

Directions to HSBC Bank UK plc issued under the Retail Banking Market Investigation Order 2017

Introduction

1. The Competition and Markets Authority (CMA) is issuing Directions to HSBC Bank UK plc (HSBC) concerning two breaches of Part 6 of the [Retail Banking Market Investigation Order 2017](#) (the Order).
2. The CMA considers HSBC's failure to provide Alerts to customers before those customers received charges in relation to exceeding pre-agreed credit limits (i.e. incurring unarranged overdraft borrowing fees and charges) or attempting to do so as a serious matter. To date, approximately 115,754 customers have been affected, and HSBC has committed to refunding all affected customers and has already started to refund those customers. The total amount of charges to be refunded is estimated to be £8m. HSBC notes that the figures are subject to revision. The CMA considers that HSBC has been in breach for both of these issues since Part 6 of the Order came into force in February 2018.

Background

3. On 6 November 2014, the CMA board, in exercise of its power under sections 131 and 133 of the Enterprise Act 2002 (the Act) made a reference for a market investigation into the supply of retail banking services to personal current account (PCA) customers and to small and medium-sized enterprises (SMEs) in the United Kingdom (the market investigation).
4. 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 are 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, 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.

5. On 2 February 2017 the CMA made the Order.¹ For the purposes of these Directions all terms unless expressly stated otherwise shall be as defined in the Order.
6. The integrated package of remedies in the Order contains, amongst others, a requirement for all providers of PCAs in GB and NI to enrol customers in a Programme of Alerts (the Alerts Remedy).
7. Part 6 came into force on 2 February 2018. It requires PCA providers to use reasonable endeavours to ensure that Alerts² are capable of being received by customers as soon as possible after an Alert Trigger³ relating to a pre-agreed credit limit. The purpose of the Alerts is to give warning to customers that they are likely to incur charges relating to pre-agreed credit limits unless they take action.

Current breaches

8. These Directions relate to two breaches of the Order:
 - Breach One: HSBC's commitment to implementing its "unsociable hours" policy to minimise disturbance to customers means that it did not contact customers between 10:45pm and 7:30am on weekdays and 10:45pm and 10am on weekends and bank holidays. The knock-on effect is that this included not sending Alerts to customers during those specified hours even though HSBC continued to charge customers for using an unarranged overdraft. This meant that customers who triggered an Alert between 10:45pm and 11:45pm (when balances were calculated) did not get an Alert that complied with the Order and continued to be charged by HSBC. Most customers received an Alert the next day after incurring the charge, which is in breach of the Order.

¹ The Order was made in performance of the CMA's duty under section 138 of the Act for the purpose of remedying, mitigating or preventing the adverse effects on competition and any detrimental effects on consumers so far as they have resulted, or may be expected to result, from the adverse effects on competition as identified in the Final Report.

² For the purposes of the Order, 'an 'Alert' means either a text message sent to a mobile phone or a push alert from a mobile banking application including the contents required by Article 25 (Article 24.7.1).

³ As defined in Article 24.2 of the Order.

- Breach Two: HSBC’s systems for storing the mobile phone numbers of customers that applied for PCAs through certain application methods (including its digital current account, digital credit card and digital loans applications) stored numbers in a format that was incompatible with the text alert system used to comply with Part 6 of the Order. As a result, HSBC did not process these Alerts and some customers were not notified before incurring charges related to unarranged overdrafts.
9. The CMA has decided, based on the information available, that both are breaches of Part 6 of the Order each time they occur.
 10. Breach One constitutes a breach of Article 24.1: “Unless instructed otherwise by the FCA in accordance with Article 27, Providers shall, in accordance with Article 24.4, initiate the sending of an Alert to customers enrolled in the Programme of Alerts in respect of the relevant PCA, following an Alert Trigger, as set out in Article 24.2 unless any of the circumstances specified in Article 24.3 apply”. The CMA considers that the primary point of Article 24.4 is to require providers who are subject to the Order to use reasonable endeavours to ensure that Alerts are received as soon as possible. The CMA does not consider that HSBC’s unsociable hours policy qualifies under the “certain circumstances” wording under the second part of Article 24.4⁴ that would allow Alerts to be sent on the day after the Alert Trigger. The Explanatory Note to the Order (at para 85) notes that Article 24 “is intended to require Providers to take steps to remove delays in customers receiving Alerts that the Provider is able to control or reasonably influence.” That is to say that a provider subject to the Order should have infrastructure in place to send out an Alert as soon as possible once triggered. By failing to do so and charging customers prior to them receiving an Alert, we consider that HSBC was in breach of the Order.
 11. Breach Two constitutes a breach of the following provisions of the Order:
 - Article 26.1: “Providers shall use reasonable endeavours to collect each PCA customer’s mobile phone number, at a minimum at the time of account opening for new customers and in each instance when a PCA customer updates his contact details . . . “. In this case it appears that

⁴ Paragraph 24.4 states that “The Provider shall use reasonable endeavours to ensure the Alert is capable of being received as soon as possible after the Alert Trigger but for the avoidance of doubt this may mean that in certain circumstances the Alert is sent on the day after the Alert Trigger.”

customer's mobile phone numbers were not stored in a usable format. By not having adequate systems in place for storing mobile numbers in a usable format that would enable HSBC to send alerts, we consider that HSBC was in breach of the Order.

- Article 24.1 which requires providers to “initiate the sending of an Alert to customers enrolled in the Programme of Alerts in respect of the relevant PCA, following an Alert trigger”. As a consequence of not having adequately enrolled customers' mobile phone numbers, HSBC also failed to send these customers Alerts as required under Article 24.1 of the Order.
12. The CMA engaged with HSBC on details of the breaches and to obtain an explanation for the breaches between 11 April 2019 and 25 November 2019. The CMA wrote to HSBC on 20 September 2019 to confirm that it was minded to issue Directions. The letter requested representations from HSBC.
 13. On 11 and 18 October 2019 HSBC responded to the CMA's formal letter, reiterating its position previously shared with the CMA by email on 11 April 2019 and 22 May 2019 that it considered that Article 24.1 was open to interpretation regarding when Alerts should be sent and that the operation of its unsociable hours policy was consistent with the second part of Article 24.4 of the Order which enables providers to delay sending Alerts under certain circumstances. In the same letters, HSBC also provided further updates on the the work it had undertaken and continued to undertake to address the breaches.
 14. In relation to Breach One, HSBC confirmed it would shorten its unsociable hours policy which minimise the number of customers affected by this breach until August 2020 when HSBC will cease charging customers affected by this breach. In relation to Breach Two, HSBC confirmed that it has now rectified all technical issues to ensure that going forward mobile numbers collected from customers through affected applications are compatible and enrolled within the overdraft text alert system for Alerts to be sent as required by the Order.
 15. HSBC expressed its regret that the breaches had occurred and noted that the CMA may be minded to issue Directions. HSBC also reiterated its commitment to refunding all customers affected by these breaches. The CMA expects HSBC to refund all charges where a compliant Alert was not received, and to continue to do so.

16. The CMA has considered the point made by HSBC that Article 24.1 was open to interpretation regarding when Alerts should be sent. However, as noted above, the CMA believes that the Explanatory Note to the Order (at para 85) makes clear that there should be no delay by stating that the relevant clause "is intended to require Providers to take steps to remove delays in customers receiving Alerts that the Provider is able to control or reasonably influence."

Previous breach

17. On 1 February 2019, as part of its Annual Compliance report, HSBC notified the CMA of an incident where customers were charged in relation to unarranged overdrafts before they received an Alert.
18. The incident related to HSBC issuing charges to 432 customers who on 20 September 2018 did not receive an alert to warn them that their temporary overdraft limit was due to expire later that day. Those temporary limits expired at approximately 10pm on that date and some customers with a temporary limit that expired were then in an unarranged overdraft position. The next day, those customers received an alert informing them that they had exceeded their arranged limit and had been charged. HSBC has remediated customers affected but nevertheless considers that this did not constitute a breach of Part 6 of the Order. The CMA considers that this was a breach of the Order.

The CMA's decision

19. In taking decisions about appropriate actions to take in response to a breach of a remedy, the CMA takes a number of factors into account, including the severity of the breach; the actions taken by the business to address the breach; the previous conduct of the business; and the need for future action by the CMA.
20. When considering the severity of the breach, the CMA considers issues which include, its duration; the number of customers affected; and the harm caused to those customers. These breaches are serious. Both issues have been in place since Part 6 of the Order came into force, and indicate poor implementation of and ongoing compliance with the Order. Combined, there are around 115,000 instances (some customers may have been affected by both breaches). For each customer affected it appears that money was taken out of their accounts when it should not have been, totalling around £8m.

21. When considering the actions taken by the business to address the breach, the CMA considers issues which include the extent to which the provider has engaged positively with the CMA about the breach and about addressing it. In this regard, the CMA notes that HSBC has engaged positively with the CMA since these breaches were brought to our attention. HSBC had promptly fixed the technical issues as regards Breach Two soon after the issue was identified. For Breach One, we note that although HSBC's current plans are that a full fix will not be in place until June 2020, it has committed to refunding charges incurred on an ongoing basis so affected customers will not be worse off. The CMA notes though that confirmation of the size and scale for both breaches will not be available until August 2020.
22. When considering previous conduct, the CMA considers issues which include whether the business has breached the remedy previously and whether it is subject to a heightened compliance regime. HSBC has breached Part 6 of the Order previously (see Previous Breach). This breach was of limited scale, which we have taken into account when weighting it against the need for CMA intervention.
23. When considering the need for future action, the CMA considers issues which include whether there is a need for formal action to address the risk of future breaches.
 - In the event that the CMA decides to remove Part 6 of the Order on or before 18 December 2019 (the date at which the equivalent provisions in the FCA's rules come into force) there is no need for future action other than to ensure that HSBC has not breached Part 6 of the Order in any way other than in relation to the breaches of which the CMA is already aware. In this event, those Articles identified at Article 3.1 of the Directions will not apply.
 - In the event that the CMA decides not to remove Part 6, we consider that is necessary for the CMA to take formal action to ensure HSBC will take all reasonable steps to become compliant with the Order and ensure it has sufficient controls and processes in place to protect its customers. This is the result of the number and size of breaches identified, their duration, and the poor implementation and ongoing compliance with the Order.

24. The CMA has taken into consideration the information and representations provided by HSBC between 11 April 2019 and 25 November 2019 and the fact that the CMA requires a range of compliance actions to be implemented by HSBC. As the CMA takes the view that only enforcement through directions will ensure that the necessary actions will be carried out effectively, the CMA has decided to issue directions to HSBC.

Directions to HSBC Bank UK plc issued under the Retail Banking Market Investigation Order 2017

The CMA gives these Directions (the Directions) to HSBC Bank UK plc (HSBC) with company number 09928412 and registered address at 1 Centenary Square, Birmingham, United Kingdom, B1 1HQ under Article 57 of the Retail Banking Market Investigation Order 2017 (the Order).

1. Commencement and Duration

- 1.1 The Directions come into force on 29 November 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 Order, unless stated otherwise.
- 2.2 'Action Plan' for the purposes of these Directions means a plan (including milestones where relevant) of how HSBC shall deliver the requirements of these Directions and containing the information detailed in article 5.2.
- 2.3 'Assurance Audit' for the purpose of these Directions means an assessment carried out by the Independent Body of HSBC's processes, procedures and outcomes which make up compliance with Part 6 of the Order.
- 2.4 'Independent Body' for the purposes of these Directions, means a body capable of carrying out an Assurance Audit of processes, procedures and outcomes, and is not part of the HSBC corporate group/company, and is without conflicts of interest.
- 2.5 'Material' for the purposes of these Directions means significant and/or systemic changes made to compliance systems or controls rather than minor technical or operational related changes.
- 2.6 'Potential breach' for the purposes of these Directions, means any incident which HSBC reasonably believes may breach the Order.

2.7 'Relevant Staff' for the purposes of these Directions, Relevant Staff means as a minimum, all HSBC staff who are responsible for or take actions in connection with the Alerts which could result in charges for exceeding or attempting to exceed pre-agreed credit limits.

3. Application of Directions

3.1 In the event, within 3 months of the date the Directions come into force or any time prior to that date, the CMA publishes a notice setting out its final decision to remove Part 6 of the Order then from the date of that notice the following articles in these Directions shall not apply;

- article 5.2 bullet 2, and article 5.2 bullet 4;
- article 6 in its entirety;
- article 8 in its entirety;
- article 9.3.

4. Assurance Audit of Past and Current Compliance

4.1 HSBC is directed to appoint an Independent Body to conduct a one-off Assurance Audit of the procedures, processes and outcomes which constituted and constitute compliance with Part 6 of the Order between 2 February 2018 and 18 December 2019. HSBC is directed to appoint an Independent Body to conduct a one-off Assurance Audit of HSBC's procedures, processes and outcomes which constituted and constitute compliance with Part 6 of the Order between 2 February 2018 and 18 December 2019. HSBC will:

- submit to the CMA for approval a description of the scope of the Assurance Audit (which will form part of the contract with the Independent Body);
- confirm the appointment of the Independent Body to the CMA;
- submit the report by the Independent Body to the CMA within 30 calendar days of the report being completed. The report must describe in detail the

extent of any other failures (except those breaches referenced in these Directions) in compliance with Part 6 of the Order between these dates;

- ensure that if any other failures of compliance with Part 6 were identified, the report is accompanied by a statement of actions that HSBC will carry out with any affected customers and more widely related to findings in the report. This statement must be signed by a Director responsible for PCA products and the Director responsible for Compliance and;
- all the above to be subject to the timings outlined in the Action Plan.

5. Action Specified with regard to the Action Plan

5.1 HSBC shall abide by the Action Plan approved by the CMA.

5.2 The Action Plan shall contain the following information:

- With regard to article 4 of these Directions - details (including milestones where relevant) of how HSBC shall deliver the requirements of article 4 of these Directions including dates for delivery;
- With regard to article 6 of these Directions - details (including milestones where relevant) of how HSBC shall deliver the requirements of article 6 of these Directions including dates for delivery;
- With regard to article 7 of these Directions - details (including milestones where relevant) of how HSBC shall deliver the requirements of article 7 of these Directions including dates for delivery and HSBC's actions to identify and refund customers affected by the breaches of the Order;
- With regard to article 8 of these Directions - details (including milestones where relevant) of how HSBC shall deliver the requirements of article 8 of these Directions including dates for delivery.

5.3 HSBC shall update the CMA on progress made in completing the actions set out in the Action Plan at monthly intervals.

5.4 Should HSBC propose to make amendments to the published Action Plan all such proposed amendments need to be notified to and approved by the CMA before being implemented.

6. Action specified with regard to training

- 6.1 HSBC shall create a training programme (Training Programme) on the key requirements of Part 6 of the Order for all Relevant Staff within HSBC.
- 6.2 The Training Programme should include an evaluation element, and the evaluation should demonstrate whether Relevant Staff clearly understand the requirements of Part 6 of the Order.
- 6.3 The Training Programme shall be run on an annual basis to ensure all new Relevant Staff receive the full training course (and evaluation). Existing Relevant Staff shall be provided with annual refresher training on an annual basis. The creation of the Training Programme should a) start in March 2020 and b) be rolled out by July 2020.
- 6.4 HSBC shall
- provide to the CMA a training plan (Training Plan) containing details (including milestones where relevant) on how it shall deliver the requirements of the Training Programme, including dates for delivery;
 - update the CMA on progress made in completing the Training Plan via the monthly report in accordance with Article 5.3.

7. Actions specified with regard to refunds

- 7.1 HSBC shall, in accordance with the Action Plan, provide the CMA on a monthly basis with a report setting out HSBC's progress towards identifying and refunding the customers affected by the breaches of the Order detailed in the pre-amble to these Directions.
- 7.2 If HSBC chooses not to refund any class of customer who has been affected by these breaches, or any other breaches of Part 6 of the Order, HSBC shall make all reasonable efforts to inform those customers about their rights to pursue individual redress against HSBC under section 167(4) Enterprise Act 2002 for the charges incurred by the customer as a result of the breaches of the Order detailed in the pre-amble to these directions.

8. Actions specified with regard to review of procedures

- 8.1 HSBC shall carry out, on an annual basis, a full audit of the procedures, processes and outcomes which constitute compliance with Part 6 of the Order as put in place as a result of the Assurance Audit referred to above, to ensure they are still relevant and are still being complied with. The first of these annual reviews is to be carried out in the year after the review by the Independent Body. For the avoidance of doubt, these subsequent annual reviews can be carried out by a unit within HSBC as long as it is independent of the systems HSBC uses to comply with Part 6 of the Order.
- 8.2 HSBC shall provide the CMA with a report of the annual review referred to above within 30 days of the review's completion. This shall be accompanied by a statement explaining any changes it plans to make to its procedures and processes.

9. Monitoring and Compliance

- 9.1 A non-confidential summary of how the actions required by the applicable articles of these Directions are to be completed, with timescales for completion, are to be included in HSBC's Action Plan.
- 9.2 HSBC shall notify the CMA of any breaches or potential breaches of Part 6 of the Order within 14 calendar days of identifying a breach or potential breach. HSBC shall take all necessary steps to ensure its internal systems are meeting this requirement.
- 9.3 Should HSBC propose to make any material changes to its compliance systems or controls relating to compliance with Part 6 of the Order, proposed amendments need to be notified to, and approved by, the CMA in advance of implementation and before coming into effect.

Adam Land
Senior Director
Signed by authority of the CMA Board
29 November 2019