

## Explanatory note to accompany The Northern Ireland PCA Banking Market Investigation Order 2011

(This note is not part of the Order)

### Introduction

1. On 15 May 2007, the Competition Commission (CC) published its report on its investigation into the market for personal current account (PCA) banking services in Northern Ireland (the Report). The Report set out a number of remedies to address the adverse effects on competition that it found. The CC made the Northern Ireland PCA Banking Market Investigation Order 2008 (the 2008 Order) to give effect to these remedies.
2. The remedies in the 2008 Order were designed to develop competition in the Northern Ireland PCA banking services market by helping customers make informed choices about PCAs. They included a requirement for providing better and clearer information to customers to help them understand Banks' PCA services, charges and interest rates. Other remedies required giving customers at least 14 days' notice before deducting overdraft charges and interest from their account; and introduced improvements to the switching process to ensure that customers who switch banks do not incur costs in doing so.

### Review of the 2008 Order

3. The Office of Fair Trading (OFT) has a general duty to monitor the operation of a CC enforcement order under [section 162](#) of the Act. This includes the duty to consider, from time to time, whether an enforcement order should be varied or revoked in the light of a change of circumstances.
4. In May 2010 the OFT advised the CC that the coming into force of two European Union Directives, the Payment Services Directive (PSD)<sup>1</sup> and the Consumer Credit Directive (CCD),<sup>2</sup> constituted a change of circumstances making variation of the 2008 Order necessary.
5. On 10 January 2011 the CC published its final report setting out its reasons for deciding that by reason of a change of circumstances it was necessary to vary the 2008 Order by revoking it and making a new order, the Northern Ireland PCA Banking Market Investigation Order 2011 which reflects the change of circumstances. The CC made and published the Northern Ireland PCA Banking Market Investigation Order 2011 (the 2011 Order) on [*insert date here*].

---

<sup>1</sup>Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC.

<sup>2</sup>Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreement for consumers and repealing Council Directive 87/102/EEC.

## Variations to the 2008 Order

6. The approach taken by the CC in considering whether to make variations to the 2008 Order was to take into account the following three principles:
  - (a) Where the requirements of the Order are *in scope* of and *exceed* the requirements of the PSD or the CCD, we have revoked these parts of the Order because the PSD and the CCD are maximum harmonization directives. We examined whether existing voluntary arrangements or guidance may achieve any revoked elements of the Order not covered by the PSD or CCD.
  - (b) Where the requirements of the Order are *in scope* of and are *duplicated by or are duplicated in effect by* the requirements of the PSD or the CCD, we have revoked those requirements to avoid duplication of regulation except where it is necessary to retain the duplicated provisions to ensure that part of the Order remains an effective remedy.
  - (c) Where the requirements of the Order are *outside the scope* of the PSD and the CCD, we have retained the requirements of the Order unless there are other regulations or voluntary arrangements which are as effective as the Order or there are reasons of practicability or proportionality which mean that it is appropriate for those requirements to be revoked.
7. The following variations were made to the 2008 Order:
  - (a) Articles 1 and 2 of the 2008 Order have been amended to reflect the making of a new order and changes made to other Articles;
  - (b) Article 3 of the 2008 Order has been deleted in full;
  - (c) Article 4 of the 2008 Order is now Article 3 of the 2011 Order but is unchanged;
  - (d) Article 5 of the 2008 Order has been amended to remove the requirement for independent certification of text and is now Article 4 of the 2011 Order;
  - (e) Article 6 of the 2008 Order has been amended to revoke the requirement to give information on charges and interest rates when opening a PCA and is now Article 5 of the 2011 Order;
  - (f) Article 7 of the 2008 Order has been deleted in full;
  - (g) Article 8 of the 2008 Order has been deleted in full;
  - (h) Article 9 of the 2008 Order has been amended to require only the provision of a 14-day period between notifying overdraft interest and charges and deducting them from the customer's account and is now Article 6 of the 2011 Order;
  - (i) Article 10 of the 2008 Order has been amended to require only the provision of a switching rights reminder and leaflet and is now Article 7 of the 2011 Order;
  - (j) Article 11 of the 2008 Order is amended to remove the requirement to take into account the expected number of and level of direct debits and standing orders when offering an Authorized Overdraft and is now Article 8 of the 2011 Order;
  - (k) Articles 12 and 13 of the 2008 Order have been deleted in full as they are time-expired;

- (l) Article 14 of the 2008 Order is now Article 9 of the 2011 Order;
- (m) Article 15 of the 2008 Order has been amended to require compliance reports to be submitted to the OFT and is now Article 10 of the 2011 Order;
- (n) Article 16 of the 2008 Order has been deleted in full;
- (o) Schedule 1 of the 2008 Order has been amended to reflect the requirements of the CCD;
- (p) Schedule 2 of the 2008 Order has been deleted;
- (q) Schedule 3 of the 2008 Order is now Schedule 2 of the 2011 Order but is unchanged; and
- (r) A new Schedule 3 has been added to the 2011 Order to set out the format for compliance reporting to the OFT.

### **Status of this Explanatory Note**

- 8. Nothing in this Explanatory Note is legally binding. In the event of a conflict between this Explanatory Note and any provision of the 2011 Order, the 2011 Order shall prevail.

### **Structure of the 2011 Order**

- 9. The 2011 Order retains the structure of the 2008 Order but some parts have been deleted as a consequence of the changes made. This has led to many of the articles in the 2008 Order being renumbered in the 2011 Order.
- 10. Those articles of the 2008 Order that have been deleted in full are:
  - (a) Article 3, which specified the form of delivery of an Annual Summary or a Written Communication made to comply with Article 9 by a Bank to a Customer. This article is no longer relevant.
  - (b) Article 7, which set out the duty to provide information on the level of Charges and Interest Rates on Statements. This article has been deleted as the requirements exceeded the requirements of both the CCD and PSD.
  - (c) Article 8, which set out the duty to provide an Annual Summary. This article has been deleted as the requirements exceeded the requirements of both the CCD and PSD.
  - (d) Articles 12 and 13, which set out suspension provisions of the 2008 Order. These articles have time-expired.
  - (e) Article 16, which explained the funding of the Banking Code Standards Board (BCSB). This article is no longer relevant.
- 11. The 2011 Order is divided into four parts. Part 1 contains: general provisions including specifying when certain obligations in the 2011 Order come into force; definitions that are used throughout the 2011 Order; and a provision on the delegated powers of direction.

12. Parts 2 and 3 of the 2011 Order address those parts of the remedies set out in the Report that remain following the change of circumstances. Part 2 sets out the circumstances in which a Bank must provide certain information to its Customers. Part 3 requires a Bank to inform its Customers that they can switch to another Bank to obtain PCA banking services and provides a range of measures to protect consumers against any failures in the switching process.
13. Part 4 specifies when a Bank should provide information to the OFT and a Bank's duty to submit reports on its compliance with the 2011 Order to the OFT.
14. The rest of this Explanatory Note deals with each of the articles in the 2011 Order.

## **PART 1 (General)**

### **Article 1 (Citation and commencement)**

15. Article 1 has two functions. It gives the Order its name and it sets the date on which it comes into force.
16. Clauses 2 (a) and (b) of the 2008 Order have been deleted as these commencement dates have passed.

### **Article 2 (General interpretation, index of defined expressions etc)**

17. Article 2 contains a number of definitions applicable throughout the 2011 Order. Some definitions, which apply only to a particular article of the 2011 Order, are defined in that article.
18. The definitions in the 2008 Order remain largely untouched although some have been deleted as they are no longer relevant because the articles to which they relate have been deleted. Those deleted definitions include *Annual Summary*.
19. The definitions of *Authorized Overdraft* and *Unauthorized Overdraft* have been amended to reflect the corresponding definitions in the CCD. In the CCD, these terms are described as an 'overdraft facility' and 'overrunning'. In the terms used by the OFT in its PCA Market Study, an *Authorized Overdraft* means the same as an 'arranged overdraft' and an *Unauthorized Overdraft* means the same as an 'unarranged overdraft'. We have chosen to use the same terms as were used in the Report and the 2008 Order.
20. There is a new definition of 'Marketing Communication' which is relevant to the revised Articles 4 and 5.
21. The definitions associated with Charges and Interest have not been amended.
22. *Ancillary Charge*: An Ancillary Charge is a Charge for the provision of an ad hoc service requested by a Customer regardless of whether the PCA has a credit or debit balance. An ad hoc service includes, for example, making a CHAPS payment (Clearing House Automated Payment System) or when a Customer asks the Bank to stop a payment that has previously been requested. It is expected that the Customer will be informed of the Ancillary Charge for the service upon making the request, and in most cases will pay for the Ancillary Charge at this time. Neither Authorized Overdraft Charges nor Unauthorized Overdraft Charges are Ancillary Charges for the purposes of this Order. An arrangement fee for an overdraft would fall under the definition of a Maintenance Charge and not an Ancillary Charge.

23. *Written Communication:* A Written Communication is a communication in writing from a Bank to a Customer or potential Customer by any means and as such includes a communication made electronically such as by Short Message Service or by electronic mail.
24. *PCA:* The definition of PCA includes accounts held by individuals that offer all the facilities contained in the definition. The definition specifically excludes business accounts, basic bank accounts, foreign currency current accounts, offset/current account mortgages and offset/loan accounts (other than overdraft facilities). This means that not all types of bank account are covered in the Order.
25. *Customer:* A Customer is defined as a person holding a PCA (which had been available in Northern Ireland at the date of opening) and having a nominated address in Northern Ireland. The person's nominated address is the main contact address that the Bank holds for that person. In the event that the person holds a PCA which is attached to a physical branch of a Bank, that person is only a Customer for the purposes of the Order if that branch is located in Northern Ireland. For PCAs that are not attached to a physical branch (for example, Internet accounts and postal accounts), if a person had a nominated address in Northern Ireland at the time of opening his PCA, then that PCA would normally have been available in Northern Ireland at the date of opening.
26. *Bank:* A Bank is defined such that those banks having a small number of Customers in Northern Ireland will not fall within the definition of Bank and so will not be caught by the provisions of the Order.
27. The provisions of the Order place obligations on the Banks in relation to its Customers. Persons who have an account with a Bank covered by the Order but do not have a postal address in Northern Ireland will not be covered by the Order. The term a potential Customer is used in certain provisions of the Order and refers to any person that would be eligible to be a Customer.

### **Article 3 (Powers of direction)**

28. Article 3 is made under [section 87](#) of the Act as applied by [section 164\(2\)](#) of the Act. This was Article 4 in the 2008 Order.
29. The article gives the CC power to give directions to a person for the purpose of carrying out, or ensuring compliance with, the Order. The directions can be addressed to an individual or a company or can be addressed to the holder for the time being of an office in a company, for example, the secretary.

## **PART 2 (Information requirements)**

### **Article 4 (Duty to communicate clearly)**

30. Article 4 replaces Article 5 of the 2008 Order, which has been deleted. Article 5 of the 2008 Order set out the process for ensuring that communications to customers were 'easy to understand' in order to discharge the duty to communicate clearly.
31. Article 4 has a much narrower requirement than Article 5 of the 2008 Order. It provides that a bank must ensure that a Marketing Communication (as defined in Article 2) must be in easily understandable words and in a clear and comprehensive form. This reflects the requirements in the Banking Conduct of Business Sourcebook

(BCOBS)<sup>3</sup> regarding communications with customers and indicates that the same standard is expected here.

32. We note that other legislation, rules and guidance apply similar requirements (that information is easy to understand) to terms and conditions of a PCA (for example, The Unfair Terms in Consumer Contracts Regulations 1999 (see Regulation 7)).

### **Article 5 (Duty to provide details of Charges and Interest Rates to Customers when selecting a PCA)**

33. Article 5 amends Article 6 of the 2008 Order, which provided for the duty to provide details of Charges and Interest Rates to Customers when choosing and opening a PCA.
34. Article 5 specifies the information which must be provided when Banks are promoting PCAs. The term 'selecting' has been used in place of 'choosing' a PCA in order to differentiate between information which must be given before a consumer is bound by either an agreement for payment services or an Authorized Overdraft agreement and when information is given in marketing or promotional material.
35. Pre-contractual information for payment services is regulated by the PSD<sup>4</sup> and pre-contractual information for an Authorized Overdraft is regulated by the CCD.<sup>5</sup> However, neither directive prescribes what information needs to be given in documents which promote a PCA. Article 5 has therefore been amended to retain the requirements to disclose Interest Rates and charges for authorized and unauthorized overdrafts and for the provision of payment services in materials which promote a PCA.
36. Article 5 also takes account of the relationship between this Order and other disclosure requirements under consumer credit regulation. Article 5(1) sets out the primary obligation to provide the information leaving the choice of means to individual banks. Article 5(2) indicates how that obligation may be discharged, for example, by providing the information in branch or online and making reference to its availability in other marketing materials such as direct mail, oral advertising or posters and billboards promoting PCAs.
37. The nature of the information to be provided in paragraph 1(a) to (d) is unchanged from the 2008 Order. Banks are required to ensure that Customers are informed about Specified Charges and Interest Rates, which are set out in Schedule 1. The information to be provided includes the existence of and level of the Specified Charges and Interest Rates, the circumstances in which these would be incurred or applied, the time at which they would be applied and the way in which they would be applied. Banks are also required to disclose whether the Interest is calculated on a daily, weekly or monthly basis. If discretionary policies exist as to how Charges and Interest Rates apply to Unauthorized Overdrafts, a Bank is required to note such existence but is not required to give specific details.

---

<sup>3</sup><http://fsahandbook.info/FSA/html/handbook/BCOBS>.

<sup>4</sup>See Payment Services Regulations 2009 Part 5, regulations 36 and 40.

<sup>5</sup>Consumer Credit (Disclosure of Information) Regulations 2010.

**Article 6 (Duty to notify a customer before deducting overdraft charges and debit Interest)**

38. Article 6 amends Article 9 of the 2008 Order, which set out the duty to notify a Customer of overdraft charges and debit Interest.
39. Article 6 has been amended to remove the specification on how a customer must be notified of incurring an Authorized Overdraft Charge, an Unauthorized Overdraft Charge and/or debit Interest (paragraphs 1, 2 and 3 of Article 9 of the 2008 Order).
40. The requirement to notify remains and banks must not deduct an Authorized Overdraft Charge, an Unauthorized Overdraft Charge or debit Interest until at least 14 days have passed since the Customer was notified.
41. In the case where a Customer has requested the Bank to close the PCA, the Bank can make a deduction if account closure is less than 14 days since the date of the request to close the account.

**PART 3 (Switching)**

**Article 7 (Provision of switching information)**

42. Article 7 is Article 10 of the 2008 Order renumbered and amended to remove any references to the Annual Summary.
43. The requirement to provide switching information and a Switching Leaflet on an annual basis remains but there is no requirement to send it with an Annual Summary as the requirement to send an Annual Summary has been revoked. Banks may discharge the obligation to send the Switching Leaflet and switching information on an annual basis by including the switching information on a Statement annually or, with an annual summary of PCA activity a Bank may produce on a voluntary basis.
44. The requirement to produce a Switching Leaflet which explains in easy to understand language the operation of a Bank's switching process remains. This should be a generic document applying to all Banks. The Switching Leaflet should also be provided on an annual basis.
45. Each Bank is required to use its best efforts to develop and maintain the Switching Leaflet together with all other Banks under the coordination of the BBA.

**Article 8 (Switching provision)**

46. Article 8 is Article 11 of the 2008 Order renumbered and with a minor amendment.
47. The minor amendment requires a New Bank to offer an Eligible Customer an Authorized Overdraft at a level applying the New Bank's usual credit assessment criteria. This recognizes the obligation imposed by the CCD to undertake a credit assessment prior to providing an Authorized Overdraft.
48. The New Bank is prohibited from applying or levying Interest or Charges on Authorized Overdrafts for a minimum of three months from the date the Eligible Customer opened the PCA with the New Bank.

49. In certain circumstances relating to the provision of Authorized Overdrafts the New Bank is also required to refund any Interest and/or Charges incurred on a PCA at the New Bank as a result of a failure in the switching process.
50. Article 8 also requires the Old Bank to refund any Interest and/or Charges incurred on a PCA at the Old Bank as a result of a failure in the switching process.
51. Failure in the switching process means any failure which occurs due to the switching process and results in the wrong amount being credited or debited to a Customer's PCA, and/or delays in the application of credit and/or debit transactions to a Customer's PCA. Such circumstances may include delays and errors in the setting up of direct debit or direct credit facilities.
52. The article will apply whenever a Customer uses a Bank's Switching Service. A Bank is obliged to refund any Charges incurred due to a failure of the Switching Service where the Bank itself has identified such Charges or where a customer has brought such Charges to a Bank's attention (regardless of whether that customer can prove that the charge arises because of a failure of the Switching Service as opposed to an error on the Customer's part).
53. Banks are required to refund such a Charge within a reasonable period, this is a period that is reasonable in the circumstance but is not expected to exceed 30 days from the date on which the Bank establishes that such a Charge has been incurred.

#### **PART 4 (Supply of information and audit on compliance)**

##### ***Article 9 (Supply of information to the OFT)***

54. Article 9 is Article 14 of the 2008 Order renumbered.
55. The OFT has a general duty to monitor the operation of the 2011 Order under [section 162](#) of the Act. This includes the duty to consider, from time to time, whether the 2011 Order should be varied or revoked in the light of a change of circumstances. Nothing in the Order affects the OFT's duty to consider, from time to time, whether it is appropriate to advise that the Order should be varied or revoked by reason of a change of circumstances; nor does it affect the CC's ability to vary or revoke the Order on the basis of OFT advice under [section 161](#).
56. Article 9 and Schedule 2 of the Order requires a Bank on request to provide the OFT with information to allow it to monitor and review the operation of the Order.

##### ***Article 10 (Duty to submit reports on compliance with the Order to the OFT)***

57. Article 10 amends Article 15 of the 2008 Order.
58. Article 10 has been amended to remove the BCSB as an Approved Body for the purposes of carrying out a review of a Bank's compliance with the Order. This function will be undertaken by the OFT on the basis of simplified annual Compliance Reports. Banks are required to submit annual Compliance Reports to the OFT covering every Review Period. The Template for a Compliance Report is set out in Schedule 3.

## **Possible consequences of not complying with the Order**

59. [Section 167](#) of the Enterprise Act 2002 places a duty on any person to whom the 2011 Order applies to comply with it. Subject to the defences in the section, any person who suffers loss or damage due to a breach of this duty may bring an action.
60. [Section 167](#) of the Act also provides that the OFT and the CC can seek to enforce the 2011 Order by civil proceedings for an injunction or for any other appropriate relief or remedy.

Consultation Draft