

Questions and answers for OFT personal current account work

Updated 19 June 2009

Investigation and Test Case Update

1. When is the House of Lords appeal being heard?

The hearing will begin on 23 June and will last for 3 days.

2. What is the background to the appeal?

The OFT launched its bank charges investigation in April 2007. The investigation is looking into the fairness of personal current account unarranged overdraft charging terms under the Unfair Terms in Consumer Contracts Regulations (UTCCRs). In July 2007, the OFT entered into a written litigation agreement with seven banks, one building society¹ and the Financial Services Authority (FSA) with a view to bringing a test case to ensure an orderly and efficient process for resolution of the legal issues.

The case is in two stages. So far, the courts have considered stage 1: the issue of whether unarranged overdraft charging terms can be assessed for fairness under the UTCCRs. The Court of Appeal confirmed on 26 February 2009 the OFT's view that unarranged overdraft charging terms can be assessed for fairness. The court found that these terms are not part of the core or essential bargain between a consumer and their bank, and therefore consumers do have protection under the UTCCRs for these terms. It is this judgment that is being appealed by the banks. Stage 2 of the case addresses the issue of whether the terms are unfair (see below for details).

¹ Abbey National plc, Barclays Bank plc, Clydesdale Bank plc, HBOS plc, HSBC Bank plc, Lloyds TSB Bank plc, Nationwide Building Society, and the Royal Bank of Scotland Group plc. This selection of banks covers an estimated 90 per cent of the personal current account market.

3. Does the OFT think the banks' terms are unfair?

The OFT is currently investigating the issue of whether the terms are unfair. In August 2008, the OFT wrote to the seven banks and one building society setting out its approach to the assessment of fairness and, for seven of them², its concerns that the unarranged overdraft charging terms may be unfair. Following the banks' responses to that letter, the OFT's concerns remain and it is continuing to progress the investigation in order to reach a final decision on fairness. In March 2009, the OFT focused its investigation on three banks.

4. Why has the OFT decided to focus the investigation on three banks?

In order to progress the investigation in the shortest and most efficient way possible, the OFT has decided to concentrate initially on the unarranged overdraft charging terms of Lloyds TSB, HSBC and Clydesdale. It has written to all the banks under investigation to outline this decision.

The OFT believes that the terms of the three selected banks provide the best representative selection of all the banks' unarranged overdraft charging terms, and therefore the outcome of this more focused investigation will be relevant to the assessment of other banks' terms.

It should not be assumed that the OFT is more or less likely to find the unarranged overdraft charging terms of these selected banks unfair than those of the other banks.

5. What happens to the banks not selected?

The investigation into the other banks' terms is merely on hold. None of the banks' terms have been given a clean bill of health. The OFT is committed to resolving the issue of the fairness of the charges for all consumers as quickly and efficiently as possible.

6. How does the decision to focus on three banks affect the ongoing legal proceedings?

The investigation continues in parallel to any legal proceedings. If the investigation concludes that the banks' unarranged overdraft charging terms are

unfair, the OFT will work with banks to identify how any subsequent litigation can be managed sensibly and efficiently.

7. What is the next step in the investigation?

On 31 March 2009, the OFT issued the selected banks with a detailed request for financial and operational information relating to their unarranged overdraft charging terms, which will then need to be analysed in some detail.

8. The investigation appears to be taking a long time. Why is this?

The OFT has necessarily adopted a rigorous approach to its investigation. The timeline is largely dictated by the practical constraints of obtaining and analysing the required information from the banks. By streamlining the investigation to three banks, the OFT will progress it in the shortest possible time.

The OFT has strong working relationships with all parties, including the banking industry and regulatory authorities, to ensure continued support for the shared objective of determining the relevant issues as quickly as possible.

9. When does the OFT expect this matter to be finally decided?

The OFT expects to reach a final decision on the fairness of the unarranged overdraft charging terms later this year. If this decision is disputed, subsequent litigation may ensue.

10. Does part ownership of some of the banks by the government affect the investigation?

The investigation is unchanged by the part ownership.

11. Some banks have changed their terms and conditions, what does this mean for the test case and investigation?

The OFT is giving any changes due consideration.

² While Barclays is a signatory to the litigation agreement, it had introduced new terms during the investigation. So as not to delay our investigation unduly, we concentrated on the terms of the others.

12. Will the test case have any implications for other financial contracts such as for credit cards and business bank accounts?

The OFT's primary concern is whether the unarranged overdraft charging terms in banks' personal current account contracts comply with the UTCCRs. The judgments are important milestones in the process of establishing that. Of course, the extent to which the judgments (including on penalties) provide legal precedent for cases on other matters is something for consideration in relation to the particular circumstances of those cases.

13. Will the OFT be publishing all the court documents on its website? Wherever it can, the OFT will seek to publish the court documents.

Broadly speaking, the Civil Procedure Rules (CPRs) say that some documents - like particulars of claims - should be freely available publicly. They would usually be freely available from the court, but the OFT will seek to make them available on our website. The CPRs also say that the availability of other documents - such as the witness evidence and the skeleton arguments - is more restricted, and they are only available on specific application to the court.

To obtain a quote for copies of transcripts of court hearings, please contact the Case Management Department at Merrill Legal Solutions on (020) 7421 4010.

Copies of the documents can be found here at:

www.ofc.gov.uk/advice_and_resources/resource_base/market-studies/current/personal/personal-test-case/personal-documents

Complaints about charges

14. Are County Courts able to proceed with consumer cases?

The decision whether to hear a case or not lies with each individual court. Following the Court of Appeal judgement, Moore-Bick LJ, Deputy Head of Civil Justice, sent a letter to all Designated Civil Judges stating that there is much to be said for continuing the existing stays pending a decision by the House of Lords on whether the banks may appeal to the Court of Appeal decision and / or the outcome of the OFT investigation.

15. Will the FSA lift the Waiver?

To facilitate the test case, in July 2007, the FSA granted a number of firms a waiver. This means that firms that were granted the waiver do not have to deal with complaints about charges while the waiver is in force. The waiver does not interfere with the firms' obligations under the Banking Code, which sets out how businesses should deal with cases of financial difficulty.

In January 2009, the FSA extended its waiver for a further 6 months.

For further information, please see the FSA website:

www.moneymadeclear.fsa.gov.uk.

16. What does this mean for consumers?

If you have already made a complaint or are thinking of doing so, the FSA's website www.moneymadeclear.fsa.gov.uk has some guidance to help you. For information about your individual circumstances, speak to your bank or building society.

Overview of the OFT's work relating to personal current accounts

17. What work is the OFT doing relating to personal current accounts?

Personal current accounts are a vital gateway to effective participation in the economy. Since April 2007, following an initial review, the OFT has been looking at how well the market as a whole serves consumers, as well as the specific issue of the legality of unarranged overdraft charges.

In July 2008, the OFT published a market study into the state of the personal current account market. It established a complete picture of the market. It found that personal current accounts in the UK have many positive features:

- high levels of customer satisfaction
- many day-to-day services don't incur a charge, and
- internet and telephone banking makes it easier to manage accounts.

However there are a number of concerns which the OFT believes need addressing:

- low levels of transparency over unarranged overdraft charges and costs, coupled with a high proportion of banks' total revenues made on unarranged overdraft charges and costs
- the complexity of the charges makes it harder for consumers to control the costs they incur and some pay significant amounts (a significant group of consumers underestimate the level and frequency of banks' charges, and 1.4 million consumers paid over £500 in charges), and
- a general perception among consumers, not completely unfounded, that switching is complex and risky, contributing to low levels of switching between banks.

The study can be found, together with an executive summary, on the OFT website at www.of.gov.uk/pca.

The market study also provides additional context for the UTCCRs investigation which is looking into the fairness of unarranged overdraft charging terms.

18. I am happy with my account and don't incur charges, what is OFT doing to protect consumers like me?

The purpose of the investigation is to consider whether the unarranged overdraft charging terms are compliant with the UTCCRs, designed to protect consumers against unfair standard terms in contracts they make with businesses. To reach a view on this the OFT is looking at things like how much banks charge, and how they charge. However the OFT is not saying that banks can't charge people where appropriate.

The initial scoping work the OFT did on unarranged overdraft charging terms highlighted a number of concerns about the personal current account market that it decided needed to be considered in the context of the market as a whole. So, for example, the market study has considered the potential consequences for all consumers of any enforcement action in relation to the unarranged overdraft charging terms, to try and avoid any undesirable consequences as far as possible.

19. What if the banks start charging everyone for providing accounts?

The OFT is aware of concerns that more banks may change their charging structure, for example by introducing annual/monthly fees for providing accounts that aren't currently charged for in this way. Banks' decisions about how to charge for providing accounts are commercial decisions for them providing, of course, that any charges are clear and transparent and do not contravene consumer protection and competition legislation.

20. Why does the OFT want to see more people switching accounts?

Low switching rates have implications for both competition and efficiency. Where consumers are reluctant to change providers, firms have less incentive to compete vigorously. Also, new banks entering the market, offering potentially better deals, have less opportunity to expand.

When people do switch, the process tends to be relatively easy and trouble free, but a significant minority of consumers do have problems, particularly with direct debits and standing orders. What is worrying is that the market study survey found that this was more likely to be the case for those that used bank switching services than those that made their own arrangements.

21. What are the next steps with the market study?

The OFT has found there are problems with the personal current accounts market, particularly regarding the transparency of costs and consumers' ability to switch between accounts. It is currently trying to negotiate solutions to these problems with the banking industry.

The OFT would like to see solutions which result in:

- greater transparency in current account pricing that will enable active and informed consumers to drive competition amongst banks. This in turn will deliver efficiency in supply and value for consumers,
- greater consumer confidence in switching between PCAs, due to a reduction in the number of things that can go wrong in the process
- banks treating consumers sufficiently fairly and well, within a coherent self-regulatory framework or otherwise, that pre-empts the need for further regulatory intervention.

The OFT acknowledges steps the banking industry have taken to work with it to develop solutions to achieve these aims.

The OFT expects to publish a further report in late summer/early autumn. The aim is for a final report containing recommendations the banking industry will then take forwards. However the OFT will also be considering other routes to implement remedies should that not happen.

Other routes to implement remedies could include:

- recommendations to Government
- market investigation reference to the Competition Commission, and
- any action which can be taken under the UTCCRs or other consumer protection legislation.

22. How does the OFT's work on personal current accounts affect consumers in Northern Ireland and Scotland?

The OFT expects its work to be relevant for consumers right across the UK.

The market study covered the whole of the UK and the main UK banks. The OFT has not specifically focused on NI due to the recent Competition Commission report.³

The UTCCRs apply across the UK.

OFT, Financial Services Authority and Financial Ombudsman Service

23. What are the roles of the OFT, Financial Services Authority and Financial Ombudsman Service in all of this?

The OFT's role is to make markets work well for consumers. Its responsibilities include enforcement of the UTCCRs, where appropriate. The OFT does not have the power to intervene in individual disputes between consumers and businesses, rather, it is the OFT's duty to consider any complaint that a consumer contract term is unfair and, if appropriate, apply for an injunction from the court to prevent the continued use of that, or a similar, term.

³ This report found that consumers were not actively searching or switching in the NI personal current account market.

The Financial Services Authority (FSA) regulates the financial services industry and in particular deals with how banks handle complaints. Like the OFT, it does not handle individual complaints but it does have an interest in ensuring that complaints about past actions are satisfactorily dealt with. The FSA is a Qualifying Body under the UTCCRs, meaning it too has the power to enforce them, where appropriate.

The Financial Ombudsman Service (FOS) has responsibility for dealing with individual complaints by customers.

While all three organisations hold different roles, we have been working together to ensure that this process is well coordinated.