

**REGULATING RETAIL BANKING CONDUCT OF  
BUSINESS**

**THE FINANCIAL SERVICES CONSUMER PANEL  
RESPONSE TO CP 08/19\*\***

## **Developing the right regime for the future**

### ***Q1: Do you have any comments on our analysis in Chapter 3 and our reasons for proposing a new framework?***

In our view the Banking Code is an important document that covers some important areas and is accessible for retail consumers. The absence of a strong overarching principle of fairness and flaws in the governance of the Code are, however, serious concerns for consumers. We have always welcomed and supported the system of independent reviews of the Code and the Panel has taken the opportunity to respond to invitations to participate in the process. The fact remains, however, that the Code sponsors are the final arbiters over the content of the Code and over the Guidance that is produced to assist Code subscribers. There are a number of examples of changes proposed to the Code by the Independent Reviewer and/or stakeholders that were not taken up by the sponsors, such as the application of a principle of fairness, as we have already mentioned; a ban on credit rejection simply on the grounds of reaching a certain age; and a requirement to alert customers before the end of a bonus rate period. Inevitably this has undermined confidence in the Code and in the independent review process. We do not think that making changes to self-regulation generally and the Code in particular will address the fundamental issues here. It is essential that the proposed new framework based on the Principles for business; Banking Conduct of Business Sourcebook; Unfair Terms in Consumer Contracts Regulations; and regulations arising from the Payment Services Directive; is now put in place. We see no viable alternative.

Whatever the eventual outcome of this consultation process in terms of detail, it is essential that both the FSA and the retail banking industry take into account the lessons to be learned from the serious problems that exist in the market at the moment. The area of charging is the most obvious example of this. A great deal could be achieved if the principle of Treating Customers Fairly was applied, pragmatically, to helping consumers to avoid unauthorised overdraft charges. This could be by way of developing or promoting accounts with a 'sweep' facility – which would also encourage consumers to save with the same institution that handles their current account – or just by the use of simple text message alerts. Such a service could be offered free.

## **Proposed new framework**

### ***Q2: Do you agree with our proposal to apply all the Principles fully for all firms that accept deposits or issue e-money?***

We fully support the proposals to apply all the Principles for Business fully for all firms that accept deposits or issue e-money. We agree that the current FSA guidance on the application of the Principles is no longer justifiable or sustainable.

### ***Q3: Do you have any comments on our proposals for a Banking Conduct of Business Sourcebook and the draft Handbook text?***

We support the introduction of a Banking Conduct of Business sourcebook (BCOBS) to underpin the Principles for Business. The application of the Payment Services Directive and its harmonised provisions does make the regulatory structure quite complex. It will be important to ensure that firms and in particular their front line staff are aware of the implications of these various business requirements. From a consumer perspective we hope that there will be no need for consumers to develop an understanding of the precise scope of BCOBS and the Directive. All the information that retail customers will need should be available in a straightforward format in branch premises and on line.

Our only comment on the Draft Handbook Text is that, as we explain in our response to question 4 below, we do not support the use of the term micro enterprise which currently appears in Appendix 1 to the Paper.

We do have some comments on the new high level conduct of business rules. We strongly support in particular the introduction of rules and guidance on the level of service provided; fair treatment of customers in financial difficulty; and changing banks/banking service providers. We are pleased that these rules will apply to moving cash Individual Savings Accounts.

The proposed high level rules relating to the provision of information, while welcome in many respects, could lead to consumers being overwhelmed with documentation and a possible consequence of this could be that consumers put this information to one side and rely instead on what they are told about a particular account or facility. There is a considerable body of evidence on consumer behaviour<sup>1</sup> which we suggest provide useful insights into consumer decision making in financial services including the impact of written information. At the same time, firms could be relying on the fact that they had supplied every

---

<sup>1</sup> Including CR 68 Evidence of impact: an overview of financial education evaluation and CR69 Financial capability: a behavioural economics perspective, both published by the FSA at [www.fsa.gov.uk](http://www.fsa.gov.uk)

possible piece of information in written form, in order to meet their disclosure obligations. This is an important area for both firms and consumers and we would like to see a pragmatic approach taken. It may be that the recent changes to banking in Northern Ireland as a result of the Competition Commission decision will provide a useful insight as to why the industry should not be left to decide for itself how to interpret and implement such remedies. We believe that had the FSA had oversight of the implementation of the remedies and been able to apply its principle of Treating Customers Fairly, a significantly better consumer outcome would have been achieved.

***Q4: Do you have any comments on our proposed use of the definition of micro-enterprise to cover business banking customers?***

As we said in our response to CP08/14 Implementation of the Payment Services Directive, the change in definition to 'micro enterprises' effectively reduces the numbers who are eligible to complain to the Financial Ombudsman Service. This definition also categorises the type of firms eligible in terms of their turnover in Euros. The Euro is not legal tender in the UK so this will raise endless questions about the exchange rates on different dates throughout the course of a complaint. A more realistic solution would be to have an equivalent figure in Sterling which could be based on the exchange rate at a fixed point in time.

***Q5: Do you have any comments on the proposed application of BCOBS to incoming EEA branches and e-money issuers?***

The Panel has expressed concern on other occasions about the effectiveness of the passporting regime and the risk of consumer detriment that can arise. We are looking forward to seeing the results of the FSA review and any subsequent consultation. In the meantime, we would support the application of BCOBS to UK branches of credit institutions authorised in another EEA State.

***Q6: Do you have any comments on the proposed application of the requirements in BCOBS to credit unions?***

In principle we would like to see the provisions of BCOBS applied to credit unions provided that the requirements are proportionate to the business and the level of regulatory risk.

***Q7: Do you think that there are elements of the current Banking Codes and other relevant codes/guidelines that would not appear in the PSD Regulations or BCOBS (as proposed in this CP) but which ought not to be lost?***

Yes. The Banking Codes and Guidance for Subscribers cover many points of detail that will not be set out in BCOBS, such as the arrangements relating to

PINs and other security issues. These are valuable for consumers and continued application of such detailed arrangements will also assist firms to ensure compliance with high level principles. However, while we would not want to see elements of the Banking Code lost we see FSA regulation as an opportunity to correct serious deficiencies in consumer treatment and we would expect these to be incorporated into any guidance.

This particular question relates specifically to the part of the Consultation Paper that deals with industry guidance. There is provision in the formal FSA confirmation procedure for the Consumer Panel to be consulted where proposed industry guidance has a significant consumer impact. The FSA also notifies us of other guidance for which confirmation is being sought, so that the Panel can take the opportunity to review it in draft for areas of consumer interest that might not be immediately obvious. Consequently we see benefit in the use of confirmed industry guidance and we will be happy to continue our role in the FSA's confirmation procedure. As we have said, given the high level nature of much of BCOBS, industry guidance on particular issues could be helpful. It is important, however, that due weight is given to the views of the Panel and of other consumer bodies on the content of the guidance and that sufficient time is built into the drafting process to allow meaningful consultation and discussion to take place.

There is an additional issue however. The provision of fair and efficient banking services is vitally important to consumers. There is a real and urgent need too for consumer confidence in the retail banking sector to be rebuilt following the damaging effect of widespread unfair treatment and mis-selling (Payment Protection Insurance and bank charges being the most obvious examples), as well as the impact of the financial crisis<sup>2</sup>. Consequently we would prefer to see only guidance that has been issued by the FSA itself – or industry guidance confirmed by the FSA - used in this particular sector. The Panel has always been supportive of steps taken by trade bodies to raise the standard of business provided by their members by way of other initiatives and we will continue to do so, but in our view the retail banking sector cannot be relied on to deliver what is needed in any less structured way.

We are conducting our own separate review of the Banking Code to identify any issues other than those listed in the Paper, on which industry or FSA guidance would be needed. More generally, however, we would like to see more work being done on the disclosure of information to consumers. Please refer to our answer to Question 3 above.

***Q8: Do you have any comments on our proposed approach to operationalising the new framework?***

---

<sup>2</sup> Findings of a survey published by YouGov in October 2008 ([www.yougov.com](http://www.yougov.com)) included 19% of savers did not consider that their savings were safe; 26% of savers over 55 were concerned about the safety of their savings; and 21% were likely to withdraw some or all of their savings in the next month

Much of the success of the proposed framework will depend on the level and quality of supervision and, ultimately, enforcement by the FSA. We note that the FSA intends to use the same range of supervisory tools as it does in other business areas, subject to the implementation of the Supervisory Enhancement Programme. It will be important for the FSA to ensure that it has sufficient resources available to undertake this role. As we understand it, the cornerstone of the regime will be a combination of the ARROW framework; thematic work; and current processes for dealing with credit unions. We are pleased to see that the FSA will also deal with monitoring financial promotions, rather than referring these to the Banking Code Standards Board.

Subject to further review by the FSA at a later date, we agree that currently there is no obvious need for additional reporting of banking Product Sales Data.

While the FSA has already announced that its specific initiative on Treating Customers Fairly (Principle 6) has been subsumed into its core supervisory process, we urge the FSA to take a particular interest in TCF compliance in retail banking. Given the questions raised over fairness by the on-going test case on bank charges - and issues related to sales practices by banks of Payment Protection Insurance too - we believe that this is an entirely appropriate focus for the FSA's work. TCF is the cornerstone of consumer protection in banking and the principle applies widely across all FSA regulated business (other than dealings with market counterparties). We have high expectations for the application of the FSA's fairness principle. For example, where banks have a 'sweep' or similar facility available, we would like to see banks becoming more proactive in promoting this to customers to help them avoid moving into an overdrawn balance on their current accounts. This would be particularly helpful where the overdraft is caused by payment of a direct debit. Delivery of essential services such as gas and electricity could be compromised if direct debit instructions are not met, but consumers will also want to avoid going into overdraft. Some financial institutions use cash machines to warn customers if their account is in danger of going overdrawn, or exceeding the overdraft limit. This is a helpful means of warning consumers and more use could be made of this facility. We will be taking a particularly close interest in TCF and how the FSA monitors and enforces TCF through its supervisory and enforcement work.

As regards the FSA's proposals on enforcement, we endorse the approach set out in the Paper. The FSA's power to pursue cases against individuals as well as firms is an important tool unavailable to the Banking Code Standards Board, as is the power to impose financial penalties. We would like to see the FSA adopting a robust approach in this important area for consumers and more use made of regulatory transparency to get the right messages across to both firms and consumers. Consumers will be seeking decisive enforcement action from the FSA when there is evidence of significant non-compliance. In this context, there is a possibility that the current test case on bank charges might not have been concluded by November 2009, when the new regulatory regime will come

into force. It is a matter of fact that the bank charges question is an area of significant detriment that is continuing to affect a large number of consumers on a daily basis. The longer the court case drags on, the worse it gets for consumers. The Panel is against any transitional arrangements for conduct of retail banking (see answer 10) and therefore expects the FSA to ensure that it is in a position to act on the aspects of current account charges which fall under its remit at November 2009, namely those for declined payments. We believe the FSA should ensure it has all the relevant information from the banks with regard to these charges in advance of the November implementation deadline, and further that it make it known to banks that it stands ready to bring the full weight of its enforcement regime down on any bank which fails to comply with this deadline.

We believe the FSA's regulatory approach should include scrutiny of individual business models, which must be sustainable. FSA supervisors will need to adopt a robust approach, with full support from FSA senior management, in challenging models which appear vulnerable to particular scenarios or to be reliant on the performance of assets with opaque or unquantifiable risk.

As the Paper acknowledges, an effective working relationship with the Office of Fair Trading (as well as the Financial Ombudsman Service) will be essential. While we have no reason to think that there will need to be a material change to the current arrangements with FOS, we understand that the FSA and OFT have been reviewing the current memorandum of understanding to ensure that it properly sets out their respective future responsibilities and operating procedures. Given the relative complexity of the regulatory framework in financial services there is a real need for a well-structured, comprehensive and pragmatic operating model. Without it, the new regulatory framework will not deliver the necessary outcomes. We will be looking for positive evidence that there has been no consumer detriment as a result of the dual FSA/OFT approach to banking regulation, either in terms of regulatory gaps or communications failures. The complex interaction between the Payment Services Directive, Financial Services and Markets Act and Consumer Credit Act – and the way in which they are being implemented - will mean that consumers will not have one single regulatory interface for all their financial relationships. We are pleased, however, that FOS will be the single point of contact for consumers with unresolved complaints arising from the PSD, consumer credit and financial services business.

In addition, the Consultation Paper refers to the need to improve the disclosure gateways that currently exist between the FSA and the OFT. Given the importance of the working relationship between the two regulators and the fact that the new regulatory framework will be implemented in only nine months' time, we would like assurance that these improvements are already being made. Any legal or procedural obstacles to the timely exchange of relevant information

between the regulators could result in significant consumer detriment and would, in any event, be damaging to the new regulatory structure.

## **Recommendations and next steps**

***Q9: Do you agree that the proposed new framework should come into effect at the same time as the PSD in November 2009?***

We agree that the new framework should be implemented in November 2009. As the Paper states, many firms would be required to make changes to systems and processes as a result of the Payment Services Directive in any case.

***Q10: In which areas do you think transitional provisions would be desirable and for how long?***

The Panel has not identified any areas where transitional provisions should be put in place.

## **Cost Benefit Analysis**

***Q11: Will a change to the proposed new framework generate any further costs have not been identified here?***

***Q12: Will a change to the proposed new framework generate any further benefits that have not been identified here?***

***Q13: Do you have any other comments on the Cost Benefit Analysis?***

The Panel is not in a position to comment on the detail of the Cost Benefit Analysis. However, it is important not to lose sight of the broader and less easily quantifiable consumer benefits that should arise from the move to the new regulatory framework. We have in mind factors such as consumer confidence in the retail banking sector which, ultimately, could lead to greater engagement by consumers with the industry, and increased levels of consumer protection. The cost to deposit-takers of the current test case on bank charges – and the possible additional cost of firms having to refund at least some of the charges already levied against customers – we believe could have been avoided if the Principles for Business (and TCF in particular) had been applied from the outset and dealt with as part of the FSA regulatory regime. The specific costs identified in the Consultation Paper, while seeming significant in absolute terms, should be considered in the context of the size of the market in the round. Ultimately customers will be bearing at least some of the cost of the regulatory changes and this cost must be reasonable and consistent with TCF.



It is obvious from the OFT market study on personal current accounts plus its work on Payment Protection Insurance and credit cards that the current model for retail financial services is clearly not sustainable, but we do not believe that it is impossible for banks to offer fair products and make a profit. We would like the FSA to issue a Discussion Paper on the sustainability of banking business models in the near future.

We note that the FSA does not expect the new regulatory framework to generate material ongoing costs for credit unions. Credit unions provide an important service and we would not wish to see any forced to close because of increased cost. The application of the framework should be proportionate to the risks of the business.

### **Compatibility of proposals with FSA objectives and the principles of good regulation**

#### ***Q14: Do you agree with the compatibility statement?***

We agree that the compatibility statement covers all the key issues and, subject to the comments we have made in this response, we support the FSA's proposals for the new regulatory framework.