

Northern Ireland PCA Banking Market Investigation Order 2008

Response to consultation

Introduction

1. As a result of our consultation on the draft Order, published on 22 November 2007, we received a number of submissions. In this paper we summarize the changes of substance we have made to the consultation draft Order as a result of points made in those submissions and give the reasons why we have not made changes in response to other points made in those submissions.

Changes made

2. In paragraphs 3 to 50 we outline the material changes that we have made to the consultation draft and set out why these changes have been made. Non-material changes are not discussed here.

Part 1—General

Citation and commencement

Article 1.1

3. Most of the parties that responded to the consultation on our draft Order argued that it would be challenging meeting the implementation date of 1 July 2008 for Articles 5 and 6 because of the delay in the making of the Order and the fact that the approval process envisaged in these two articles would be a new process involving third parties that do not have the same obligations as the banks to comply with the implementation deadline. The BBA and four banks (~~[X]~~) suggested changing the implementation date and proposed new deadlines of, variously, December 2008, April 2009, October 2008, and 2009. Some parties also suggested extending the provisions for suspension also to these articles (the BBA, Barclays, Bol and HBOS).
4. We consider that if our remedies are to be effective they must be implemented in a timely way. With this in mind, we intend the implementation dates specified in our Order to be challenging but achievable. We note that the implementation dates included in the consultation draft already reflected the additional length of time it has taken us to prepare the Order and that some banks have already taken significant steps to prepare for its implementation. We also note that the arguments raised by many of the parties in support of delaying the Order were in line with those arguments put to us before we issued the draft Order for consultation, and which we took into account in arriving at the implementation dates included in that draft. We have therefore decided not to change the implementation dates included in the Order.
5. In preparing our draft Order we had recognized that there may be reasons why some banks could not comply with Articles 7 to 10 of our Order, which would require changes to their systems. We had therefore included in the consultation draft provision for banks to apply to us for temporary suspension of those provisions, until such time as they were able to comply. Having considered the responses of the banks to our consultation, we now consider that there may be reasons why some banks cannot comply with the deadline for implementation of Articles 5 and 6 of our Order. We do not expect many banks to be in this situation, and we expect all banks

to try their utmost to implement these articles by the specified date. However, we consider it prudent to provide for banks also to apply to us for a suspension of Articles 5 and 6 of the Order until such time as they are able to comply. The same conditions that apply to suspensions from Articles 7 to 10 will also apply to Articles 5 and 6. The suspension is provided for in Article 12 and is discussed in more detail in paragraphs 46 to 48 of this paper.

General interpretation, index of defined expressions etc

Article 2

6. Almost all parties pointed out that the definition of a 'PCA' should exclude basic bank accounts. HBOS also said that the definition should exclude its other accounts which do not offer overdrafts. First Trust Bank (First Trust) and Northern Bank (Northern) considered that the definition should exclude current account mortgages and First Trust also told us that its private banking PCAs and non-sterling PCAs should be excluded.
7. The BBA, HBOS, and Ulster Bank (Ulster) considered that the definition of a bank included in the consultation draft captured banks that had PCA customers with NI addresses even if those banks did not have a branch network in Northern Ireland; these banks believed that was not our intention and therefore suggested that the definition should be revised.
8. We have changed the Order to include in Article 2(2) a new definition of a PCA. This new definition makes clear that, for our purposes, a PCA does not include basic bank accounts, foreign currency accounts, offset/current account mortgages and offset/loan accounts. We have not dealt explicitly in the Order (or the explanatory note) with particular named accounts; however, we consider that if an account falls within the definition of PCA as set out in Article 2(2)—and if the bank offering it falls within the scope of the Order—the account falls within the scope of our Order. Neither have we dealt explicitly in the Order (or the explanatory note) with private banking accounts; however, again, we consider that if a private banking account falls within the definition of PCA as set out in Article 2(2)—and if the bank offering it falls within the scope of the Order—that account falls within the scope of our Order.
9. We have also changed the Order to include in Article 2(3) a new definition of a customer. Article 2(3) now defines a customer as a person who, individually or jointly, holds a PCA and who has a postal address in Northern Ireland, whose PCA was available in Northern Ireland at the time it was opened and in the case that the PCA is attached to a physical branch the branch is located in Northern Ireland. Our inquiry concerned PCA banking in Northern Ireland, and given that during the inquiry we considered only accounts available to customers in Northern Ireland, we consider it reasonable for us to require that our remedies only apply to customers with postal addresses in Northern Ireland and where that account was available in Northern Ireland. We note that our inquiry included in its scope accounts available to customers in Northern Ireland offered by banks, such as Internet-only banks, with no branch presence there and it has never been our intention only to apply our remedies to those banks with a branch presence in Northern Ireland.
10. Our changes to the definitions of 'customer' and 'PCA' have resulted in some consequential amendments and some clarifications to the definition of 'bank', which is now set out in Article 2(4).
11. In addition we have clarified the definition of unauthorized overdraft charges as suggested by Ulster. The revised definition covers charges, such as unpaid item

fees, that are levied when the customer gives an instruction for payment that the bank declines to honour because the customer does not have sufficient funds in the account.

Delivery of a written communication

Article 3

12. Ulster considered that it was not always appropriate to oblige a bank to agree to every request by a customer to provide a written communication by a different means from the means by which the bank communicate the statement to the Customer, as the banks might need to comply with legal requirements. Ulster suggested amendments to Article 3 in Order to allow for this.
13. Ulster also pointed out that the way in which the article had been drafted in the consultation draft suggested that, where a customer had elected to receive a communication in a different form to the form in which they received their statement, this created an obligation on the bank to provide the communication in that form. In addition to its point that there may be legal requirements preventing this, Ulster said that this might result in banks having to offer a communication in a particular form where it was not practical to do so.
14. [X] said that it would prefer to have the option to choose the method of communication as customers can currently choose to receive their statement online but would not necessarily receive other communications online (eg pre-notification of overdraft charges are sent to the customer via the postal system). Without this option [X] said that it would need to make further IT changes.
15. We acknowledge that there may be circumstances in which a bank is required under law to provide a written communication to a customer in a particular way and we have amended our Order to reflect this (see Article 3(1)(a) and 3(2)(a)).
16. We also note that it was never our intention to oblige a bank to use whatever form of communication a customer had requested. Our intention was merely that a bank should not use a form different from that in which the customer received their statement unless the customer had requested this. We have therefore amended our Order so that communications may be made in a form different from that of the statement where the customer has requested this *and* where the bank has agreed (see Article (3)(1)(b) and (3)(2)(b)).
17. We note that the amendments discussed above will not deal with a situation where a bank already provides a written communication (pre-notification) in a form (hard copy letter) in which some customers do not receive their statement. On the basis of Article 3(1)(b) alone, in order to comply with the Order, [X] would have to have the agreement of every customer who receives their statement in electronic form to send pre-notification by letter. We have therefore expanded Article 3 to include new provisions. These allow for a bank that is already pre-notifying its customers of charges and interest on the date the Order is made to continue pre-notifying in whatever form it was using on that date, unless the customer chooses to use a different form and the bank agrees.
18. We deleted Article 3(2) because we believe it unnecessarily duplicated the requirement already covered in Article 10(2).

Part 2—Information requirements

Duty to communicate clearly

Article 5

19. Almost all those parties who responded to our consultation (Barclays, the BBA, the Banking Code Standards Board (BCSB), Bol, First Trust, HBOS, HSBC, Ulster) considered that the BCSB should review only the process a bank went through to have the written communication approved or certified as easy to understand, rather than approving each individual written communication a second time. The BCSB added that this should not be done, except on a sample basis.
20. Barclays and the BBA raised concerns about the applicability of this article to a PCA's Terms and Conditions, which is a document or documents that have to achieve legal and regulatory compliance and suggested excluding Terms and Conditions from the requirements of this article.
21. We do not consider that it is for us to specify the way in which the BCSB would satisfy itself that communications were easy to understand. This is something that will need to be decided by the BCSB, working together with the OFT and the banks. However, we had always envisaged that the work of the BCSB in approving written communications would be focused on ensuring that the banks had established appropriate processes that would ensure communications were easy to understand and that they had followed them, supplemented with an assessment of samples of communications as appropriate. We do not consider that the consultation draft had the effect of requiring the BCSB to approve individual communications, either in relation to their original form or following any material changes. We have therefore not amended the Order in respect of this. However, we have amended the explanatory note to provide greater clarity as to how we expect the process by which the BCSB is satisfied that written communications are easy to understand to work (see paragraph 34). We have made clear that we expect the process by which the BCSB satisfies itself of the clarity of communications to be the subject of dialogue between the BCSB, the OFT and the banks. We have also provided more detail in the explanatory note (paragraph 35) on the sorts of changes that are likely to be considered non-material.
22. We accept that the Terms and Conditions of a PCA is a legal document that will need to reflect various legal and regulatory requirements. However, while we accept that these requirements may add complexity, we do not consider that this in itself is an insuperable barrier to the Terms and Conditions being easy to understand. That said, we consider that in most cases customers wishing to understand their PCA will turn not to the Terms and Conditions themselves but to accompanying documents. We also note that other legislation applies similar easy to understand requirements to Terms and Conditions (eg The Unfair Terms in Consumer Contracts Regulations 1999 (see Regulation 7)) and it is an existing requirement of the Banking Code that banks ensure that customers are able to understand information on changes to their Terms and Conditions. On balance, we therefore consider it reasonable to exclude the Terms and Conditions from the requirement to be communicated clearly. An amendment to Article 5(1)(a) achieves this.
23. Bol said that fees and interest rates should not fall within the ambit of a material change. Also, HSBC said that figures and amounts relating to offer dates, interest rates, fees and charges should be expressly excluded as they are subject to frequent change without any amendment to the explanatory text. We agree and we have amended Article 5(5)(a) to clarify this.

24. The BBA, BoI, and BCSB raised some concerns about the requirement (in Article 5(6) of the consultation draft) that the cost incurred by the BCSB in performance of its functions under paragraphs 3(b) and 4 of this article should be borne wholly by the relevant bank and the BCSB and HSBC suggested that the exact mechanism for funding the BCSB should be agreed between the banks and the BCSB. The BBA suggested that the means of funding the BCSB should be left to the industry and the BCSB to determine following publication of the final Order (this might include it being funded wholly by the relevant bank).
25. We do not consider that it is necessary for us to mandate the precise mechanism by which banks will fund the BCSB in the performance of its functions under this Order. Since the BCSB is funded by the banks, the BCSB will need to agree with the banks how best it should be funded to perform these functions. However, the BCSB commented that the funding provision should cover not only Article 5 but also Article 15 and any other part of the Order that may involve the BCSB in performing any functions. We agree with this and have therefore moved the funding provision from Article 5 into a new article, Article 16 which covers the Order as a whole.

Duty to provide details of charges and interest rates in marketing and account opening

Article 6

26. HBOS told us that the requirement in the consultation draft to include details of charges and interest rates in direct marketing material was unnecessary and duplicative. We consider that direct marketing is a particular form of advertising and have therefore changed this article so that the requirement to provide details of charges and interest rates in direct marketing is aligned to the requirement for any other form of advertising. We have reflected this change in the explanatory note (see paragraph 40).
27. This means that banks will not be required to include in their direct marketing materials the information set out in Article 6(2) (eg the existence and level of charges and interest rates applicable to the account and the circumstances in which they would be incurred) but will only need to refer in direct marketing materials to where customers can find this information.

Duty to provide an Annual Summary

Article 8

28. The BBA and certain banks [redacted] expressed concerns about the requirement to show the historical interest rates that applied to the PCA on the Annual Summary. [redacted] was also concerned about the requirement that where a customer switched between PCAs within a bank the details of each PCA should be provided on one Annual Summary. [redacted] said that it would be disproportionately difficult to implement these requirements and [redacted] said that it would detract from or obscure key information and would not address what it said was our main concern, namely that the customer understands the cost of a PCA. Both [redacted] and [redacted] said that customers are given information on rates applicable on their accounts on their regular account statements.
29. [redacted] argued that the requirement for historical information on interest rates and charges should be removed. In line with our final report it noted that there was a requirement to provide explanatory information on the charges and interest included on the Annual Summary. [redacted] told us that the specific requirements in relation to

historic records of interest rates and charges at customer level were not readily available because [§]. It told us that including this information on the Annual Summary would require additional and expensive IT development the cost of which was not included in its original estimate of the costs of implementing this remedy, which did not originally form part of this requirement.

30. We accept the argument advanced by the banks that information on historical interest rates and historical charge levels will not be readily available to them at the time the Annual Summary is compiled. We note that the intention of our Annual Summary remedy was to ensure that customers had an understanding of the costs of operating their account over a 12-month period, and we do not consider that historical interest rates are likely to be critical to this understanding. Indeed, on reflection, we consider that including all the rates of interest that had applied to an account over a 12-month period could result in too much information being included in the annual summary.
31. We have therefore retained the obligation on the banks to include in the Annual Summary the total amount of a particular type of interest paid and a particular type of charge incurred on the account in the 12-month period (or paid to the account in that period) but we have amended the Order so as to ensure that banks are not required to include in the summary the level of the rates and charges that applied to the account in the 12-month period. However, the Order now includes a requirement on banks to include the level of the rate or rates and charges that applied to the account at the date of the Annual Summary and to make clear to customers that these rates may have changed throughout the period. Banks must also make clear to customers where they can find information on the rates and charges that may have applied to their account over the period covered by the Annual Summary.
32. Barclays told us that it assumed that the requirements of Article 8 applied only to active accounts. It said that it did not send mail to holders of inactive accounts to protect against the possibility that the customer no longer lives at the address on its records and therefore to avoid the risk of intercept fraud and identity theft. We consider that banks should not be required to provide Annual Summaries for an account that has not had transactions, interests or charges applied to it in the period covered by the Annual Summary. We have amended Article 8(1) and the explanatory note to make this clear. In the explanatory note (paragraph 47) we have also clarified that banks are not required to provide a customer with an Annual Summary where it is not possible to contact the customer.

Duty to notify a customer of overdraft charges and debit interest

Article 9

33. [§] noted that the purpose of the provision of the month end statement was to provide a list of transactions completed on the customer's account. It said that the Record of Charges and Interest would not necessarily address this in the case of a customer who receives quarterly statements. In fact, there could be an information gap in relation to payments made from and received into the account between the period covered by the last statement and the start of the Record. It gave the example of a customer who received a quarterly statement for the period January to March and their next statement was due at the end of June. In the month of May they were overdrawn. The requirement would be to send a statement for the month of May. However, at this stage the customer had not received information on transactions into or out of their account for the month of April which could confuse the customer and lead them to take incorrect action.

34. [X] also noted that the introduction of an additional customer communication which covers the same information as a customer statement, but which does not link to the customer's normal statement, would be confusing to customers who may think that payments have been duplicated causing them to take inappropriate action. Information provided would be a duplication of the transactional information contained in their bank statement but where it covered a different period it could show a different opening and closing balance.
35. [X] also suggested that we should consider retaining the option to issue a statement at the end of the month covering the period since the previous statement was issued.
36. We note that our intention in requiring banks to provide a Record of Charges and Interest in addition to pre-notification was to ensure that a customer whose account would be debited with overdraft charges or interest would have sufficient information about their account usage to form a view on whether it would be necessary to take steps to ensure there were sufficient funds in the account to cover the charge or interest payment. We consider that, provided a customer receives a Record of Charges and Interest that covers a period of at least one month up to the date of that record, customers will have the information that they need. We have therefore amended the Order (see Article 9(1)) to provide flexibility for banks to provide a Record of Charges and Interest that covers more than one month. We have also amended Article 9(1) and the explanatory note (paragraph 49) to make clear that a statement falls within the definition of Record of Charges and Interest, ie to make clear that a bank can comply with the requirement to issue a Record of Charges and Interest by providing a statement that covers the requisite period.
37. BoI requested clarification that if a customer closed their account any outstanding charges can be levied at account closure rather than be subject to the delay required in Article 9(4). We have included a new Article 9(5) to address this point.

Part 3—Switching

Provision of switching information

Article 10

38. The BBA interpreted Article 10(1)(a) and (b) as meaning that the bank should tell a customer that they can close their PCA and open one with a competitor and that it was easy to do that. The BBA asked that the text was redrafted to clarify that the information the bank is required to provide is with regard to switching, rather than with regard to obtaining PCA services from a different bank (ie banks are not required to give customers information on the services of their competitor). We considered that the text included in the consultation draft was sufficiently clear but have made a small change to Article 10(1)(b) to improve clarity.

Article 11

39. The BBA, Barclays, BoI, HBOS and Northern asked that it was made clear that the level of the authorized overdraft offered should only be at a level that a bank's credit and risk assessment criteria suggest is acceptable. We have clarified that in Article 11(2)(a) and (b).
40. In relation to Articles 11(4) and 11(6) of the consultation draft and the relevant parts of the explanatory note, the BBA, BoI and HBOS made the comment that references to a reasonable period should be replaced by 'at least 3 months' in accordance with

Article 11(3) to ensure consistency and to avoid confusion. Ulster told us that it believed that one month would be a more reasonable period for a bank to refund any charges incurred as a result of a failure of the switching service.

41. With regard to paragraph 52 of the consultation draft explanatory note, the BBA and certain banks ([REDACTED]) told us that the requirement that banks should refund any interest or charge accrued on the account as a result of a failure in the switching process where the customer had not brought these to the attention of the bank would require extremely resource-heavy manual intervention and place an impractical burden on the old and new bank. In fact, it would require banks to monitor proactively all charges and interest accrued over a three-month period for every new customer and then to determine whether the customer is a 'switcher' and whether the charge/interest was accrued as a result of a failure of the switching process.
42. The BBA, BoI and First Trust said that refunds should be investigated by banks on notification from the customer according to the established FSA's complaint-handling processes. The FSA's Dispute Resolution Complaints rules provide a procedure for complaints' handling, which First Trust believes is understood by customers and works well. First Trust considered that the requirement of the Order would be appropriately implemented within this existing system.
43. [REDACTED] also considered that it would not be apparent in most cases whether a charge had been incurred due to a failure of the switching service and proposed to offer a refund for any charges which either:
 - (a) a bank had itself identified as arising due to a failure of the switching service; or
 - (b) a customer brought to a bank's attention where that customer claimed that the charge had been imposed because of a failure of the Switching Service (regardless of whether that customer could prove that the charge arose because of a failure of the switching service as opposed to an error on the customer's part).
44. We note that Article 11 of the Order did not include a time period within which banks would be expected to refund charges incurred by a customer as a result of a failure in the switching service. However, we had suggested (in what was paragraph 53 of the consultation draft of the explanatory note) that we would expect banks to refund such charges within 14 days from the date on which the banks had established the charge had been incurred. Taking into account the comments we received on the draft Order, we have amended the relevant text in the explanatory note (now paragraph 58) so that banks could refund the charge within 30 days. Given that this text does not impose a specific requirement on the banks, and given that we have amended the explanatory note to make clear that the banks are not required pro-actively to monitor all switched accounts for charges (see below) we consider that 30 days represents a reasonable benchmark. We consider that if banks routinely took three months to refund charges incurred as a result of a failure of the switching process, this would undermine the effectiveness of our remedy.
45. We also note that Article 11 of the Order did not oblige the banks to monitor switched accounts proactively and to identify any charges incurred as a result of a failure of the switching process. However, in what was paragraph 52 of the explanatory note, we had said that we would expect it to be apparent to a bank when a customer had incurred a charge as a result of a failure of the switching process. We now understand that this may not be the case. We have therefore amended the explanatory note (now paragraph 57) to make clear that a bank must refund a charge that is the result of a failure in the switching process whether that charge has been

identified by the bank itself or brought to the bank's attention by the customer. However, we have also made clear (in the same paragraph) that the bank should refund any such charge whether or not the customer can prove that the charge has been incurred as a result of a failure of the switching process.

Part 4—Suspension of provisions of this Order

Application for suspension

Article 12

46. Having amended the Order to allow banks to allow for the suspension Articles 5 and 6 (as well as Articles 7 to 10, for the suspension of which provision had already been made), we reviewed Article 12 to ensure that it would provide the basis not only for suspension of Articles 7 to 10 but also Articles 5 and 6. We also made some amendments to this article in Order to make clear exactly what information a bank applying for a suspension will be required to provide.
47. It seemed to us likely that banks would employ different experts to review applications for suspension in relation to Articles 5 and 6 than in relation to Articles 7 to 10. We have therefore amended the references to 'an expert' in this article and in the explanatory note to make clear that more than one expert would be acceptable. On reflection, we also considered that the CC would as a matter of course request a review of an application by an independent expert and we have therefore moved this from being an example of further information the CC may require under Article 12(3)(d) into the list of requirements for an application under Article 12(2). We have also included in Article 12(4) provision for the CC to have the independent expert review any further information that the bank provides to the CC at the CC's request under Article 12(3)(d).
48. In addition, we have amended the explanatory note (paragraph 60) to provide more detail on the process by which we expect an application for suspension to be granted. This now includes a process by which banks will be expected to seek approval for the expert or experts who will review their application. We have included this because it seemed likely to us that a bank would wish to have its expert or experts approved by the CC in advance of commissioning a review of its application, as this would avoid the risk of the expert or experts undertaking the work only to find that CC approval was not granted.

Part 5—Supply of information and submission of reports on compliance to the OFT

Duty to submit reports on compliance with the Order to the OFT

Article 15

49. Bol and Northern noted that the banks would be reliant on the BCSB to comply with the time frame to produce a Compliance Report. Northern suggested amending the requirement to reflect this fact while Bol suggested that banks should not be accountable for the late submission of Compliance Reports where this is the fault of the Approved Body.
50. We acknowledge that the Order as previously drafted would have left the banks exposed to the risk of non-compliance with the Order had the BCSB or another approved body not provided its compliance reports in time. In the light of the

comments received we have amended Article 15(2) of the Order so that the banks are given two weeks to submit their reports after they have received the compliance report from the approved body. This means that the banks are fully able to control their compliance.

Changes not made

51. Where respondents to our consultation made points in relation to a particular part of the Order some of which have led us to make changes and some of which have not, we have discussed their points in the previous section. In this section we discuss only stand-alone points made in response to consultation have not caused us to make a change to the Order or the explanatory note.

Citation and commencement

Article 1(1)

52. Bol noted that a number of the provisions in the Order would also become part of the Banking Code and submitted that the Order should include a provision specifying that provisions which become part of the Banking Code would be removed from the scope of the Order.
53. We have not adopted Bol's suggestion. The Banking Code is a self-regulatory tool and it is open to the banks to make changes to it. We therefore cannot rely on the Banking Code to give effect to our remedies. If banks choose to include measures that would see them comply with our Order in the Banking Code they are free to do so.

19 February 2008