

# **Personal Current Accounts - Unarranged Overdraft Charges**

Decision on an investigation under the UTCCRs and  
next steps

December 2009

OFT1154

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# 1 INTRODUCTION

- 1.1 The OFT's significant concerns about the way in which unarranged overdrafts work and the charges that banks levy in relation to them were set out in its market study, *Personal current accounts in the UK*<sup>1</sup>, published in July 2008. This found that banks earn around a third of their personal current account (PCA) revenues from unarranged overdraft charges (UOCs) that are difficult to understand, not transparent and not subject to effective customer control.
- 1.2 Alongside the market study, the OFT opened an investigation into the fairness of certain unarranged overdraft charging terms under the Unfair Terms in Consumer Contracts Regulations (UTCCRs) and entered into a test case with certain banks<sup>2</sup> (the Banks). This case ultimately led to a hearing before the Supreme Court, and a judgment dated 25 November 2009<sup>3</sup> (the Judgment). The OFT stated that it would consider the detail of the Judgment before making a decision on whether or not to continue its investigation. The OFT indicated that it would also explore with others the implications of the Judgment for consumers and for existing and future legislation and regulation<sup>4</sup>.
- 1.3 The OFT has now decided not to continue an investigation into UOCs under the UTCCRs. The OFT will continue to work to achieve change in

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<sup>1</sup> [www.offt.gov.uk/shared\\_offt/reports/financial\\_products/OFT1005.pdf](http://www.offt.gov.uk/shared_offt/reports/financial_products/OFT1005.pdf). Alongside the report the OFT published a consultation paper to invite comments from stakeholders on the high level concerns identified in the report.

<sup>2</sup> 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. Further information on the test case is contained in the Questions and Answers document on the OFT's website [http://www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/completed/personal/personal-test-case/personal21](http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/completed/personal/personal-test-case/personal21).

<sup>3</sup> Office of Fair Trading v Abbey National plc and others  
[http://www.supremecourt.gov.uk/docs/uksc\\_2009\\_0070\\_judgmentV3.pdf](http://www.supremecourt.gov.uk/docs/uksc_2009_0070_judgmentV3.pdf).

<sup>4</sup> <http://www.offt.gov.uk/news/press/2009/137-09>.

the market. This document sets out the OFT's reasons for reaching this decision and the next steps that the OFT intends to take.

- 1.4 In reaching this decision the OFT has considered the views of the Banks and various consumer and campaign groups. The OFT has also discussed relevant issues with the Financial Services Authority (FSA), the Financial Ombudsman Service (FOS) and the Government.
- 1.5 The OFT has considered a number of potential avenues for continuing an investigation under the UTCCRs. Any such investigation would be narrow in scope, would appear to have a low probability of success and, in any event, would appear to make only a limited contribution to achieving the OFT's objectives. When considered against the risks and resources involved, the OFT does not think it appropriate to continue an investigation.
- 1.6 This is a decision about the OFT's own investigation. It sets out the OFT's understanding of aspects of the Supreme Court judgment that are relevant to individual complaints and claims for redress associated with UOCs, but it does not mean that these individual actions are barred or necessarily are likely to fail. Individual litigants should seek advice about their own cases that takes into account their particular circumstances. The FSA and FOS have published advice on their websites for customers with complaints about bank charges<sup>5</sup>.
- 1.7 The remainder of this document is structured as follows:
  - Section 2 sets out the background to the investigation that the OFT has been carrying out under the UTCCRs
  - Section 3 sets out the OFT's assessment of the options available for continuing an investigation under the UTCCRs

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<sup>5</sup> See

[http://www.moneymadeclear.fsa.gov.uk/news/product/unauthorised\\_overdraft\\_charges\\_test\\_case.html](http://www.moneymadeclear.fsa.gov.uk/news/product/unauthorised_overdraft_charges_test_case.html) and <http://www.financial-ombudsman.org.uk/faq/bank-charges.html>.

- Section 4 sets out the OFT's objectives in relation to this work and assesses the contribution that continuing an investigation under the UTCCRs would make to achieving those objectives
- Section 5 sets out the OFT's prioritisation principles and assesses the options for continuing an investigation under the UTCCRs against these principles
- Section 6 concludes and sets out the OFT's next steps

## 2 BACKGROUND

- 2.1 The £8 billion<sup>6</sup> PCA market is the cornerstone of the UK's retail finance system and an essential service for 90 per cent of adult consumers<sup>7</sup>.
- 2.2 In March 2007<sup>8</sup>, the OFT commenced an investigation into the fairness of certain charging terms relating to unarranged overdrafts under the UTCCRs. The decision to commence the investigation reflected the fact that the OFT shared public concern about the level and incidence of such charges.
- 2.3 In July 2007<sup>9</sup> the OFT entered into a litigation agreement with the Banks and commenced a test case to assist in securing a clear and orderly resolution of the fairness of these charges. The OFT argued that it could assess in full the fairness of unarranged overdraft terms under the fairness test set out in regulation 5 of the UTCCRs. The Banks argued that the terms were exempt from the fairness assessment under regulation 5 because of the exemption found in regulation 6(2) of the UTCCRs.
- 2.4 The OFT's investigation into the fairness continued alongside the test case. In August 2008 the OFT wrote to the Banks setting out its preliminary view that the terms were unfair.
- 2.5 The Judgment overturns previous High Court and Court of Appeal judgments that unarranged overdraft charging terms are assessable in full for fairness.

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<sup>6</sup> *Personal Current Accounts in the UK*, OFT, July 2008, paragraph 2.25.

<sup>7</sup> *Personal Current Accounts in the UK*, OFT, July 2008, paragraph 2.3.

<sup>8</sup> <http://www.offt.gov.uk/news/press/2007/54-07>.

<sup>9</sup> <http://www.offt.gov.uk/news/press/2007/106-07>.

- 2.6 Alongside the investigation, the OFT launched a market study<sup>10</sup> to consider the wider questions about competition and value for money in the provision of PCAs, such as transparency of costs to customers and ease of switching.
- 2.7 In July 2008 the market study was published. It established a picture of the UK PCA market with many positive features for customers:
- high levels of customer satisfaction
  - many day-to-day services that do not incur a charge, and
  - internet and telephone banking making accounts easier to manage.
- 2.8 However, the OFT was concerned that there were features of the market that led to an equilibrium that did not work well for consumers. These were:
- complexity in the way that UOCs were implemented, which made it hard for customers to predict when they will be charged, coupled with a lack of mechanisms for customers to exercise control or opt out of situations that incur high charges
  - low levels of transparency on UOCs, forgone interest and other fees. These elements were the least visible to customers and were not effectively competed on by providers, and
  - a perception amongst consumers that switching was both complex and risky with some real risk of the switching process going wrong.
- 2.9 The market study found that, in 2006, the aggregate revenue of banks from PCAs was approximately £152 per active account<sup>11</sup>. Just over 80 per cent of income came from two sources: UOCs (£2.6bn) and net

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<sup>10</sup> <http://www.offt.gov.uk/news/press/2007/67-07>.

<sup>11</sup> *Personal Current Accounts in the UK*, OFT, July 2008, paragraph 2.25.

credit interest income (£4.1bn)<sup>12</sup>. The average daily unarranged overdraft balance in 2006 was £680m. Paid item and maintenance fees totalled some £1.5bn - which would equate to a return of over 220 per cent on the average balance<sup>13</sup>. A significant number of customers did not know how much they actually paid in bank charges, either before or after they were incurred<sup>14</sup>. Over three-quarters did not know the credit interest rate of their current account<sup>15</sup>, and even those that did lacked the means to calculate the interest they had forgone.<sup>16</sup>

2.10 The OFT worked with the industry and consumer groups to develop initiatives to improve the ability of all consumers to assess the costs and benefits of their PCA. The OFT also worked with Bacs<sup>17</sup> to address problems with switching. In October 2009<sup>18</sup>, the OFT announced that banks had voluntarily agreed to implement a number initiatives that will make costs for PCAs more transparent and the switching process more reliable and trusted.

2.11 First, to improve transparency, so that customers can more easily understand the costs of their accounts and compare with others, banks agreed that they will:

- introduce an annual summary of the cost of their account for each customer

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<sup>12</sup> *Personal Current Accounts in the UK*, OFT, July 2008, paragraph 2.27.

<sup>13</sup> <http://www.ofg.gov.uk/news/press/2008/84-08>.

<sup>14</sup> *Personal Current Accounts in the UK*, OFT, July 2008, paragraph 4.74.

<sup>15</sup> *Personal Current Accounts in the UK*, OFT, July 2008, paragraph 4.27.

<sup>16</sup> *Personal Current Accounts in the UK*, OFT, July 2008, paragraph 4.16.

<sup>17</sup> Bacs is the body that processes payments for a number of different payment schemes in the UK, including Direct Debit and Direct Credit.

<sup>18</sup> [www.ofg.gov.uk/news/press/2009/122-09](http://www.ofg.gov.uk/news/press/2009/122-09).

- make charges prominent on monthly statements, so that customers are more aware of the charges they pay
- provide average credit and debit balances, which will help customers to estimate the potential benefits of switching bank, and
- produce illustrative scenarios showing UOCs, giving customers an idea of the costs for different patterns of use.

2.12 Second, the OFT has taken steps to help customers understand and compare the costs of their accounts through new advice and tools, including an interest calculator, on its Consumer Direct website<sup>19</sup>.

2.13 Third, the OFT has also worked with Bacs, the payment processor, to improve the process of switching bank accounts and to increase consumers' confidence in the switching process through the following:

- steps to reduce problems that arise from transferring Direct Debits
- measures to reduce the impact on customers of any problems with transferring Direct Debits, and
- a new consumer guide and website as part of efforts to increase consumer awareness of the automatic switching process<sup>20</sup>.

2.14 Despite these welcome developments, the OFT stressed that problems relating to UOCs still needed to be resolved for the market to work in the best interests of bank customers<sup>21</sup>.

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<sup>19</sup> [www.consumerdirect.gov.uk/before\\_you\\_buy/money\\_and\\_credit/Currentaccounts/](http://www.consumerdirect.gov.uk/before_you_buy/money_and_credit/Currentaccounts/).

<sup>20</sup> <http://www.bacs.co.uk/Bacs/Consumers/AccountSwitching/Pages/default.aspx>.

<sup>21</sup> *Personal Current Accounts in the UK– A follow-up report*, OFT, October 2009, paragraph 1.23.

### 3 OPTIONS FOR CONTINUING AN INVESTIGATION

- 3.1 On 25 November 2009, the Judgment overturned previous High Court and Court of Appeal judgments on the test case that unarranged overdraft charging terms could be assessed in full for fairness. The OFT has since been considering whether or not to continue its investigation.
- 3.2 This section sets out the OFT's views on the implications of the Judgment on the investigation the OFT was carrying out and the alternative options considered, including those suggested by others.

#### The Judgment

- 3.3 The Supreme Court decided that the charges levied by a bank under its PCA contract (the Relevant Charges) form part of the price of the overall package of banking services supplied under such a PCA contract. As a consequence, regulation 6(2)(b) of the UTCCRs<sup>22</sup> applies to an assessment of the terms pursuant to which the Relevant Charges are levied (the Relevant Terms). This means that the OFT is not able to assess these terms in a way which relates to the adequacy of the Relevant Charges as against the service(s) supplied.
- 3.4 The Supreme Court did not look at whether the Relevant Terms are unfair. It recognised that its decision did not, in principle, rule out the possibility of the Relevant Terms being found to be unfair. But it did not state on what basis they might still be assessed for fairness.
- 3.5 The Supreme Court decided that the issues before it were such that a reference to the European Court of Justice was not necessary.

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<sup>22</sup> Regulation 6(2) states that 'In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate –

- (a) to the definition of the main subject matter of the contract, or
- (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.'

## Implications of the Judgment for the OFT's current investigation

- 3.6 Prior to the Judgment, the OFT's investigation had proceeded along lines designed to establish whether it was unfair under regulation 5(1)<sup>23</sup> for the Banks to recover through their Relevant Charges more than the costs caused by customers who incur such charges in circumstances where it was thought that customers might have difficulty in understanding, predicting and controlling the charges they incur.
- 3.7 In the light of the Judgment, the OFT considers that an investigation along the same lines as had been proceeding cannot now be conducted other than in the very restricted circumstances set out in the next paragraph.
- 3.8 In the High Court certain of the Banks' Relevant Terms<sup>24</sup> were found not to be in plain intelligible language (PIL) in 'minor respects'<sup>25</sup>. Mr Justice Smith was also unpersuaded that one of the Banks' Relevant Terms<sup>26</sup> is not capable of being penal and found this term to be a contractual prohibition on the Bank's customer. Moreover the historic Relevant Terms of the Banks have not been put before the Courts for a determination as to whether or not they are in PIL. To the extent that terms are not in PIL or are penalties it *may* be open to the OFT to

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<sup>23</sup> Regulation 5(1) states that 'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

<sup>24</sup> See paragraph 293 of Andrew Smith J's judgment: 'I therefore conclude that the terms of four of the Banks, HSBC, Lloyds TSB, Nationwide and RBSG are in plain intelligible language. Those of Abbey, Barclays, Clydesdale and HBOS are in plain intelligible language except in certain specific and relatively minor respects.'

<sup>25</sup> The consequence of a term not being in plain intelligible language is that regulation 6(2) does not apply to that term and that the term is therefore open to all forms of fairness assessment.

<sup>26</sup> "You must not use your Card to go overdrawn on your Account unless we have previously agreed this with you", (as such term appears in 'Terms and Conditions for NatWest Personal Current Accounts' (June 2001)).

conduct an assessment of these terms that is broadly along the lines of the investigation that the OFT has been conducting. These issues are considered more fully in section 4.

## **Other potential challenges under the UTCCRs**

- 3.9 The OFT has considered whether there are any other investigations which could be carried out to challenge the Relevant Terms under the UTCCRs. As part of this consideration, the OFT has spoken to the Banks and various consumer and campaign groups.
- 3.10 The Banks have stated that they consider that the OFT should now cease its investigation under the UTCCRs into the Relevant Charges. They consider that following the Judgment each of the arguments relating to unfairness that the OFT set out in August 2008 now falls away.
- 3.11 The OFT has also received representations from a number of people and groups representing consumers. Some of these representations have set out arguments that others have suggested could be used as a basis for challenging the Relevant Terms.
- 3.12 The OFT has considered in particular five bases of challenge under regulation 5(1) of the UTCCRs:
- Customers are deemed to make a request for an unarranged overdraft when they attempt to make payments for which they have insufficient funds, and they have no ability to 'opt out' of the arrangement
  - When the customer has insufficient funds to meet a payment request, banks have discretion as to whether or not to make a payment and this determines the charges that the customer has to pay
  - Customers may go into unarranged overdraft unintentionally because of the way in which unarranged overdrafts work, which may in turn have adverse consequences for them

- Customers lack the ability to understand and control the sequence in which transactions are processed, and banks' rules for determining the sufficiency of funds, which can affect whether, and if so which, of the Relevant Charges are triggered, and
- Customers who pay Relevant Charges subsidise the cost of services supplied to other customers (cross subsidy).

3.13 In relation to the first three bases of challenge above, the OFT considers that a case brought by it would have no realistic prospect of success. One reason (amongst others) is the impact of well established common law rules relating to banking<sup>27</sup>.

3.14 The OFT believes that the fourth challenge described is also likely to be difficult to mount successfully. Even if such a challenge could be brought successfully, it is likely to be limited in its potential effect, in particular because the OFT has been given indications (and has no evidence to the contrary) that banks generally order the sequence of payments where possible in a way that is not harmful to, or even benefits, the interests of customers.

3.15 The OFT also considers that it would not have a realistic prospect of success in making a challenge on the fifth basis. This is because one of the elements of the test of unfairness in the UTCCRs is that the term must cause a significant imbalance in the parties' rights and obligations under the contract. The relevant approach is to assess the rights and obligations of the parties to the contract, i.e. those of the bank and the customer. The comparison is not between the bank and the whole body of its customers generally or between different groups of customers<sup>28</sup>.

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<sup>27</sup> For example, an instruction to a bank which would, if paid, take a current account into debit is deemed to be not a breach of contract, but a request for an overdraft.

<sup>28</sup> This was recognised by the High Court at first instance (Andrew Smith J paragraph 16). This aspect of his ruling is not undermined by the Supreme Court's judgment.

## Investigations using tools other than the UTCCRs

- 3.16 The OFT has also considered the possibility of investigating the Relevant Charges using other enforcement tools. In particular, it has considered the unfair relationships (URs) provisions in the Consumer Credit Act 1974<sup>29</sup>, and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs)<sup>30</sup>. Various people and groups representing consumers have also raised the relevance of these and other measures.
- 3.17 The OFT has considered whether use of these enforcement tools is appropriate. The OFT's initial assessment is that there are not good grounds for concluding that a collective challenge alleging breach of these provisions arising from the use of the Relevant Terms generally would have good prospects of success. This partly reflects an assessment of the wider repercussions of reasoning underlying the Judgment. This reasoning will inevitably be influential in guiding the deliberations of any UK court before which the OFT might bring enforcement action based on the concept of fairness. Therefore the OFT has not initiated an investigation at this time using the above enforcement tools. However, it will keep these issues under review and does not rule out the possibility that it may in future consider use of these tools.
- 3.18 The above is a statement of the OFT's position as a public enforcement authority and should not be treated as advice to bank customers about the possibility of bringing individual actions relating to UOCs under the UR provisions of the Consumer Credit Act<sup>31</sup>. Their chances of success in so doing would depend on the particular facts of each case, and they

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<sup>29</sup> Section 140A of the 1974 Act (as amended in 2006).

<sup>30</sup> The Consumer Protection from Unfair Trading Regulations 2008, Statutory Instrument 2008/1277.

<sup>31</sup> More information about the URs provisions of the Consumer Credit Act 1974 can be found at [http://www.of.gov.uk/advice\\_and\\_resources/resource\\_base/legal/cca/CCA2006/unfair/](http://www.of.gov.uk/advice_and_resources/resource_base/legal/cca/CCA2006/unfair/). The CPRs do not give rights to individuals, and therefore are not mentioned in this paragraph.

therefore need to seek advice that takes account of their personal circumstances.

## 4 CONTRIBUTION TO ACHIEVING THE OFT'S OBJECTIVES

- 4.1 This section outlines the OFT's objectives in relation to its work in the PCA market in general and the investigation under the UTCCRs in particular. It sets out the reasons why the OFT considers that continuing an investigation under the UTCCRs will not make a significant contribution to meeting these objectives.

### OFT objective in the PCA market

- 4.2 As is set out in section 2, the July 2008 market study identified a number of problems in the PCA market which meant it was not working well for consumers.
- 4.3 The OFT's objective with its PCA work is to address these problems and achieve change in the market so that account costs are transparent, the switching process is more reliable and charges are well understood and subject to effective consumer control.
- 4.4 The OFT has already worked with banks and other stakeholders to address transparency and switching issues (see paragraphs 2.11 to 2.13 above).

### OFT objectives with the UTCCRs investigation

- 4.5 The OFT's investigation under the UTCCRs into the fairness of banks' UOCs is within the broader context of its PCA work under the market study, as set out above, and shares a common objective of achieving change in the PCA market<sup>32</sup>.
- 4.6 While the primary objective of the investigation under the UTCCRs is to support the change in the PCA market going forward, there are

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<sup>32</sup> See for example *OFT launches test case on unauthorised overdraft charges*, 'The test case complements the ongoing market study into personal current accounts, which addresses wider questions about competition and price transparency in the provision of personal current accounts.' [www.oft.gov.uk/news/press/2007/106-07](http://www.oft.gov.uk/news/press/2007/106-07).

supplementary objectives of providing a precedent for the use of the UTCCRs and assisting in the resolution of complaints<sup>33</sup>.

4.7 The OFT's objectives for its investigation under the UTCCRs can be summarised as being to:

- **Support change in the PCA market going forward:** continuing an investigation could assist in bringing about market change by creating additional incentives for banks to voluntarily change their terms to address the OFT's concerns. Ultimately an investigation could require the Banks to change their terms at the end of a litigation process that went in the OFT's favour.
- **Provide a precedent for the use of UTCCRs:** continuing an investigation could establish a helpful precedent for the use and application of the UTCCRs in other sectors, in particular to what can broadly be categorised as 'aftermarket' issues<sup>34</sup>.
- **Assist in the resolution of complaints:** more specifically to the PCA market, continuing an investigation could provide clarity on various legal issues to assist others in the resolution of complaints on UOCs<sup>35</sup>.

4.8 In reaching a conclusion on whether or not to continue an investigation under the UTCCRs, the OFT has considered the extent to which continuing an investigation would contribute to these objectives.

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<sup>33</sup> See for example *OFT launches test case on unauthorised overdraft charges*, '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.' [www.of.gov.uk/news/press/2007/106-07](http://www.of.gov.uk/news/press/2007/106-07).

<sup>34</sup> Aftermarkets are markets where customers who buy one product or service are likely to buy a related, follow-on product.

<sup>35</sup> It should be noted that the OFT's objective has never been to obtain compensation for individual consumers. The OFT's role has been to establish principles that will assist others in their roles in relation to handling complaints.

## Supporting change in the market

4.9 In relation to the OFT's objective of achieving market change, the OFT will, in particular, be seeking improvements around unarranged overdrafts in three critical areas:

- **Control.** Consumers need greater ability to manage their finances, both for their own interests and to ensure that competition operates more effectively in the PCA market. At a minimum, the OFT believes that consumers must have a real choice about whether to have a facility that allows them to go into unarranged overdraft or not.
- **Clarity and predictability of charging for unarranged overdrafts.** Current charging structures are typically not simple to understand and predict. It has also become clearer through the OFT's recent work on high-cost credit<sup>36</sup> that consumers find it difficult to compare the costs of using unarranged overdrafts with other forms of short-term credit. The OFT will be considering whether there is a simple method of describing the charges for unarranged borrowing that allows these comparisons to be made more effectively and for competition to work better.
- **Responsibility.** All banks have a duty not to lend irresponsibly<sup>37</sup>, and the OFT can have particular regard to this in administering the licensing regime under the Consumer Credit Act 1974, including assessing fitness to hold a credit licence<sup>38</sup> or deciding whether to impose requirements on individual traders<sup>39</sup>. The OFT will consider as part of this process what expectations are appropriate for lending

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<sup>36</sup> *Review of high-cost credit, interim research report*, [www.offt.gov.uk/oft\\_at\\_work/markets/services/review-high-cost-consumer-credit](http://www.offt.gov.uk/oft_at_work/markets/services/review-high-cost-consumer-credit).

<sup>37</sup> Section 25 (2B) of the Consumer Credit Act 1974.

<sup>38</sup> Section 25(2B) of the 1974 Act.

<sup>39</sup> Section 33A of the 1974 Act.

through unarranged overdrafts, especially to customers for whom other lending arrangements might be more appropriate<sup>40</sup>.

- 4.10 The OFT will discuss these issues intensively with banks, consumer groups and other organisations over the next few weeks, with the aim of reaching a voluntary agreement from the banks to implement the changes sought. The Banks have indicated to the OFT that they are willing to enter into such discussions<sup>41</sup>. The OFT expects to issue a report on progress in the first quarter of 2010. The OFT will also report back at that stage on the case for further actions, such as the need for legislative change.
- 4.11 This work will be taken forward under the wider PCA market study and will take place whether an investigation under the UTCCRs continues or not. In seeking to change the market going forward, the OFT's view is that continuing an investigation under the UTCCRs along the lines of any or all of the options that appear to be available is unlikely to provide additional benefit for this work, given changes already made and the prospect of further changes arising from future developments.

### **Establishing precedent for the use of the UTCCRs**

- 4.12 Following the Judgment, it is no longer possible to use the banks case as a precedent for aftermarket issues in the retail banking sector in the manner envisaged when the OFT launched its investigation.
- 4.13 A continued investigation may serve to explore UTCCRs issues that were not directly before the Supreme Court. It is also possible that the Judgment may have wider implications for other cases under the

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<sup>40</sup> The OFT has published draft guidance on irresponsible lending (July 2009), and aims to publish final guidance in March 2010.

[http://www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/legal/cca/irresponsible](http://www.offt.gov.uk/advice_and_resources/resource_base/legal/cca/irresponsible).

<sup>41</sup> The BBA statement of 25 November confirms this: 'We will also continue to work together with the OFT in connection with its on-going Market study.'

[www.bba.org.uk/bba/jsp/polopoly.jsp?d=145&a=16922](http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=145&a=16922).

UTCCRs. There is therefore an argument for continuing an investigation to explore these possibilities and constraints.

- 4.14 However, the OFT does not believe these are strong arguments for continuing an investigation under the UTCCRs as the OFT has a number of options for obtaining further clarity on the application of the UTCCRs, in particular by pursuing other UTCCRs cases.
- 4.15 It should also be noted that there are unique features of the legal and factual context of unarranged overdrafts arising from the nature of the business and the common law applicable to banking. This limits the precedent effect of the Judgment outside the banking services area and reduces the desirability of continuing an investigation to further the objective of establishing precedents of wider relevance.

### **Assisting in the resolution of complaints**

- 4.16 A reformulated investigation under the UTCCRs could contribute to meeting the objective of assisting in the resolution of complaints.
- 4.17 One area identified in section 3 where a continued investigation under the UTCCRs might be possible would be consideration of terms that are not in plain intelligible language (PIL). Such an investigation would involve examining only those terms that do not meet PIL criteria to assess them for fairness. However, the terms found not to be in PIL were few in number and the respects in which those terms were not in PIL were regarded as 'minor' (see paragraph 3.8).
- 4.18 In relation to those terms that have not been considered for PIL, the OFT does not believe an investigation under the UTCCRs would provide significant additional clarity to assist in the resolution of complaints. Action taken by the OFT in the test case and in other cases<sup>42</sup> has already

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<sup>42</sup> The Office of Fair Trading v Foxtons Limited, High Court of Justice, Chancery Division, 10 July 2009 [2009] EWHC 1681 (Ch). Foxtons has now been given leave to appeal this judgment but on limited grounds that exclude an appeal on the issue of how or whether any terms can be considered to be in PIL.

resulted in court decisions that shed some light on what is meant by PIL. These decisions can already be applied to help resolve complaints relating to PIL and how terms can be assessed if they are not in PIL.

- 4.19 It may be more appropriate, rather than continuing an investigation, for the OFT to intervene as a third party to give the court the benefit of its views and experience on PIL if and when any such issues are ever litigated privately.

## **Conclusion**

- 4.20 The OFT has considered whether continuing an investigation under the UTCCRs could play a significant role in achieving the OFT's broader objectives in the PCA market and those specific objectives relating to the investigation.
- 4.21 Continuing an investigation under the UTCCRs along the lines of any or all available options is unlikely to have any significant impact in achieving the objective of market change. Moreover, other work addressing this objective will continue irrespective of the decision whether to continue the investigation.
- 4.22 Continuing an investigation is also unlikely to meet the OFT's objective of providing precedent for the use of the UTCCRs. In addition, the OFT has a number of other, potentially more effective, options for obtaining further clarity on the application of the UTCCRs.
- 4.23 Continuing an investigation under the UTCCRs along the lines of any or all available options may provide clarity that assists in the resolution of some complaints. However, this may be limited to the application of principles which have already been established and have very limited effects. There may also be more effective ways to provide such clarity than continuing an investigation.

## 5 ASSESSMENT AGAINST THE OFT'S PRIORITISATION PRINCIPLES

5.1 In order for OFT to make the best use of its resources in terms of real outcomes for consumers, it needs to ensure that it makes appropriate decisions about which projects and programmes of work it undertakes. It generally prioritises according to the **impact** of work on consumers and according to the work's **strategic significance**. It balances this against the **risks** and **resources** involved. All relevant principles will be balanced in the round and, where appropriate, the OFT may also take account of other relevant factors. The approach that the OFT takes is set out in its guidance on its prioritisation principles<sup>43</sup> and its approach to consumer protection enforcement<sup>44</sup>.

### Impact

5.2 In terms of the impact of the OFT's work, under its prioritisation principles it considers the likely direct effect on consumer welfare in the market or sector where the intervention takes place (including better value for consumers in terms of price, quality, range or service and reducing non-financial detriment such as physical harm or emotional distress<sup>45</sup>), the likely indirect effect on consumer welfare (including deterrence and improved awareness for consumers, business and government) and the expected additional economic impact on efficiency and productivity.

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<sup>43</sup> *OFT Prioritisation Principles*, OFT 953, October 2008  
[http://www.offt.gov.uk/shared\\_offt/about\\_offt/offt953.pdf](http://www.offt.gov.uk/shared_offt/about_offt/offt953.pdf).

<sup>44</sup> *Statement of consumer protection enforcement principles*, OFT 953, December 2008  
[http://www.offt.gov.uk/advice\\_and\\_resources/publications/reports/consumer-protection/offt964](http://www.offt.gov.uk/advice_and_resources/publications/reports/consumer-protection/offt964).

<sup>45</sup> The OFT may also prioritise work because the direct effects would specifically benefit disadvantaged consumers.

- 5.3 As set out in section 3, the OFT considers the prospects of success for continuing an investigation under the UTCCRs to be weak and, even if it were successful, its practical effect would be limited in scope. Moreover, as set out in section 4, the OFT expects that any investigation is unlikely to make a significant contribution to achieving its objective of future change in the PCA market.
- 5.4 The strongest case for continuing an investigation under the UTCCRs appears to be the contribution that it may make to assisting others to resolve some customer complaints. However, as set out in section 4, there are other ways in which the OFT could contribute to assisting others to resolve complaints.
- 5.5 The OFT therefore considers the impact of continuing an investigation under the UTCCRs to be limited.

### **Strategic Significance**

- 5.6 Under its prioritisation principles the OFT considers how strategically significant the work is. This includes how the work fits with its annual plan and/or other objectives, and whether the work will establish new legal approaches, build the credibility of the regime or enhance the ability of the OFT and the policy system as a whole to deliver better outcomes. The OFT also considers whether it is best placed to act or whether alternatives such as action by other bodies, private enforcement or other market or regulatory developments may be appropriate.
- 5.7 The key consideration in relation to the strategic significance of continuing an investigation under the UTCCRs relates to establishing precedent for the use of the UTCCRs as a consumer protection enforcement tool. As noted in section 4, the scope for doing so through an investigation into UOC terms appears to be limited, and the options for using other cases to achieve this objective appear to be more promising. For such reasons, and given that continuing an investigation under the UTCCRs is unlikely to provide the OFT with extra insight into the operation of this market, the strategic significance is assessed as limited.

- 5.8 When determining strategic significance, the question of whether the OFT is 'best placed to act' must also be asked. There are a number of reasons why the OFT may be best placed to act. In particular the fact that the OFT has already undertaken significant investigation of UOCs means that it has considerable information and evidence that it has already gathered, and has also built up knowledge and expertise in relation to the PCA market and the application of the UTCCRs in this area. However, being best placed does not necessarily mean that the OFT should act: this decision needs to be taken in the round considering other criteria relevant to the decision.

## **Risks**

- 5.9 In terms of risk, under its prioritisation principles the OFT considers how likely the project is to deliver its desired impact. Given the concerns noted above regarding the prospects for success, there is a significant risk that continuing an investigation under the UTCCRs would not achieve the desired outcome.
- 5.10 A further relevant factor is the risk that the OFT would be liable for costs incurred by the Banks if it pursued an investigation and litigation that was ultimately unsuccessful. The test case that has been conducted to date was conducted in accordance with a litigation agreement under which the OFT and the Banks each agreed to bear their own costs. It is not clear that any future litigation would be covered by the same costs arrangement.

## **Resources**

- 5.11 Under its prioritisation principles, the OFT takes into account all resources required to undertake the work (which may change over the life of the project) and the resource availability of other parties, including its enforcement partners.
- 5.12 The OFT has considered the level of resources that would be required to continue an investigation under the UTCCRs and the level of resources that would be required to pursue its objectives through other means. It

anticipates that continuing an investigation would require resources that could be better used in other ways. It would also seem likely to involve very significant legal costs.

- 5.13 Moreover, there appear to be other ways of the OFT achieving its objectives that would require fewer resources, in particular:
- continuing work to achieve market change without any further UTCCRs investigation, such as promoting voluntary change or advocating legislative change
  - pursuing its objectives regarding precedent through other cases as opportunities arise, which would require little or no additional resources compared to those which would be allocated in any event, and
  - intervening on a case by case basis in relevant cases as appropriate.
- 5.14 The OFT is aware of the impact that its decision will have on the resources of others. It is in part for this reason that it has set out in some detail the reasons for its decision.

## **Conclusion**

- 5.15 In conclusion, the OFT considers that it would not be consistent with its administrative priorities to continue an investigation into UOCs under the UTCCRs. It does not consider that the impact or strategic significance of continuing an investigation would be sufficient to warrant the risks and resources involved. In particular, the OFT considers that it is not appropriate for it to pursue an investigation which it considers has limited prospects of success when other options for pursuing its objectives are available which would involve substantially less cost and lower risk.

## 6 CONCLUSION AND NEXT STEPS

- 6.1 The OFT has today set out its next steps in relation to its work on the PCA market, and in particular UOCs, following the Judgment.
- 6.2 For reasons set out in this document, the OFT has decided not to continue an investigation into UOCs under the UTCCRs, as a result of the Judgment. The OFT has considered a number of potential avenues for continuing an investigation under the UTCCRs. Any such investigation would be narrow in scope, would appear to have a low probability of success and, in any event, would appear to make only a limited contribution to achieving the OFT's objectives. When considered against the risks and resources involved, the OFT does not think it appropriate to continue an investigation.
- 6.3 Nevertheless, the OFT continues to have significant concerns about the operation of the PCA market, in particular in relation to unarranged overdrafts. As set out in its market study follow-up report, published in October 2009, banks have voluntarily agreed to implement initiatives that will improve transparency and measures have been implemented, or will be implemented, to give greater confidence in switching accounts. Despite some improvements in the market over the past couple of years, the OFT believes that more fundamental changes are needed in relation to unarranged overdrafts.
- 6.4 The OFT will enter into intensive discussions with banks, consumer groups and other organisations early in January with the intention of seeking rapid change. In particular, it will look to secure changes in the areas identified in paragraph 4.9 of this document, concerning control, clarity and predictability, and responsibility. A number of options may be available to secure these objectives, ranging from voluntary action (which could be supported by amendments to the Lending Code<sup>46</sup> and

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<sup>46</sup> The Lending Code is a self-regulatory code setting minimum standards of good practice when dealing with the following customers in the UK. <http://www.lendingstandardsboard.org.uk/>.

guidance issued by the OFT, for example) to legislative change. It will report on progress by the end of March 2010.

- 6.5 As explained in this document, the OFT has not opened any investigation under the Consumer Credit Act 1974 or the Consumer Protection from Unfair Trading Regulations 2008. It will continue to keep these options under review. Furthermore, the OFT will continue to consider whether or not to intervene in cases initiated by other parties under the UTCCRs or other legal instruments, on a case-by-case basis.
- 6.6 The Financial Services Authority and Financial Ombudsman's Service have published advice on their websites for customers with complaints about bank charges<sup>47</sup>.

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<sup>47</sup> See

[http://www.moneymadeclear.fsa.gov.uk/news/product/unauthorised\\_overdraft\\_charges\\_test\\_case.html](http://www.moneymadeclear.fsa.gov.uk/news/product/unauthorised_overdraft_charges_test_case.html) and <http://www.financial-ombudsman.org.uk/faq/bank-charges.html>.