

## Article-by-Article assessment of overlap between the Order and the PSD, the CCD and other regulations or voluntary arrangements

### Introduction

1. In this appendix, we consider Articles 5 to 11 of the Order and the extent to which there is an overlap with the PSD and/or the CCD. We also look at any substantive overlap with other regulations or voluntary agreements. We consider each article in turn, but as the changes to Article 5 are dependent on our views of Articles 6 to 9, we present our views on Article 5 after those articles.
2. We provide the text of each article and we summarize the views of the eight banks operating in Northern Ireland that responded<sup>1</sup> to a number of questions we asked about the interactions between the Order and the PSD and CCD. We also spoke with third parties including BIS, OFT and the FSA to develop our understanding of the existing mandatory regulation and voluntary arrangements in place. As part of our review we also heard from the CCNI on the ongoing need for the requirements of the Order. We set out these views in the relevant sections of this appendix and in the main report.
3. In the main report we set out changes that will be made to the Order in Articles 5 to 11 and consider the need for any changes to the other articles of the Order (Articles 1 to 4 and Articles 12 to 16).

### Article 6: Duty to provide details of charges and interest rates to customers when choosing a PCA and when opening a PCA

4. Article 6 requires banks to provide consumers with clear explanations of the level of charges and interest rates (including those applying to authorized and unauthorized overdrafts) that apply to a PCA, when choosing and when opening a PCA:<sup>2</sup>
  - (1) A Bank shall provide the information mentioned in paragraph 2:
    - (a) with any document or literature designed to assist a Customer when choosing to open a PCA including documents or literature supplied in branches and online; and
    - (b) to the Customer or potential Customer at the time of opening a PCA.
  - (2) The 'information' means:
    - (a) the existence of and level of the Specified Charges and Interest Rates applicable to the PCA;
    - (b) the circumstances in which each of the Specified Charges and Interest Rates would apply to the PCA;

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<sup>1</sup>One of the nine banks that we contacted did not respond to our questions.

<sup>2</sup>The standard of clarity the explanations must achieve is set out in Article 5.

- (c) the time when each of the Specified Charges and Interest Rates would be applied; and
  - (d) the way in which the Specified Charges and Interest Rates are applied to the PCA including whether discretionary policies exist as to how Charges and Interest Rates apply to Unauthorized Overdrafts.
- (3) A Bank shall refer to the existence of the information mentioned in paragraph 2 and where such information can be found:
- (a) in any Written Communication in the form of an advertisement or a promotional message for a PCA which is sent directly to Customers and/or potential Customers;
  - (b) in all its oral marketing of a PCA; and
  - (c) on posters, billboards and signs that market a PCA.

### ***Views of banks and third parties***

5. Six banks told us about a number of overlaps between Article 6 and the PSD and CCD, in particular citing that both directives require provision of pre-contractual information 'before a customer is bound'. Northern specifically commented that Article 6 exceeded the requirements of the PSD because it sought to prescribe the information given in oral marketing, billboards and signs and how that information is given.
6. A number of banks also referred to Chapter 4 of BCOBS which covers information to be communicated to customers to help them make decisions on an informed basis.
7. We spoke to the FSA about the PSRs and BCOBS. Our understanding of the following aspects of the PSRs and BCOBS were particularly relevant to our assessment:
  - (a) The PSRs require specified pre-contractual information to be provided before the customer is bound by a framework contract or immediately after the conclusion of the contract where the contract is concluded at the customer's request using a means of distance communication which does not enable the provision of such information. In practice we considered that this would generally ensure that the information specified in the PSRs was given to the customer before a PCA was opened.
  - (b) Provision of information about charges outside the scope of the PSRs relating, for example, to paper-based transactions are captured within the scope of BCOBS (in particular, BCOBS 4.1.1 R and BCOBS 4.1.4(5)G<sup>3</sup>). In practice we considered that such information would therefore also be provided before the time of opening a PCA.

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<sup>3</sup>BCOBS 4.1.1R (the appropriate information rule) states that 'A firm must provide or make available to a banking customer appropriate information about a retail banking service and any deposit made in relation to that retail banking service: (1) in good time; (2) in an appropriate medium; and (3) in easily understandable language and in a clear and comprehensible form; so that the banking customer can make decisions on an informed basis. BCOBS 4.1.4(5)G states that the pre-contractual information provisions of BCOBS should include 'any charges at any time payable by or on behalf of a banking customer in relation to each retail banking service and any changes to those charges'.

- (c) Any monthly charges for banking services, for example as part of a packaged account,<sup>4</sup> are covered within the scope of the PSDs. Details of other charges that were not integral to the account and did not form part of a framework contract (eg banker's drafts) could be provided at the time of request.
  - (d) BCOBS Chapter 4 relates to information to be communicated to banking customers and applies only to the extent that it does not overlap with the PSDs. BCOBS 4.1.1R ensures that banking customers had appropriate information so that they were able to make decisions on an informed basis.
  - (e) The FSA financial promotions team monitored press and television advertising and mailshots to ensure compliance with BCOBS.
8. BIS told us that the requirements of the CCD relating to financial promotions did not preclude the Order from requiring information on interest rates and charges for overdrafts to be included in advertisements or literature for PCAs.

### ***Our assessment***

9. We considered first the application of the PSD and the CCD to the definitions of choosing to open a PCA and opening a PCA contained in the Order. We then considered the overlap between the Order and the PSD and the CCD in terms of information to be provided (i) when choosing to open a PCA and (ii) when opening a PCA.

#### *Definition of choosing a PCA and opening a PCA*

10. Both the PSD and CCD require the provision of pre-contractual information 'in good time before the consumer is bound' by a credit agreement or a framework contract.<sup>5</sup> In each case the content of the information which must be disclosed is a detailed description of the product.<sup>6</sup> In neither case is the time at which the information must be given defined any more precisely than 'in good time before a consumer is bound'.
11. The periods 'when choosing' and 'when opening' a PCA in the Order are similarly not precisely defined but in our 2007 report choosing between PCAs is described as enabling customers 'to compare the likely costs of running a PCA with different operators, whereas 'at the time a PCA is opened' is described as enabling customers to be 'fully aware of the interest rates and charges that will apply to the PCA'.
12. In our view, the period when pre-contractual information is required by the CCD and PSD (ie 'in good time before a consumer is bound') corresponds with the period described in the Order as 'when opening' but not the period described in the Order as 'when choosing a PCA'. We have taken this view because:
- (a) Each directive provides for the giving of detailed pre-contractual information relating to a specific agreement or contract (for a consumer credit agreement in the form of an authorized overdraft in the case of the CCD and for a single or continuing payment service in the case of the PSD) which ensures that a

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<sup>4</sup>A packaged account includes additional benefits or services with the PCA and the customer often pays a monthly fee.

Additional benefits and services may include travel insurance, a will-writing service or a reduction to normal borrowing rates.

<sup>5</sup>In both cases where the agreement has been concluded by means of distance communication, the pre-contractual information must be provided immediately after the conclusion of the contract.

<sup>6</sup>PSD Articles 41 and 42; CCD Articles 5 and 6. In the case of the PSD the obligation may be satisfied by giving a copy of the draft contract and in the case of the CCD by a multipage document (ECCI) in a prescribed form.

consumer has ‘the information needed to compare different offers in order to take an informed decision’ on whether to conclude an agreement.

- (b) As described in paragraph 11, the period identified in our 2007 report as ‘when opening’ a PCA is when a consumer needs to have specific information on interest rates and charges for a particular product in order to be fully aware before entering into a contract. In our view, this information is provided by the pre-contractual information required by the PSD and CCD.
- (c) The CCD distinguishes between information given in advertising (CCD Article 4) and pre-contractual information (CCD Article 6). The PSD does not contain any requirements on marketing or advertising of payment services but does contain pre-contractual information requirements. We have taken the view that the period identified in our 2007 report as ‘when choosing’ a PCA relates to this advertising or promotional stage.

### *Choosing a PCA*

- 13. Having reached the view that the information in the Order defined as ‘when opening a PCA’ are consistent with the pre-contractual information requirements of the CCD and the PSD, we considered whether the ‘choosing’ requirements of the Order (as set out in Articles 6(1)(a) and 6(3)) are consistent with Article 4 of the CCD.
- 14. Article 4 of the CCD requires that any advertising concerning credit agreements which indicates an interest rate or any figures relating to the cost of credit to the consumer should include specific standard information by way of a representative example.<sup>7</sup> Article 4 of the CCD only covers authorized overdrafts and not unauthorized overdrafts.

#### *Article 6(1)(a)*

- 15. Article 6(1)(a) of the Order requires banks to provide information relating to interest rates and charges for a range of products provided through a PCA including authorized overdrafts, in documents available in branch or online which are designed to assist customers when choosing a PCA.
- 16. In our view, the requirement in Article 6(1)(a) is not incompatible with Article 4 of the CCD. The CCD is a maximum harmonization directive harmonizing those provisions which are within its scope. Article 4 relates to the advertising of consumer credit but does not seek to regulate all consumer credit advertising; it regulates the way in which interest rates and cost of credit are presented in advertisements where the advertisement includes either an interest rate or cost of credit information. The purpose of Article 4 is therefore in our view to ensure that in advertisements for consumer credit which include either the interest rate or cost of credit information, that information is presented consistently by a representative example which includes the standard information required by CCD Article 4(2).
- 17. We do not see this as incompatible or in conflict with the requirement in the Order that information on interest rates and charges associated with overdraft facilities and

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<sup>7</sup>The Consumer Credit (Advertisements) Regulations 2010, which implement Article 4 of the CCD, require that ‘where a credit advertisement includes a rate of interest or any amount relating to the cost of the credit...the advertisement shall... include standard information by means of a representative example’. For authorized overdrafts this standard information comprises the rate of interest, the nature and amount of any other charge included in the total charge for credit, and the total amount of credit. It does not include the representative APR.

payment services be provided to consumers to assist in choosing a PCA. We note a practical consequence may be that the inclusion of interest rate and costs information relating to an authorized overdraft may trigger the requirement to comply with Article 4(2) of the CCD.

18. We also note that Article 4 of the CCD does not require banks to advertise or market authorized overdrafts; it only prescribes the manner in which standard information must be displayed when an advertisement for an authorized overdraft indicates an interest rate or any figures relating to the cost of credit. In our view, there is no guarantee that authorized overdrafts will be advertised or promoted by banks and the requirement in Article 6(1)(a) of the Order ensures that such information is brought to consumers' attention when they are choosing a PCA. We are concerned that consumers may be misled if banks do not disclose all the costs associated with a PCA when a consumer is choosing a PCA.

#### *Article 6(3)*

19. We have taken the view that Article 4 of the CCD does not conflict with Article 6(3) of the Order because in this case Article 6(3) does not require the giving of interest rate information or cost of credit information which triggers the standard information requirements of Article 4 of the CCD; Article 6(3) only requires that certain types of marketing materials refer to the availability of this information.

#### *Other regulations*

20. We considered whether there were any other regulations that duplicated Articles 6(1)(a) and 6(3). We considered whether BCOBS might have the same effect. Whilst we do not see any inconsistency between BCOBS and the Order our assessment was that BCOBS specifies a particular outcome which must be achieved whilst the Order sets out specific information that must be delivered. In addition, BCOBS does not duplicate our specific requirement in Article 6(3) for an advertisement for a PCA to include a reference to where all the terms and conditions relating to an account could be found. We found that neither BCOBS nor any other mandatory or voluntary regulation had the same scope and effect as the Order for Articles 6(1)(a) and 6(3).

#### *Opening a PCA*

21. We found that PSD Article 42 and CCD Articles 6 and 18 largely duplicate the requirements of Article 6(1)(b) of the Order with the exception of information on unauthorized overdrafts.
22. Table 1 summarizes the information that is required to be provided by the Order when opening a PCA compared with that required by the PSD and the CCD.

TABLE 1 **Comparison of requirements when opening a PCA**

<i>Requirements of Order (Schedule 1)</i>	<i>Requirements of PSD and CCD</i>
To be provided 'at the time of opening the PCA'	To be provided 'in good time before the consumer is bound' unless stated otherwise
Interest rates applicable to relevant balance limits in credit	'The interest rate to be applied' (PSD Article 42). This covers credit interest rates.
Current account charges and transaction charges applicable to balances in credit	'All charges payable by the payment service user' (PSD Article 42). We understand that charges for PCA services that were outside the scope of the PSD and PSRs (eg cheques) would fall to be considered under BCOBS rules and guidance.
Authorized overdraft interest rates and charges	Authorized overdraft 'borrowing rate' and 'charges applicable' (CCD Article 6)
Unauthorized overdraft interest rates and charges	Unauthorized overdraft 'borrowing rate' and 'charges applicable' (CCD Article 18). However, this information only needs to be provided with the relevant credit agreement and not in good time before the consumer is bound.

Source: CC analysis.

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23. Table 1 illustrates that there are some important differences between the information requirements of the Order and the PSD and CCD when opening a PCA.
24. First, some charges relating to payments are or appear to be outside the scope of the PSD. These include charges relating to paper-based payment transactions<sup>8</sup> in contrast to those for payments such as standing orders or direct debits. We understand that charges for PCA services that were outside the scope of the PSD and PSRs (eg cheques) would fall to be considered under BCOBS rules and guidance.
25. Second, certain charges covered by the CCD relating to unauthorized overdraft interest rates and charges are not covered by the requirement to be provided 'in good time before the customer is bound' and only need to be contained in the agreement to open the PCA (CCD Article 18). We found this was an important difference between the Order and the CCD. Our 2007 report made express findings in relation to customers' lack of knowledge about the existence and level of unauthorized overdraft charges. The Order intended to remedy this information asymmetry by requiring (i) this information to be made available when a customer was choosing a PCA and opening a PCA; and (ii) advertisements for PCAs to include references to where this information could be found. Accordingly, in our view, the CCD requirement does not equal that contained in the Order.
26. Third, the type of information required in Article 6(2) of the Order is quite specific and covers the 'existence of and level of' interest rates and charges, 'the circumstances in which applied', 'the time when applied' and 'the way in which applied'. The PSD and the CCD do not contain such a level of specificity; they require notification only of the charges, not the circumstances in which applied, the time when applied and the way in which applied. These additional requirements were considered necessary again in view of the information asymmetry identified in our 2007 report.

### **Article 7: Duty to provide details of charges and interest rates on statements**

27. Article 7 of the Order sets out when a bank shall provide to customers as part of each statement the details of charges and interest rates specified in Article 6(2) and Schedule 1 of the Order:

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<sup>8</sup>This is to the extent that such charges exist or may exist in the future.

- (1) A Bank shall include the information specified in Article 6, paragraph 2, as part of each Statement sent to a Customer and correct as at the date of the Statement.

### ***Views of banks and third parties***

28. Six banks told us about the requirements under the PSD and CCD for statements of actual charges and interest to be provided to customers on a regular basis. One referred to the requirement under CCD from 1 February 2011 to include the debit interest rate on a statement where debit interest has been charged in the period. Banks were not able to identify any other requirements of the PSD and CCD that covered the tariff of charges and credit interest rates and the additional detail about when these would be applied, as set out in Article 6(2).
29. The OFT told us that the voluntary initiatives for providing enhanced monthly information that it had agreed with the largest PCA providers in Great Britain did not apply to the Northern Ireland banks as at that time the Order had been made and it covered similar issues.
30. The CCNI told us that it was important that consumers were reminded of the applicable fees and charges on an ongoing basis and not just when there had been changes. It said that this may be covered in future by adding a clause to the Lending Code.
31. The LSB told us that there were no existing requirements in the Lending Code for the regular provision of tariff interest rates and charges on authorized and unauthorized overdrafts. Additionally, at this stage there were no plans to include within the Lending Code the separate OFT voluntary initiatives on transparency agreed with the main Great Britain PCA providers in October 2009. The LSB told us that their inclusion could, if raised, be considered by the independent reviewer of the Lending Code as part of the current review but that the final decision on inclusion would rest with the sponsors, ie the BBA, BSA and the UK Cards Association.

### ***Our assessment***

32. We considered the extent to which the PSD and CCD require the notification of interest rates and charges and compared this with Article 7.
33. We noted that there are provisions within the PSD and CCD for the notification of adverse changes to the level of charges and interest rates. These are set out in Table 2 in a comparison with the Order.

TABLE 2 Comparison of requirements when opening a PCA

<i>Requirements of Order (Schedule 1)</i>	<i>Requirements of the PSD and CCD</i>
Interest rates applicable to relevant balance limits in credit	Adverse changes in interest rates to be notified 'at the earliest opportunity' (PSD Article 44). No requirement to notify the interest rate on each statement.
Current account charges and transaction charges applicable to balances in credit	Two months' advance notice of any adverse changes in applicable charges (PSD Article 44). No requirement to notify the full tariff of charges on each statement. Only covers the same charges as for opening a PCA. (See Table 1).
Authorized overdraft interest rates and charges	Authorized overdraft 'borrowing rate applied' to be 'regularly informed by means of a statement of account' and any adverse changes in the borrowing rate or charges payable to be notified 'before the change in question enters into force' (CCD Article 12).
Unauthorized overdraft interest rates and charges	Unauthorized overdraft 'borrowing rate' and 'charges applicable' to be provided on 'a regular basis' (CCD Article 18).

Source: CC analysis.

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34. Table 2 illustrates that there are some important differences between the post-contractual requirements of the Order and the PSD and the CCD:
- (a) PSD Article 44 requires notification of adverse changes in interest rates and charges rather than a tariff of charges and interest rates on each statement (as required in the Order).
  - (b) CCD Article 12 requires authorized overdraft borrowing rates to be provided regularly on statements but it only requires notification of adverse changes in authorized overdraft charges to happen before the change in question enters into force.
  - (c) CCD Article 18 requires borrowing rates and charges for unauthorized overdrafts to be provided 'on a regular basis' which has been expressed in CCR Regulation 21(3)<sup>9</sup> as 'at least annually' but not necessarily on a statement and not on every statement.
35. In our view, a requirement to notify only adverse changes in interest rates or charges is less effective in remedying the problem we identified in the Northern Ireland PCA market than a full reminder of the tariff of charges and interest rates on each statement.
36. We agree with the views expressed by the banks that there is no requirement under the PSD and CCD to include the tariff of charges and interest rates on each statement save for the requirement in the CCD to include the debit interest rate on statements from 1 February 2011 from which duplicates the Order. As the CCD and PSD set out what should be included in statements, we found that the requirements of the Order exceed and are therefore in conflict with those of the PSD (Articles 44, 47 and 48) and CCD (Articles 12 and 18).
37. We considered whether there were any voluntary agreements which might be relevant to the gap in coverage of the remedies identified in paragraph 33. We noted the comments of both the OFT and LSB in paragraphs 28 and 30 and could not find any other relevant voluntary arrangements currently in place.

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<sup>9</sup>The Consumer Credit (EU Directive) Regulations 2010.

## **Article 8: Duty to provide an annual summary**

38. Article 8 of the Order sets out that at least once a year banks must provide customers with an annual summary for each PCA showing the total amount of charges and interest applied to the PCA:

- (1) At least once in every 12 months, a Bank shall provide each Customer with a separate Annual Summary for each PCA having activity in the period to be covered by the Annual Summary.
- (2) The Annual Summary must show:
  - (a) the total amount of each individual type of Charge and Interest applied on the PCA for the period covered by the Annual Summary including those specified in Schedule 2;
  - (b) the level of each of the Specified Charges and Interest Rates applicable to the PCA as at the date of the Annual Summary;
  - (c) an explanation for the application of the Specified Charges and Interest Rates;
  - (d) an explanation that each type of Interest Rate and each type of Charge may have changed throughout the period covered by the Annual Summary; and
  - (e) an explanation of where the Customer can find information on the different Interest Rates and Charges that have applied to his PCA throughout the period covered by the Annual Summary.
- (3) The Annual Summary may include details of Ancillary Charges.
- (4) Where a Bank provides an Annual Summary that does not include details of Ancillary Charges, the Annual Summary must include a clear and prominent statement informing the Customer that they may also have incurred Ancillary Charges during the year and that details of these Ancillary Charges can be found on the Customer's Statements.

### ***Views of banks and third parties***

39. The OFT wrote to the banks in August 2009 advising them that this article was in conflict with the PSD and CCD and was likely to be unenforceable. As a result, all banks responding to us already understood that Article 8 of the Order would need to be revoked. Four noted that banks had voluntarily agreed to provide annual summaries to customers across the UK before or around the end of 2011.
40. The OFT told us that it intended to monitor the PCA market and would publish update reports on a regular basis until 2012, when it expected to consider a further review of the market and the impact of the range of initiatives introduced following the 2008 market study.

## ***Our assessment***

41. In our view, Article 8 of the Order exceeds the requirement of PSD Articles 47 and 48 and CCD Articles 12 and 18.
42. We noted that the banks have agreed separate voluntary initiatives with the OFT and intend to provide annual summaries to customers from before or around the end of 2011. We understand that the format will be the same or very similar to that contemplated in Article 8.
43. We hope that banks will provide these annual summaries as this will have the same effect as originally intended by the remedy in Article 8. However, we noted that as these are to be provided under voluntary initiatives, there are no legal enforcement powers in marked contrast to the enforcement powers which the Order carries. We consider that the related risk of public censure for not producing the annual summaries may provide sufficient incentives to the banks.

## **Article 9: Duty to notify a customer of overdraft charges and debit interest**

44. Article 9 has two separate requirements: first, Articles 9(1), 9(2) and 9(3) require the notification of authorized and unauthorized overdraft charges and/or debit interest within one month of being incurred; and second, Articles 9(4) and 9(5) require that banks cannot deduct overdraft charges and/or debit interest until 14 days after such notification:
  - (1) In this article 'a Record of Charges and Interest' means either:
    - (a) a Statement; or
    - (b) a Written Communication containing the same information as a Statement including the information specified in Article 6, paragraph 2,  
  
that covers a period of at least one month up to the date of the Record of Charges and Interest.
  - (2) Within one month of a Customer incurring an Authorized Overdraft Charge, an Unauthorized Overdraft Charge and/or Interest debited to his PCA, the Bank shall:
    - (a) notify the Customer accordingly; and
    - (b) send the Customer a Record of Charges and Interest.
  - (3) Where the notification required in accordance with sub-paragraph 2(a) is not provided together with a Record of Charges and Interest, the Bank must provide the information specified in Article 6, paragraph 2 in or with the notification.
  - (4) Except for as provided in paragraph 5, a Bank shall not deduct an Authorized Overdraft Charge, an Unauthorized Overdraft Charge and/or debit Interest from a Customer's PCA until at least 14 days have passed since the date of the Record of Charges and Interest that followed or accompanied the notification required in accordance with paragraph 2.

- (5) Where a Customer requests a Bank to close his PCA, a Bank may deduct an Authorized Overdraft Charge, an Unauthorized Overdraft Charge and/or debit Interest from that Customer's PCA at any time following the date of the Record of Charges and Interest that followed or accompanied the notification required in accordance with paragraph 2.

### ***Views of banks and third parties***

45. Three banks told us that the notification requirements of the Order went further than that required by the CCD. Four banks said that the Lending Code, paragraph 60, covered the requirement to give 14 days' notice of before applying interest. Although some banks pointed to BCOBS rules in relation to notifying charges, our understanding was that BCOBS did not apply to credit agreements.
46. Although the Lending Code does not currently contain a requirement for charges to be pre-notified, the LSB told us that a change to include this had been discussed with the industry. The LSB thought that such a requirement was likely to be agreed in principle for unauthorized overdraft charges and was also likely to be extended to cover arranged overdraft charges. The changes would be considered as part of the review of the Lending Code and if finally agreed would become effective on 1 April 2011. The LSB also mentioned that many banks already chose to give notice of charges relating to authorized overdrafts as well as the taking of interest as this was part of the old Banking Code.

### ***Our assessment***

47. We considered the two requirements of Article 9 separately.

#### ***Notification***

48. Articles 9(1), 9(2) and 9(3) of the Order are broadly duplicated by CCD Articles 12 and 18. The CCD requires that customers are 'kept regularly informed by means of a statement of account' of 'any [authorized overdraft] charges that have been applied' (Article 12) and 'in the event of a significant overrunning [ie an unauthorized overdraft] exceeding a period of one month' are informed 'without delay' of 'any penalties, charges or interest on arrears applicable' (Article 18).
49. In comparing the relative strength of the provisions of the CCD compared with the Order, we have noted the following points:
- (a) The requirement of the CCD to keep customers regularly informed about authorized charges or interest is not as prescriptive as Article 9(2) in the Order which requires such charges and interest to be advised within one month. However, we are satisfied that the effect is similar in practice.
- (b) The guidance on the regulations implementing the CCD produced by BIS<sup>10</sup> has interpreted the term 'significant overrunning' quite widely as it includes circumstances where the consumer is liable to pay a charge and where the position is likely to have an adverse effect on the account holder's ability to receive further credit.

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<sup>10</sup>Guidance on the regulations implementing the Consumer Credit Directive, August 2010, BIS, p79.

(c) The condition of the CCD that the overrunning must have continued for a month before notification is made without delay is not as strong as Article 9(1) of the Order, which applies to any unauthorized overdraft period.

50. We are not able to go further than the requirements of the CCD and we assess the operation of the 14-day notice period in this context.

#### *Fourteen-day notice period*

51. Articles 9(4) and 9(5) of the Order are outside the scope of the CCD because the CCD does not cover how and when charges and interest are to be applied to an account. However, the 14-day notice period in the Order is 'triggered' by the actual notification of the charge being incurred. As noted in the main report, we can no longer rely on the notification provisions of the CCD (see paragraphs 47 to 49). We need to ensure that an effective trigger can be retained without being in conflict with the CCD. The most effective way to do this is to tie the requirement to the notification required by the CCD Articles 12 and 18.
52. We considered whether the requirements of the Order are covered by other regulations. We noted that paragraph 60 of the Lending Code requires customers to be given at least 14 days' notice before taking overdraft interest and that it appeared likely to be extended to include charges from 1 April 2011.

#### **Article 5: Duty to communicate clearly**

53. Article 5 requires that standard forms of information that are to be provided to a customer when choosing a PCA, opening a PCA or for the purpose of notifying a customer of charges and interest that will be applied to a PCA are easy to understand by the average customer. This requirement can be met by ensuring that information is either certified as easy to understand by an independent organization specializing in plain English or otherwise tested with customers and found to be easily understandable:

(1) In this article:

(a) a 'Specified Written Communication' means any of:

- (i) a Statement;
- (ii) a Written Communication that is made for the purpose of assisting a Customer or a potential Customer when choosing a PCA;
- (iii) a Written Communication that is made at the same time as when a Customer or a potential Customer is opening a PCA; and
- (iv) a Written Communication that is made for the purpose of notifying a Customer of the imposition of Charges and Interest that will be applied to his PCA;

but in all cases does not include any part of a communication that consists only of the terms and conditions of a PCA.

- (b) 'Standard Text' means a form of standard wording (including a template) that is used on multiple occasions by a Bank as a basis for its Specified Written Communications, including in: books; catalogues; leaflets; web pages; Statements; letters; emails and text messages.
  - (c) Standard Text shall be considered to have been 'tested with Customers' if:
    - (i) the Standard Text has been tested with a sample of the Bank's Customers which is representative of the type of Customer to whom the Specified Written Communication containing that particular Standard Text will be directed;
    - (ii) the test has been carried out by an independent and expert market research organization; and
    - (iii) that market research organization has produced a report stating whether or not the average respondent found the Standard Text to be easy to understand.
- (2) A Bank can only make a Specified Written Communication that contains Standard Text if such Standard Text is easy to understand by the average Customer and/or the average potential Customer to whom it is intended the Standard Text will be directed.
- (3) Standard Text is only 'easy to understand by the average Customer and/or the average potential Customer' if:
  - (a) the Standard Text has been either:
    - (i) certified as such by an independent organization specializing in plain English; or
    - (ii) tested with Customers and found to be easy to understand; and
  - (b) the Standard Text has been approved to the satisfaction of the BCSB as being easy to understand.
- (4) A Bank shall not make a Specified Written Communication that contains Standard Text that is easy to understand in accordance with paragraph 3 when such Standard Text has been materially changed, unless:
  - (a) such materially changed Standard Text is easy to understand by the average Customer and/or the average potential Customer in accordance with paragraph 3; or
  - (b) the Bank notifies the BCSB of the proposed changes to the Standard Text and obtains approval from the BCSB that such amended Standard Text is easy to understand to the satisfaction of the BCSB which the BCSB may give at its discretion with or without requiring the Bank to comply with the requirements set out in paragraph 3.

(5) Whether there has been a material change to Standard Text for the purpose of paragraph 4 depends on all the circumstances but for the avoidance of doubt, does not include:

(a) changes to figures and amounts relating to offer dates, Interest Rates, Charges and other fees which do not affect the overall meaning of the Standard Text that has not otherwise been changed;

(b) the correction of typographical errors; and

(c) changes to a logo or other decorative graphics.

### ***Views of banks and third parties***

54. Six banks told us that requirements for communications to be clearly understood were set out in the PSD and CCD and that there was some duplication with the Order. Three banks noted that the requirement to communicate clearly was also covered by the Lending Code, paragraphs 13, 20 and 52. Three banks also referred to BCOBS rules in Chapter 2 which required communications and financial promotions to be 'fair, clear and not misleading'.

### ***Our assessment***

55. The requirement to communicate clearly in Article 5 covers the information requirements of Articles 6, 7, 8 and 9. In the main body of the report we set out how we will vary or revoke those parts of the Order, but here we consider the extent to which the requirements of Article 5 generally overlap with or exceed the requirements of the PSD and CCD. We also consider the other regulations and voluntary arrangements that deal with communication with PCA customers.

56. We noted that the requirement of PSD Article 41 is that information 'should be given in easily understandable words and in a clear and comprehensible form'. This requirement applies to pre-contractual and post-contractual information. However, there is no equivalent requirement to Article 5(1)(c) of the Order and the PSD alone does not require that the clarity of any communication be certified by an independent body or tested with customers.

57. We made a similar assessment of the requirements of the CCD to communicate in a clear, precise and prominent way noting that, although the intention was similar to that of the Order, there was no objective test as laid out in Article 5(1)(c).

58. Where we have decided that parts of Articles 6, 7, 8 or 9 are in conflict with or duplicate the PSD and/or CCD, then in our view we would not be able to apply any higher communication standard than set out in the PSD and CCD. Where parts of the Order are outside the scope of the PSD and CCD, then we are able to apply the full standards of Article 5 provided it remains both practicable and proportionate and we discuss our approach in the main report.

59. We noted that there are standards of communication applied to some of the other mandatory and voluntary regulations relating to PCAs.

60. Chapter 2 of BCOBS sets out rules (and guidance) relating to the communication with PCA customer. Rules 2.2.1 and 2.3.1 which are of most relevance are set out below:

Rule 2.2.1: A firm must take reasonable steps to ensure that a communication or a financial promotion is fair, clear and not misleading.

Rule 2.3.1: A firm must ensure that each communication made to a banking customer and each financial promotion communicated or approved by the firm:

(1) includes the name of the firm;

(2) is accurate and, in particular, does not emphasise any potential benefits of a retail banking service without also giving a fair and prominent indication of any relevant risks;

(3) is sufficient for, and presented in a way that is likely to be understood by, the average member of the group to whom it is directed, or by whom it is likely to be received; and

(4) does not disguise, diminish or obscure important information, statements or warnings.

61. We found that the intention of these rules was very similar to that of the Order but that there was no comparable standard to that set out in Article 5(1)(c) of the Order. In our view, this means that although these rules are enforceable, they do not match the requirements of the Order.

62. The Lending Code also sets out standards for communication and extracts of the relevant parts of the paragraphs are given below:

*Paragraph 13:*

- Subscribers will make sure that advertising and promotional literature is fair, clear and not misleading and that customers are given clear information about products and services.
- Customers will be given clear information about accounts and services, how they work, their terms and conditions and the interest rates that apply to them.

*Paragraph 20:*

To ensure financial promotions and communications are clear, fair and not misleading subscribers should have regard to:

- presenting information in plain language and wherever possible avoiding the use of technical or legal language
- the way the communication or financial promotion is being made e.g. direct mail, letter, email, text message, branch or web material
- the type and complexity of information that is being presented, the actions the information might elicit from the customer, the channels by which the information is accessible and the passage of time, if any, since the information was last provided
- the appropriate format and content of the communication based on its intended audience. For instance, a communication to a personal

customer might include different information to that for a micro-enterprise, where needs may differ.

*Paragraph 52:*

When providing customers with information, before a contract is entered into, about a current account offering an overdraft facility, subscribers should include clear, fair and not misleading information outlining the availability of the overdraft, including whether there are qualifying criteria for accessing the overdraft.

63. In our view, these standards are voluntary and no objective standard of measurement has been set out, in contrast to Article 5(1)(c) of the Order.
64. We also noted the progress that has been made in clearer communication in other ways since the Order was made. This has included Moneymadeclear leaflets produced by the FSA.<sup>11</sup>

### **Article 10: Provision of switching information**

65. Article 10 requires that banks must provide customers with clear and prominent wording on an annual summary advising them that they can close a PCA and switch to another bank and specifying where they can find further information. Banks must also include a leaflet explaining how to switch a PCA to another bank:
  - (1) A Bank shall include wording in the Annual Summary that clearly and prominently states that:
    - (a) a Customer can close the PCA and seek to obtain PCA services from a different Bank; and
    - (b) specifies where the Customer can find further information on the process of how to do this.
  - (2) At the same time and together with the provision of an Annual Summary, in accordance with Article 8, paragraph 1, a Bank shall provide the Customer with a Switching Leaflet.
  - (3) The Switching Leaflet mentioned in paragraph 2:
    - (a) shall be developed and maintained in accordance with the requirements set out in paragraph 4;
    - (b) shall be approved to the satisfaction of the BCSB as being easy to understand by the average Customer which approval the BCSB may give at its discretion with or without requiring the Banks collectively to comply with the procedure set out in paragraph 3 of Article 5; and
    - (c) shall include:

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<sup>11</sup>These are guides in plain English produced by the FSA to explain the basic features of financial products and the rights of customers. A link to an example on bank accounts is given here: [www.moneymadeclear.org.uk/pdfs/your\\_bank\\_account.pdf](http://www.moneymadeclear.org.uk/pdfs/your_bank_account.pdf).

- (i) an explanation of the details of the current switching process including any changes expected to be made to the switching process in the following six months;
  - (ii) a statement explaining that using the Bank's Switching Service helps Customers to switch their PCA to another Bank; and
  - (iii) an explanation that Customers are not charged for switching.
- (4) The requirements mentioned in sub-paragraph 3(a) are that:
- (a) each Bank will use its best efforts to develop and when necessary update the Switching Leaflet together with all other Banks under the coordination of the BBA;
  - (b) each Bank will provide such assistance and resources for the development and updating of the Switching Leaflet as reasonably requested by the BBA (including any costs of the BCSB associated with the approval procedure in sub-paragraph 3(b)); and
  - (c) each Bank will regularly review the Switching Leaflet (in any event at least once in every six months) to ensure that it reflects the Bank's current switching process and where the Switching Leaflet does not reflect this process the Bank will report this difference to the BBA with a view to updating the Switching Leaflet in accordance with sub-paragraph (a).

### ***Views of banks and third parties***

66. Northern and Halifax told us that if Article 8 was in conflict with the PSD, this raised the question as to whether Article 10 was also a departure from the provisions of the PSD and could not be enforced. Northern told us that this was because Articles 10(1) and 10(2) set out the information to be included within the Annual Summary which is the subject of Article 8.<sup>12</sup> Halifax told us that it thought the conflict applied only to Article 10(1) and not the other provisions. No other banks raised such issues in relation to the existence of the provisions of Article 10. First Trust referred to section 5.12 of the Industry Guidance<sup>13</sup> which sets out that a new bank should provide the customer with a switching guide setting out how the process of switching will work and how long it is likely to take.
67. Banks put forward a number of possibilities for how the provision of the switching information could be triggered. These included providing it:
- (a) with the OFT's annual summaries (mentioned by four banks);
  - (b) with a monthly customer statement (mentioned by four banks);
  - (c) with half-yearly Financial Services Compensation Scheme (FSCS) mailings or as a separate mailing (mentioned by four banks); and

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<sup>12</sup>Nevertheless Northern told us that it had voluntarily issued an Annual Statement to customers on 30 June 2010.

<sup>13</sup>The BBA, the BSA and Payments Council jointly issued Industry Guidance that sets out in more detail how firms can achieve adherence to BCOBS.

(d) in branch, online or on request (mentioned by one bank).

68. In response to our provisional decision, Barclays and the BBA submitted that it was not necessary to establish a formal trigger for sending out the annual rights reminder and switching leaflet. Both expressed a concern that this could increase costs and thought that banks should be allowed to mail the switching rights reminder and leaflet direct to each customer without a statement or annual summary if they chose to. In such circumstances, Barclays proposed that the information should be prominent and not merged with or subordinate to any other message with which it might be combined. In addition it suggested that without this flexibility the clarity and certainty of the communication might be reduced.
69. The CCNI told us that it was important that switching information was presented to consumers in a logical way and related to information on their annual summaries. It said that this would enable them to evaluate the information easily and make a decision to shop around for alternative products. It therefore proposed that, as banks had voluntarily committed to providing annual summaries, the switching information should be provided to consumers at that point.

### **Our assessment**

70. The provision of switching information in Article 10 of the Order is outside the scope of the PSD and CCD. However, the provision of switching information is 'triggered' by the requirement to provide an annual summary in Article 8. As set out in the main report, Article 8 is in conflict with the PSD and CCD. This means that an alternative way of describing the 'trigger' for the switching information needs to be found in order for the requirements of Article 10 of the Order to remain effective.
71. We reviewed Industry Guidance 5.12 and noted that this is not mandatory. Although this sets out that a bank is to provide a new customer with a switching guide, this is only required to take place at the point where the decision to switch has been made and is to be provided by the new bank. This guidance does not mean that all customers receive a switching leaflet annually from their existing bank as required by the Order nor does this switching leaflet accompany any kind of statement provided to the customer. We have not identified any other regulation or voluntary agreement that covers the requirements of Article 10.
72. We set out an alternative trigger mechanism in the main report.

### **Article 11: Switching provision**

73. Article 11 requires that any customer switching a PCA must be offered an interest- and charge-free overdraft with the new bank for at least three months:
- (1) In this article:
- (a) a 'New Bank' means a Bank to which a Customer switches his PCA using the Switching Service;
  - (b) an 'Old Bank' means a Bank from which a Customer switches his PCA away using the Switching Service;
  - (c) a reference to an 'Eligible Customer' is a reference to a Customer switching to a New Bank using the Switching Service, who would be eligible for an Authorized Overdraft at the New

Bank in accordance with the New Bank's usual credit assessment criteria; and

- (d) 'Switching Literature' means the Switching Leaflet and any other document that advertises a Bank's Switching Service and any incentives to switch.
- (2) A New Bank will offer an Eligible Customer an Authorized Overdraft at a level:
- (a) applying the New Bank's usual credit assessment criteria; and
  - (b) that takes into account the expected number and level of direct debits and standing orders that the Eligible Customer will make on his PCA as notified to the New Bank during the switching process.
- (3) If an Eligible Customer accepts an Authorized Overdraft offered by a New Bank in accordance with paragraph 2, the New Bank will not apply or levy any Interest and/or Charge on such Authorized Overdraft facility for a period of at least three months from the date the Eligible Customer opened the PCA with the New Bank.
- (4) In the circumstances set out in paragraph 5, a New Bank shall refund any Interest and/or Charge incurred on a PCA held at the New Bank as a result of a failure in the switching process carried out in accordance with the Switching Service, to the Customer within a reasonable period of time, regardless of whether or not the Interest and/or Charge were incurred as a result of an error by the New Bank.
- (5) The circumstances are where:
- (a) an Eligible Customer declines an Authorized Overdraft offered by a New Bank in accordance with paragraph 2; or
  - (b) a Customer is not eligible for an Authorized Overdraft.
- (6) An Old Bank shall refund any Interest and/or Charge incurred on a PCA held at the Old Bank as a result of a failure in the switching process carried out in accordance with the Switching Service, to the Customer within a reasonable period of time, regardless of whether or not the Interest and/or Charge were incurred as a result of an error by the Old Bank.
- (7) A Bank shall include, in its Switching Literature, a reference to:
- (a) the availability of an Authorized Overdraft in the circumstances provided for in paragraph 2; and
  - (b) the refund of any Interest and/or Charge provided for in paragraphs 4 and 6.

## ***Views of banks and third parties***

74. Some banks noted that the switching provisions of the Order overlapped with a number of other regulations:
- (a) Six banks noted that BCOBS rule 5.1.5 and Industry Guidance 5.12 covered aspects of the switching process.
  - (b) HSBC referred to the EU Switching Principles, which are described in paragraph 3.30 of the main report.

## ***Our assessment***

75. The switching provisions of Article 11 of the Order are largely outside the scope of the PSD and CCD. However, in our view, the requirement in Article 11(2)(b) of the Order<sup>14</sup> to grant an authorized overdraft based on the level of expected transactions exceeds the requirements of Article 8 of the CCD which only requires that, before a credit agreement is concluded, an assessment of the consumer's creditworthiness is made 'on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant (credit) database'.
76. We did not find that the effect of the Order would be materially diminished if this part of the Order did not apply because a new bank is still required to offer a customer an authorized overdraft at a level that applies the new bank's usual credit assessment criteria under Article 11(2)(a).
77. We considered whether other regulations or voluntary agreements duplicated Article 11 of the Order. We did not identify any other provisions that would ensure that an eligible customer switching an account would be offered a free authorized overdraft. We noted that the EU Switching Principles set out that customers will not be subject to any fees imposed by banks as a result of the banks' own errors<sup>15</sup> and that this is implemented in the Industry Guidance 5.12. This is similar to Article 11 but in our view is not as effective in remedying the AEC identified in the Northern Ireland PCA market. The requirement of the Order goes further than the guidance and states that the requirement to refund charges and interest to the customer is 'regardless' of whether this was the result of an error by the bank (Article 11(6)). In addition, the monitoring and enforcement powers in relation to the Order are stronger and more effective than those which relate to guidance.
78. In our view, the requirements of Article 11 in order to remedy the AEC are more specific than any of the alternative mandatory or voluntary regulations we have identified.

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<sup>14</sup>Article 11(2)(b) of the Order requires a new bank to offer a customer an authorized overdraft at a level that takes into account the expected number and level of direct debits and standing orders that the customer would make on their PCA.

<sup>15</sup>EU Switching Principles Section 4d.