



## Variation of Direction

To: ("the firm")

Ref: xxxxxx

Of:

Date: 26 January 2009

**Handbook Version as in force at the date of this Direction, except as otherwise stated**

### Introduction

1. The Office of Fair Trading ("**OFT**") is undertaking an investigation into the fairness or otherwise of certain terms in personal current account agreements. In summary, these are terms providing for charges applied by a personal current account provider upon customers who seek to make payments for which they do not have available funds in the account and whose overdrafts have not been agreed by the provider in advance ("**unauthorised overdraft charges**"). The number of complaints received by *firms* concerning the level, fairness or lawfulness of these charges under personal current account agreements (a "**relevant charges complaint**") is large, as is the number of complaints and claims regarding these charges taken to the *Ombudsman* and to the courts.
2. The OFT and certain banks and one building society (the "**banks**") have brought legal proceedings in the High Court of England and Wales to resolve legal uncertainties concerning the level, fairness and lawfulness of unauthorised overdraft charges (the "**test case**"). Those banks have also sought a stay of all current and future court proceedings against themselves regarding these charges (a "**court stay**") and have requested the *Ombudsman* not to proceed with consideration of the merits of the relevant charges complaints referred to him until the resolution of the test case.



3. The *FSA* may, on the application or with the consent of a *firm*, direct that *rules* applicable to the *firm* are not to apply to the *firm* or are to apply with modifications. Such *rules* include how *complaints* are to be dealt with by *firms* (in *DISP*).
4. For such a direction to be made the *FSA* must, under section 148(4) of the *Act* be satisfied (a) that compliance by the firm with the *rules*, or with the *rules* as unmodified, would be unduly burdensome or would not achieve the purpose for which the *rules* were made; and (b) that the direction would not result in undue risk to persons whose interests the *rules* are intended to protect.
5. In view of the developments described above, the *FSA* gave a direction to the firm with its consent on 27 July 2007 (“**the 2007 direction**”). On that occasion, *firms* that were not a party to the test case confirmed to the *FSA* that the terms and conditions used in their personal current account agreements were sufficiently similar to those terms being considered in the test case so that the test case would establish the principles necessary to enable these *firms* to handle complaints going forward. The substance of the 2007 direction was to suspend the normal *DISP* timescales for handling relevant charges complaints. The 2007 direction was subject to conditions to protect the interests of complainants and potential complainants so that they would not ultimately be disadvantaged by the postponement of the handling of their relevant charges complaints.
6. The 2007 direction ended on 26 July 2008. However, as the *FSA* considers that the conditions in section 148(4) of the *Act* remain satisfied, in particular because it remains desirable for there to be further clarity as to how these complaints should be handled fairly and consistently, by obtaining greater legal certainty or otherwise. The *FSA* has accordingly given this further direction to the firm with its consent.
7. It is intended by the *FSA*, and accepted by the firm, that this direction achieves continuity with the 2007 direction unless otherwise made clear.

### **Power**

8. This variation direction is given by the *FSA* under section 148 of the *Act*.

### **Duration**

9.
  - (1) The direction xxxxx came into effect on 27 July 2008 and remain in effect (as restated), subject to the variation contained in the direction.
  - (2) This variation of direction takes effect on 26 January 2009.
  - (3) This variation direction ends on the earlier of:
    - (a) 26 July 2009; or
    - (b) resolution of the test case. For this purpose, resolution occurs when judgment has been entered in relation to all issues in dispute in the test case (including, for



the avoidance of doubt, any issues which the Court agrees should in future be introduced into the case by way of amendment or otherwise) and the resulting orders either cannot be the subject of appeal or have not been the subject of appeal in circumstances where the time for doing so has expired, or when proceedings are otherwise discontinued.

However, provisions of this direction that are expressed to continue beyond its termination continue in force in accordance with their terms.

- (4) The *FSA* will review the continued satisfaction of the criteria for giving this direction on an ongoing basis.
- (5) The *FSA* would expect to exercise its power under section 148(9)(a) of the *Act* to revoke this direction in accordance with the procedure in *SUP* 8.8 (Revoking waivers) at any time while this direction remains in force if the *FSA* is no longer satisfied that the criteria for giving this direction in section 148(4) of the *Act* continue to be met.
- (6) In particular, the *FSA* would expect to revoke this direction, at any time, if:
  - (a) there are no longer stays of relevant proceedings in the courts of England and Wales, Scotland and Northern Ireland in materially all cases;
  - (b) the *Ombudsman* has concluded that he will no longer delay consideration of the merits of the relevant charges complaints referred to him in a material number of cases;
  - (c) the firm is not complying with the conditions set out in this direction;
  - (d) without good reason, no material progress is made in the test case;
  - (e) the duration of the test case is likely to cause undue risk to consumers;
  - (f) a decision is made by the court on an element of the test case and is not subject to specific appeal by any of the relevant parties, where it would be appropriate for complaints of a certain description to proceed in accordance with the normal *rules* (in this case, the *FSA* would envisage replacing this direction with an equivalent direction excluding the element subject to the court decision); or
  - (g) the *FSA* is no longer satisfied that the test case covers all relevant issues necessary to enable the fair, consistent and prompt handling of relevant charges complaints after resolution of the test case.

## **Application**

10. This direction is relevant to any complaint received by the firm (before or after the date of this direction) to the extent that it is a relevant charges complaint (as defined above).



11. To the extent that the complaint relates also to other matters, including but not limited to disputed transactions or financial difficulty, this direction does not modify the firm's obligations to deal with those other matters in the usual way, except to the extent that this direction requires otherwise.

### Rules modified

12. The FSA directs that the *rules* listed below apply to the firm with the modifications shown.

<b>Rule</b>	<b>Modification</b>
<i>DISP 1.6.2R, DISP 1.6.5R, DISP 1.6.6R, DISP 1.9.1R</i>	(1) Time is to be treated as not running in relation to relevant charges complaints for the duration of this direction. However, if the firm nonetheless attempts to resolve a relevant charges complaint after the date of this direction, time starts to run in relation to that complaint from the date the complaint was received and the <i>rules</i> shall apply to the complaint in the usual way.  (2) The firm must comply with the conditions in this direction (including after this direction otherwise terminates) until all relevant charges complaints that it has received, but not resolved are resolved and for one year after that. In addition, the firm must continue to comply with condition 13(14) indefinitely.
<i>DISP 1.10.1R and DISP 1.10.2R</i>	The report must not contain information about relevant charges complaints unless the firm attempts to resolve them.

The FSA made amendments to its *rules* in *DISP 1* on 28 June 2007 (Dispute Resolution: Complaints (Simplification and MiFID) Instrument 2007 (FSA 2007/38)). These came into force on 1 November 2007. To the extent relevant to relevant charges complaints which have been made prior to 1 November 2007, this Direction shall be regarded as applying to the following *rules* from the pre-1 November 2007 *DISP rules*: *DISP 1.4.4R to DISP 1.4.12R, DISP 1.5.1R and DISP 1.5.4R*.

### Conditions

13. This direction is subject to the condition that the firm takes reasonable steps to ensure that complainants and potential complainants are not adversely affected to a material extent by this direction. This includes:



#### Communicating with customers:

- (1) when communicating with complainants, potential complainants and other customers about relevant charges complaints, the firm must do so in a way that is clear, fair and not misleading. This includes dealing with all concerns raised by potential complainants and other customers about relevant charges complaints;
- (2) the firm must ensure that it publishes sufficient details to keep its customers, who have not complained or who have accepted a settlement, appropriately updated (on the firm's website or by other general means) on the grant of this direction, during the course of the test case and on conclusion of the test case, about the test case, this direction and their implications;
- (3) the firm must ensure that complainants with relevant charges complaints (including those making new complaints, those whose complaints have not been resolved as at the date of this direction and those who have received a final response within the six months prior to the date of the 2007 direction, but not including those who have settled or who have referred their case to the *Ombudsman*) are kept appropriately updated about the test case, this direction and their implications (by letter or electronic equivalent), on resolution of the test case, and upon other significant developments and (by website or other general means) at other appropriate points;

#### Records:

- (4) the firm must, in respect of each relevant charges complaint referred to it after the 2007 direction, keep a record of the complaint, the date it was received and the terms and dates of any subsequent communication with the complainant about the matter and must inform the customer that it has recorded the complaint for the purpose of complying with the conditions of this direction;
- (5) the firm must continue to maintain and preserve personal current account and other records concerning customers that incur or may have incurred unauthorised overdraft charges (whether or not they have complained) that are (or could be) relevant for the handling of existing or future relevant charges complaints by the firm, the *Ombudsman*, the court or otherwise; these records must be maintained and preserved in a way which ensures that they are as easily and readily available for the period until this condition terminates as they were when the 2007 direction started;
- (6) the firm must make records of relevant charges complaints available to the *FSA* on request;

#### Cooperation:

- (7) if the firm is a party to the test case, then it must cooperate with the *FSA*, the *OFT* and other parties to the test case and use reasonable endeavours to ensure that resolution of the test case is achieved expeditiously;



- (8) if the firm is a party to the test case, then the firm must (to the extent relevant to the issues under consideration) ensure that the test case considers a representative selection of the firm's relevant historic, current and (if due to be replaced) replacement terms and charges;
- (9) the firm must cooperate with the FSA in its assessment and review of the continued satisfaction of the criteria for giving this direction;

Provision of information:

- (10) the firm must provide the FSA with a report containing the information set out in Annex 1 to this direction no later than the 15<sup>th</sup> working day of each month, commencing with a report in September 2008;
- (11) the firm must not contend that any documents or information sought by the FSA are not to be produced by the firm to the FSA because of the existence of the test case (save to the extent that such documentation or information is protected by legal professional privilege);

Handling relevant charges complaints:

- (12) the firm must ensure a fair, intelligent and consistent filtering of cases in order to identify complaints or part of complaints that are not relevant charges complaints and progress them promptly in compliance with *DISP*;
- (13) the firm must ensure that relevant charges complaints that are not progressed as a result of this direction (or the 2007 direction) are dealt with effectively and swiftly once the outcome of the test case is known (or this direction otherwise ceases to have effect) and must liaise closely with the FSA in order to achieve this. This includes making preparations for dealing with relevant charges complaints when this direction ends and updating those preparations as the outcome of the test case becomes clearer;
- (14) the firm must not take into account the period between 27 July 2007 and the date of termination of this direction (the “**stay period**”) for the purposes of relying on any limitation period (or periods) or time limits within which complainants must:
  - (a) make relevant charges complaints;
  - (b) refer relevant charges complaints to the *Ombudsman*; or
  - (c) bring claims before the court;

and the firm must not otherwise limit any redress that may be due to the customer, when complying with *DISP* or otherwise, because of the stay period;

- (15) to the extent that sums are ultimately to be paid to complainants in respect of relevant charges complaints that have been stayed, the firm must include in these sums an



element of compensation in respect of interest charged to or lost by the customer as a result of being out of money during the stay period;

(16) if the firm attempts to resolve a relevant charges complaint after 27 July 2007:

- (a) the firm must not seek agreement from the complainant that the resolution is in full and final settlement of the matter;
- (b) in relation to such complaints, if the outcome of the test case produces a result that is more favourable to the complainant, the firm must take all reasonable steps to pay any difference in the amount of compensation actually received by the complainant and that that the complainant would have been entitled if his claim has not been settled by the firm then; and
- (c) the firm must explain the implications of its approach and commitment;

(17) upon resolution of the test case, the firm must apply relevant principles established through such resolution in handling relevant charges complaints under *DISP* (even if the firm is not a party to the test case);

(18) the firm must not close accounts or threaten closure of accounts of customers when it might reasonably appear that this is for the purpose (or with the intent) of penalising customers that have complained about unauthorised overdraft charges for having complained, or deterring future complaints from these customers or others. For the avoidance of doubt, the firm may close accounts or threaten to close accounts where there is good justification for doing so based on the circumstances of the particular case;

Complainants in financial difficulty:

(19) from the date of this direction, the firm must ensure a fair, consistent and intelligent filtering of new complaints in order to identify relevant charges complaints from complainants who claim to be in financial difficulty and then assess whether that claim is justified. For the purposes of this direction, a complainant is considered to be in financial difficulty when his income is insufficient to cover reasonable living expenses and meet financial commitments as they become due;

(20) the firm must ensure that the standards in section 14 of the Banking Code guidance for subscribers, March 2008 version ('**the Code**'), for dealing with customers in financial difficulty are complied with in respect of relevant charges complaints, in so far as they are relevant, even if the firm is not a subscriber of the Code. As a minimum, the *FSA* expects the firm to take the steps described in Annex 2 of this direction in dealing with a customer who claims to be in financial difficulty, including making an assessment of financial difficulty;

Changes to charges:



(21) the firm must not make any change to the level or structure of its unauthorised overdraft charges. If the firm proposes to do so, then it may apply (in confidence) to the *FSA* for a variation of this condition. The *FSA* would expect to grant the variation if the firm satisfied the *FSA* that the proposed changes are not materially adverse to its customers. In advance of any such application, the firm must conduct an analysis of the proposed changes to identify the extent of any adverse effect on customers and share the analysis with the *FSA*. The firm must pay particular attention to the impact on customers who are unable to modify their behaviour in response to changes to unauthorised overdraft charges. Variations of this condition are recorded in the attached schedule.

### ***Guidance***

14. Whilst this direction is in force, the firm has agreed with the *FSA* to have regard to its obligations under the general law and the provisions of the Code relating to relevant charges complaints (even if the firm is not a subscriber to the Code).
15. When dealing with complainants in financial difficulty, the firm should consider the following steps in respect of the period during which they are assessed as being in financial difficulty:
  - (a) the firm might waive future unauthorised overdraft charges; and
  - (b) the firm might not enforce debts against complainants in financial difficulty to the extent that these debts are made up of unauthorised overdraft charges.
16. Before closing a personal current account of a customer in financial difficulty, the firm might offer the customer a basic bank account, if this is a facility that the bank offers.

### **Interpretation**

17. Interpretative provisions (including definitions) of the *Handbook* apply to this direction in the same way as they apply to the *Handbook*. As such, this direction must be interpreted in the light of its purpose.
18. The purpose of the conditions set out in this direction is to help ensure that the direction does not result in undue risk to complainants and potential complainants. The firm should at all times interpret this direction (and the conditions set out in this direction) purposively in their dealings with complainants and potential complainants in relation to relevant charges complaints.

Waivers Team  
Regulatory Decisions Department  
Financial Services Authority



## Annex 1 - Management information

### Relevant charges complaints

1. The number of complaints from personal current account customers:
  - a. received in the previous month that relate to unauthorised overdraft charges, not including complaints resolved by close of business on the business day following its receipt; and
  - b. assessed in the previous month as falling into the category of a relevant charges complaint.
2. The number of relevant charges complaints:
  - a. about which the firm has sent the complainant a final response (regardless of when the complaint was received) in the previous month; and
  - b. put on hold in the previous month.
3. The total number of relevant charges complaints at the end of the previous complete month:
  - a. about which the firm has sent the complainant a final response since 27 July 2007; and
  - b. put on hold since 27 July 2007.

### Financial difficulty cases

4. The number of relevant charges complaints where, in the previous month:
  - a. a complainant has claimed to be in financial difficulty;
  - b. the firm:
    - i. accepted a claim that the complainant was in financial difficulty;
    - ii. rejected a claim that the complainant was in financial difficulty; and
    - iii. the firm has not yet made a decision accepting or rejecting a claim of being in financial difficulty.
  - c. the firm has been notified by the *Ombudsman* that a claimant's claim to be in financial difficulty is to be assessed by the *Ombudsman*.

### Court stays on claims regarding unauthorised overdraft charges



5. The total number of stays of relevant proceedings in the courts of England & Wales, Scotland and Northern Ireland in place for the firm at the end of the previous month.
6. The number of court proceedings involving the firm relating to unauthorised overdraft charges formally commenced, by way of service on the firm: :
  - a. that have been stayed in the previous month;
  - b. in which a stay was refused in the previous month; and
  - c. in which a stay has been lifted in the previous month.
7. The number of court proceedings involving the firm relating to unauthorised overdraft charges resolved in the previous month (whether or not previously stayed).

#### Complaints handling

8. The average number of business days taken by the firm:
  - a. from the date of receipt by the firm, to acknowledge a relevant charges complaint in respect of those relevant charges complaints acknowledged in the previous month;
  - b. from the date of receipt by the firm, to give notice to the customer that their case is on hold in respect of those relevant charges complaints put on hold in the previous month; and
  - c. from the point that a claimant claims to be in financial difficulty to the time that the firm makes a decision to accept that the complainant is in financial difficulty in respect of those relevant charges complaints where the firm has made such a decision in the previous month.

#### Further information

9. Any remarks the firm considers necessary to clarify or explain the information supplied.



## **Annex 2 – Dealing with complainants in financial difficulty**

1. The firm will be sympathetic and positive when considering any financial difficulties claimed by the complainant. Firms will not subject a complainant to harassment or undue pressure when discussing their problems.
2. In making an assessment of financial difficulty the firm will take into account:
  - a. evidence of changes in lifestyle, including loss of employment; disability; serious illness; imprisonment; relationship breakdown; death of a partner; starting a lower paid job; parental/carer leave; and starting full-time education;
  - b. evidence of the following events:
    - i. items repeatedly being returned unpaid due to lack of available funds;
    - ii. failing to make loan repayments or other commitments;
    - iii. discontinuation of regular credits;
    - iv. notification of some form of insolvency or court proceedings;
    - v. regular requests for increased borrowing or repeated rescheduling of debts;
    - vi. making frequent cash withdrawals on a credit card at a non-promotional rate of interest; and
    - vii. repeatedly exceeding a credit card or overdraft limit without agreement (and, in this regard, where a complainant has incurred over £500 in unauthorised overdraft charges in the previous 12 months, that is to be treated as indicative of financial difficulty).
3. If during the handling of the complaint the firm becomes aware (including by notification from the complainant) that the complainant may be in, or heading towards financial difficulties, the firm will contact the complainant to outline their approach to financial difficulty cases and to encourage the customer to contact the firm if the customer is worried about their position. The firm will also provide signposts to sources of free, independent money advice.
4. The firm will make available to complainants straightforward information in plain English on the firm's procedures and systems for dealing with customers in financial difficulty.
5. If it becomes clear to the firm that the complainant needs specialist assistance, the complainant will be referred promptly to a specialist team that deals with customers in financial difficulties, if one exists. The firm will give a phone number on all communications that will put the customer in contact with a named person or a team dedicated to dealing with cases of financial difficulty.



6. Where the firm does not have sufficient evidence to assess whether or not the complainant is in fact in financial difficulty, the firm will seek such further relevant information as is reasonably required to make that assessment. In the event that the firm reasonably requires relevant information to be provided by the complainant and the complainant does not provide the requested information within a reasonable period of time, the firm shall not be obliged to treat such a complainant as being in financial difficulty.