Body to the CMA within 30 calendar days of the report being completed. At the same time, Barclays will

provide to the CMA a statement on actions that Barclays intends to carry out related to recommendations in this report, and the timings of any such actions. This statement must be signed by a Director responsible for SME banking products.

- 3.12 Barclays will provide written confirmation to the CMA of the completion of all of the actions identified by the Independent Body in its initial independent Assurance Audit within 14 days of their completion.
- 3.13 Barclays must seek written confirmation from the CMA, which is not to be unreasonably withheld and will be communicated to Barclays within 10 working days from the notification set out in Direction 3.12, that all relevant actions to address all the recommendations from the initial independent Assurance Audit carried out in year 2020 have been satisfactorily completed. Following written confirmation from the CMA, Barclays may appoint its internal audit function to carry out subsequent Assurance Audits.
- 3.14 On receipt of written confirmation from the CMA that relevant actions, in accordance with Direction 3.13 to address all the recommendations from the initial independent Assurance Audit carried out in year 2020 have been satisfactorily completed, Barclays is directed to carry out Assurance Audits on an annual basis using its internal audit function (as long as that internal audit function is independent of the systems and staff involved with the compliance with the Undertakings). The scope of Assurance Audits carried out by the internal audit function should be identical to those carried out by the Independent Body.
- 3.15 Barclays will provide the CMA with a report of each annual Assurance Audit within 30 days of its completion. This should be accompanied by a statement explaining the changes it plans to make to its procedures and processes as a result.
- 3.16 Should Barclays wish to amend the scope of the Assurance Audit, Barclays must seek confirmation from the CMA in writing.
- 3.17 Barclays will contact any SME customer who becomes known to Barclays via its Assurance Audit outlined above 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 Barclays in order to retain a loan or business deposit account.

4. Monitoring and Compliance

- 4.1 A non-confidential summary of how these actions are to be completed, with timescales for completion, is contained in Barclays' Action Plan at Annex A.
- 4.2 Should Barclays propose to make amendments to its Action Plan, all proposed amendments need to have received the CMA's written confirmation in advance of being implemented. The CMA will publish a non-confidential version of the amended compliance plan with the Directions.

Adam Land
Senior Director
Signed by authority of the CMA Board
4 July 2019