

OFT Statement

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

There is widespread concern about whether current accounts provide value for the UK consumer, and in particular whether unauthorised overdraft charges and returned item fees are fair.

The best way to get a good outcome for consumers is to ensure that consumers understand what they are paying and can vote with their feet and move to banks that offer better value for money.

To achieve this outcome, we launched an investigation into the fairness of personal current account unauthorised overdraft charges and returned item fees under the Unfair Terms in Consumer Contracts Regulations 1999 ('UTCCRs').

In parallel we also launched a market study in April to consider the wider questions about competition and value for money in the provision of personal current accounts, such as:

- Transparency of costs to consumers
- Ease of switching
- Fairness of pricing structure

2. Where does the test case fit in?

One aspect of our work is considering whether unauthorised charges and returned item fees meet the fairness requirements of the UTCCRs. We believe that the test of unfairness under reg 5 of the UTCCRs applies to such charges, but the banks dispute this. We are filing papers today to have this point of law clarified. We believe we have a strong case. In the meantime, we are collecting financial information from the banks to allow us to assess whether the levels of these charges are indeed fair.

If, in the light of this information, the OFT decides that it is appropriate to take enforcement action because it finds the charges to be unfair but is not able to secure voluntary compliance, it will expand the court case to include a claim for a ruling that the charges are unfair.

3. Why is the OFT launching a test case?

Tens of thousands of complaints that unauthorised overdraft charges and returned item fees on current accounts are unfair have been received by the county courts and the Financial Ombudsman Service. The banks do not accept that the legal test of unfairness set out in unfair contract terms legislation applies to the charges.

The OFT believes that it does and is seeking to establish this legal principle clearly in the court.

The OFT considers that a quick determination of this point of principle will assist in securing a clear and orderly resolution of the fairness of these charges.

4. What will the test case cover?

In assessing whether the charges are consistent with the UTCCRs:

- The first step is to assess whether the charges are subject to the test of unfairness,
- The second step is then to consider whether the amount of the charges is unfair.

The OFT's legal action addresses the first point by seeking to establish that the provisions of the UTCCRs that deal with unfairness apply to unauthorised overdraft charges.

The legal action will encompass a representative selection of the banks current and previous terms and conditions.

This first stage of legal action is also expected to cover some additional points of legal principle: in particular whether these charges can be a penalty at common law.

5. How is the test case structured?

OFT has entered into a written agreement with seven banks, one building society and the Financial Services Authority aimed at ensuring that this inevitably complex process is orderly and well coordinated.

In particular, while recognising that the management and timing of litigation are ultimately matters for the court to decide, the agreement includes the following commitments:

- The banks have undertaken to co-operate with the OFT in its conduct of the UTCCRs investigation and expeditiously to provide documents and information sought by the OFT in so far as practicable.
- If, in the light of the investigation, the OFT decides that the charges are unfair and, as a result, requires the Banks to do anything which they are not prepared to undertake to do in connection with the charges, then the OFT may amend its court documents so as to include a claim for a court ruling that the charges are unfair and for appropriate relief against the banks, such as a declaration or an undertaking to the Court or a final injunction or enforcement order.
- All the Parties are committed to progressing the court proceedings speedily and have agreed to seek a trial as soon as reasonably practicable. A timetable for the exchange of court documents has been agreed to help achieve this.
- The parties have agreed that each party is to pay its own costs of the court action.

6. What is the benefit of OFT starting now with a test case on legal principles rather than waiting until it is ready to take enforcement action?

It should reduce the time taken to reach an outcome.

If the OFT waited until it could take enforcement action, it is quite likely that the court would then want to take the legal principle we are pursuing now as a preliminary issue: pursuing it now saves time.

The agreement between OFT and banks commits all parties to seek a resolution of the issues, and in particular a trial, as soon as is reasonably practicable and to seek to have any appeals heard on an expedited basis.

If the OFT takes the lead in taking action now to clarify the law, this should help achieve an orderly and expeditious resolution of all of the relevant issues.

7. How does this affect consumers in Northern Ireland and Scotland?

The unfair contract terms regulations apply across the UK and the outcome of the test case will be important for consumers right across the UK. On individual claims, other aspects of court cases may be different in Scotland.

8. Which banks are taking part in the test case?

The following are parties to the agreement with OFT for the test case:

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

This selection of banks covers the bulk of the PCA market (estimated to be over 90 per cent) and their terms and conditions are representative of agreements used currently in the retail banking market and of previous agreements of the kind which are in dispute in County Court claims.

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

OFT's responsibility is to make markets work well for consumers. This includes enforcement of the UTCCRs, where appropriate. However the OFT does not have the power to intervene in individual disputes between consumers and businesses.

Financial Ombudsman Service has responsibility for dealing with individual complaints by customers.

Financial Services Authority deals particularly with how banks handle complaints, both assessing past performance and (as in the case of the present waiver) in giving directions going forward. The Financial Services Authority, like OFT, does not handle individual complaints but it does have an interest in ensuring that complaints for past actions are satisfactorily dealt with. The FSA is a qualifying body under the UTCCRs.

10. How will you ensure joined up working with the Financial Services Authority and Financial Ombudsman Service?

We have a formal working agreement. The Wider Implications Process (WIP) is an arrangement under which complaints to the Financial Ombudsman's Service are identified as having wider implications that need to be dealt with by the FSA, OFT, or possibly both. This action represents the first use of the WIP involving the OFT.

11. What happens to those wanting to, or in the process of reclaiming charges while the case is going on?

It will be for the courts to decide in relation to claims made to them.

The Financial Services Authority has issued a 'waiver' from its complaints handling rules. This action means that until the test case is resolved any bank or building society that applies for the waiver will not be required to handle complaints relating to unauthorised overdraft charges.

The UTCCR's law is one factor that the Financial Ombudsman Service must take account of when making its decisions. As this action is expected to provide certainty about the law, the Financial Ombudsman Service has decided not to progress complaints about current account charges until the outcome of the legal action is known.

12. When is OFT going to bring any enforcement action into the process?

We hope to have come to a view on fairness by about the end of the year.

We would then take appropriate steps to enforce our view, including enforcement action if the banks do not voluntarily co-operate.