

Questions and answers for OFT personal current account work

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Overview

1. 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, we have been looking at how well the market as a whole serves consumers; as well as the specific issue of the legality of insufficient funds charges (unarranged overdraft maintenance, paid and unpaid item charges).

In July 2008, we published a **market study** into the state of the personal current account market. It establishes a complete picture of the market, drawing together current and past strands of work and building on the many developments already achieved in the industry, and determines that while 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.

There are a number of concerns which we believe need addressing:

- low levels of transparency over charges and costs, coupled with a high proportion of banks' total revenues made on charges and costs
- the complexity of the charges makes it harder for consumers to control the costs they incur (some pay significant amounts, 1.4million consumers paid over £500 in charges)
- a significant group of consumers underestimate the level and frequency of banks' 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 our website at www.of.gov.uk/pca.

The market study also provides additional context for our **Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) investigation**, launched in April 2007, which is looking into the fairness of personal current account contract terms providing for insufficient funds charges (the charging terms). A test case began in July 2007 to run alongside the investigation and ensure an orderly,

efficient and speedy process for resolution of the legal issues. Further information about this below.

Timeline

DATE	MILESTONE
7.9.06	Initial review into insufficient funds charges
26.4.07	Launched personal current account market study and UTCCRs investigation

	<u>Market study</u>	<u>UTCCRs investigation</u>	
		<u>Test case</u>	<u>Overall fairness investigation</u>
26.7.07		Commenced test case proceedings	↓
17.1.08		1st High Court hearing on preliminary issues	
24.4.08		1 st judgment delivered on preliminary issues	
22.5.08		Case Management Conference	
7.7.08		2 nd High Court hearing on preliminary issues	
16.7.08	Publication		
12.8.08			Wrote to banks with provisional views on fairness
8.10.08		2 nd judgment delivered on preliminary issues	

	Stakeholder consultation (until 31 October)	Banks' appeal on April judgment (starts 28 October) Further hearing on October Judgment including permission to appeal	Depends on outcome of investigation and banks engagement
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The test case process

2. Where does the test case process fit in?

In July 2007, the OFT entered into a written litigation agreement with seven banks, one building society ('the test case banks')¹ and the Financial Services Authority (FSA) with a view to bringing an early test case process, to run alongside our overall investigation. The aim of the test case process is to ensure that the complex legal issues are resolved in an orderly, efficient and speedy manner. By bringing this action on behalf of consumers we are seeking to gain the legal clarity necessary to achieve the fair and consistent handling of consumer complaints.

At the first stage, the court was asked to rule on certain legal points of principle in dispute between the OFT and the test case banks, the key aspect of which was whether the fairness of the charging terms can be assessed by the OFT under the UTCCRs. This is called the preliminary issues process.

¹ See Q9 for a list of banks taking part in the test case.

3. What was the judgment in the first preliminary issues hearing?

In April, the judge ruled² that the charging terms found in the test case banks' personal current account contracts in force as at the date on which the hearing commenced (that is 17 January 2008.):

- can be assessed for fairness under the UTCCRs³
- are largely in plain intelligible language,⁴ and
- are not capable of being penalties at common law.

The court was not asked to consider at this stage the question of whether or not the charging terms are actually unfair. We are considering this through our overall investigation and, if necessary, it will be dealt with at a second stage of the test case process.

At a case management conference in May, the judge gave the test case banks permission to appeal his finding that the charging terms can be assessed for fairness under the UTCCRs. The appeal will start on 28 October at the Royal Courts of Justice, Strand, London, WC2.

4. What was the judgment in the second preliminary issues hearing?

Because the April ruling was limited to current charging terms, a further hearing was held in July on a representative sample of the charging terms in the banks' historical and basic bank accounts (and certain other non-mainstream current accounts)

Historical terms and conditions are a representative selection of previous terms and conditions that are in dispute in the county courts between individual customers and the banks. Non-mainstream accounts include for example student and under 18 accounts.

² Judgment was delivered on 24 April. The full judgment can be found at www.oft.gov.uk/shared_oft/personal-current-accounts/Bank-charge-judgment.pdf

³ If a contract term is a so-called 'core term' (terms that relate to the definition of the main subject matter of the contract or to the adequacy of the price paid for the goods or services supplied in exchange) it will be exempt from the assessment for fairness under Regulation 6(2). The banks argued that charging terms were indeed 'core terms'.

⁴ Contract terms may also be assessed under the UTCCRs fairness test if they are not written in 'plain and intelligible language'.

In October, the judge handed down judgment⁵ in relation to the banks' historical and other non-mainstream account charging terms. The judge indicated that he will make a declaration that the terms can be assessed for fairness under the UTCCRS, and expect this shortly. The judge found that most of these terms are not capable of amounting to penalties at common law. However, he was not able to make a ruling in respect of Abbey's May 2005 conditions relating to its Instant Plus account, Lloyds TSB's terms, RBSG's terms or HBoS' Intelligence Finance accounts (he has invited further submissions in relation to all but the last of these). There will be a further hearing to deal with these submissions and the question of whether permission to appeal will be granted. This hearing will be fixed within the next 7 days.

5. When will there be a decision on fairness?

We are continuing to progress our investigation as quickly as possible. In mid-August, we wrote to each of the test case banks setting out our approach to the assessment of fairness and (except for Barclays where a view on its now current terms will come later) provisional views as to the unfairness of particular terms and conditions that impose charges.

At this stage, no bank's terms have been given a clean bill of health and all banks remain under investigation. The purpose of the letters is to start a dialogue with each bank to enable us to reach final conclusions as to whether the terms are unfair, and to identify which issues may need to be resolved in court proceedings (as envisaged in the litigation agreement between the OFT, FSA and banks).

6. Does reference to 'start a dialogue with the banks' mean that the OFT may simply do a deal with the banks behind closed doors?

No. We want to see fair treatment of consumers and are determined to achieve successful resolution for the benefit of consumers, including those with outstanding complaints. Our position is simply that, if we can resolve any concerns we have about the charging terms, (for example, if the banks provided satisfactory undertakings to the OFT) without the need for further, lengthy, court action, then this would be in the best interest of consumers. This is no different to the approach we would take in any UTCCRs or Enterprise Act 2002 case because the OFT is usually required to seek voluntary resolution before starting enforcement proceedings.

⁵ The judgment was delivered on 8 October. Full judgment can be found at www.oft.gov.uk/shared_of/personal-current-accounts/Bank-charge-judgement2.pdf

7. Barclays has recently changed its terms and conditions, what does this mean for the test case and investigation?

We are giving the changes made by Barclays due consideration.

8. 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 charging terms in banks' personal current account contracts comply with the UTCCRs. The judgments are important milestones in the process of establishing that, and any legal precedent that arises may be of more general application. Of course, the extent to which the judgments provide legal precedent for cases on other matters is something for consideration in relation to the particular circumstances of those cases.

9. Which banks are taking part in the test case process?

The following are parties who agreed with the OFT to take part in the test case:

- Abbey National plc
- Barclays Bank plc
- Clydesdale Bank plc
- HBOS plc
- HSBC Bank plc
- Lloyds TSB Bank plc
- Nationwide Building Society
- The Royal Bank of Scotland Group plc.

This selection of banks covers the bulk of the personal current account market (estimated to be over 90 per cent) and their terms and conditions are representative of contracts used currently in the retail banking market.

10. Will the OFT be publishing all the court documents on its website?

Wherever we can, we will seek to publish the court documents. Accordingly, we have published our particulars of claim (and schedules A and B), the banks' defenses, our reply and the judgments on the website.

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 we 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 judgments and other test case documents can be found here at: www.ofc.gov.uk/advice_and_resources/resource_base/market-studies/current/personal/personal-test-case/personal-documents

Outcomes

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

The purpose of our investigation is to consider whether the 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 we are looking at things like how much banks charge, and how they charge. However we are not saying that banks can't charge people where appropriate.

The initial scoping work we did on insufficient funds charges highlighted a number of concerns about the personal current account market that we 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 charging terms, to try and avoid any undesirable consequences as far as possible.

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

We are 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.

13. Why do you want to see more people switching accounts?

Low switching rates have an implication on 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 in our market study survey this was more likely to be the case for those that used bank switching services than those that made their own arrangements.

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

We have identified a number of issues which we feel warrant further in-depth discussion with the industry prior to deciding on the next appropriate step. We have published a consultation paper setting out these issues and some thoughts on potential measures to address them. We plan to consult with the industry for a minimum of three months during which time we hope to have meetings with interested parties so that all the issues raised in the study and potential measures to address them can be discussed.

We will then collate responses to the consultation and publish a formal summary of these. Depending on the outcome and progress of the consultation we hope to publish a further report early in 2009. Our aim is for a final report containing recommendations the banking industry will then take forwards. However we will also be considering other routes to implement remedies should that not happen.

We would like to see remedies which result in:

- greater transparency in current accounts 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
- banks treating consumers sufficiently fairly and well, within a coherent self-regulatory framework or otherwise, that pre-empts the need for further regulatory intervention.

We hope that we can have an informative debate with the banks on the matter of forward solutions and will look to carry on the goodwill gained from the OFT chaired Payments Systems Task Force and Credit Card Comparisons Project. These have and will lead to positive changes to the UK banking system. Other routes to implement remedies could include:

- changes to banking code
- 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.

15. How does your work on personal current accounts affect consumers in Northern Ireland and Scotland?

We expect our work to be relevant for consumers right across the UK.

The market study covered the whole of the UK and the main UK banks. We have not specifically focused on NI due to the recent Competition Commission report.⁶

The UTCCRs apply across the UK.

OFT, Financial Services Authority and Financial Ombudsman Service

16. 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 a term, or similar term.

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.

⁶ Which found that consumers were not actively searching or switching in the NI personal current account market.

Consumer complaints about charges

17. What happens to those wanting to reclaim, or in the process of reclaiming charges?

If consumers believe they have been wrongly or unfairly charged by their bank, they should raise the issue with their bank in the first instance.

The normal complaint channels have been affected by the test case process as follows:

Prior to the test case, some customers were being refunded charges when complaining, others were not. To facilitate the test case, in July 2007, the FSA granted a number of banks a waiver. This means that banks (and building societies) 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 banks' obligations under the Banking Code, which sets out how businesses should deal with cases of financial difficulty.

In July 2008, the FSA offered banks a new waiver. The key points of the waiver include:

- a duration of 6 months and a review early in 2009
- continuation of the FSA's consumer protection measures including record keeping requirements and a suspension of the limitation period for making a complaint
- additional guidance on the identification of those complainants in financial difficulty
- enhanced monitoring of firms focusing on consumers' experience while the waiver is in place.

For further information about complaint handling, please see the FSA website: www.moneydeclared.fsa.gov.uk/.

For the time being, the FOS has decided not to progress complaints or deal with new ones, other than in hardship cases.

The courts may also 'stay' (put on hold) claims made to them. Whether and when those stays are lifted is for the courts to decide.

18. Why can the banks continue to levy charges?

As we have not yet concluded our investigation, it would not be appropriate for us to ask banks to make changes to their charging structure at the present time.