



The voice of banking
& financial services



THE
UKCARDS
ASSOCIATION

Ms Kirsten Jones
Conduct Policy
Financial Services Authority
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SENT VIA EMAIL

25 August 2010

Dear Kirsten,

Joint BBA/BSA/UKCA response to chapter 7 of FSA's July 2010 Quarterly Consultation – Proposed changes to BCOBS

The British Bankers Association, the Building Societies Association and The UK Cards Association welcome the opportunity to participate in the consultation on changes to BCOBS with a view to the right of set-off (ROSO). We are sending this response as the joint sponsors of the Lending Code, which also means that our members apply the Lending Standards Board's (LSB) guidance on ROSO.

The BBA is the leading association for the UK banking and financial services sector, speaking for 223 banking members from 60 countries on the full range of UK or international banking issues and engaging with 37 associated professional firms. Collectively providing the full range of services, our member banks make up the world's largest international banking centre, operating some 150 million accounts and contributing £30 billion to the economy.

The Building Societies Association represents mutual lenders and deposit takers in the UK including all 50 UK building societies. Mutual lenders and deposit takers have total assets of over £370 billion and, together with their subsidiaries, hold residential mortgages of over £235 billion, 19% of the total outstanding in the UK. They hold almost £250 billion of retail deposits, accounting for just under 22% of all such deposits in the UK. Mutual deposit takers account for about 36% of cash ISA balances. They employ approximately 50,000 full and part-time staff and operate through approximately 2,000 branches.

The UK Cards Association is the leading trade association for the cards industry in the UK. With a membership that includes all major credit, debit and charge card issuers, and merchant acquiring banks, our role is both to unify and represent the UK card payments industry.

Introduction and general remarks

As you mention in your consultation paper, the right of set-off has been part of banking common law for many decades. The FSA's *MoneyMadeClear* leaflet "Just the fact about your bank account", which you reference in your consultation paper, correctly states on p20 that banks and building societies "have this (i.e. ROSO) as a general, legal right, whether or not they mention it in the

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account terms". It often works to the customer's favour and saves him debt interest, e.g. if he is unaware of the debt situation and the bank can use funds in the customers' savings account to pay off the debt. The economic downturn that started in 2008 inevitably meant that the number of customers with debt problems would rise. Therefore, any rise in the number of accounts on which ROSO is being used would not be surprising.

As you are aware, the LSB looked at ROSO earlier this year and has since published minimum standards for subscribers to the Lending Code. Lending Code subscribers are already committed to acting "fairly and reasonably in all their dealings with customers, providing clear information about accounts and services and about how they work". We believe that the LSB guidance works well in practice and does not need to be changed at this point in time. We would therefore urge you to align your ROSO standards in wording and in practice with the LSB guidance as closely as possible. We understand this was also your intention when you prepared for this consultation: We were assured that this was about mirroring the LSB guidance on the deposit-taking side, not about looking at the same issue again.

You should also be aware that the LSB has already approached some banks to monitor compliance with their ROSO standards. This will also be relevant to the current review of the Lending Code, which, as a result of the LSB's evidence-gathering, may also bring further changes to the ROSO standards. Before you bring in new BCOBS guidance, it is therefore important that you coordinate your standards with the LSB as closely as possible, to avoid different standards that constantly need to be adapted to each other.

On a wider point, we believe that the ROSO issue provides a case study of the potential problems of coordination in the oversight of retail banking conduct of business we had pointed out when the Banking Code was abolished last year. We understand that the LSB offered you an early opportunity to discuss the ROSO issue when they started the work on their standards, but that this offer was not fully taken up. In order to achieve consistency in the treatment of customers through unified, clear and accepted standards, we believe that you should have made sure that you address this jointly with the LSB. As this has not happened, the credit industry is now facing the danger of double jeopardy, as two oversight bodies attempt to regulate the same subject matter and whilst the LSB is already monitoring compliance with their standards. As a learning of this, we would urge you to coordinate any activities that are likely to have an impact on credit and debt regulation with the LSB very early in the process and to conclude the Memorandum of Understanding with the LSB as soon as possible.

Response to individual consultation questions

Q21: *Do you agree with our proposal that information about set-off should be provided in the account terms and conditions?*

As outlined above and in your consultation paper, ROSO is part of common law, and there is no legal requirement that it can only be exercised if it is mentioned in the account terms and conditions. However, we agree that in order to provide information on ROSO early to the customer and to offer them an opportunity to read about its application, it would be best practice to provide information on ROSO in the terms and conditions. We would welcome your opinions on what level of detail should be included in the terms and conditions. As it is a common law right, we would not seek to re-issue terms and conditions to existing customers. However, if you intend to require banks and building societies to do so, this could only be done within a period of up to six months.

We would also welcome clarity from the FSA on how you define ROSO: Under common law, ROSO can both encompass the recovery of loan arrears or a contractual payment from an account in credit. We are also assuming that, like the LSB guidance, your proposed standards are only applying to personal customer accounts, not accounts run by micro-enterprises.

Q22: *Do you see a need for further information, beyond that set out in our proposal, to be provided about set-off when a customer opens an account?*

No, we agree that to include this information at pre-contract stage would overwhelm new customers.

Q23: *Do you agree with our proposal for firms informing customers of the right of set-off when they are beginning or continuing to experience difficulty in meeting their payment obligations?*

Yes, this is in line with Point 2 in the Lending Standards Board's published guidance on ROSO. The LSB standards allow that notification of a firm's possible use of ROSO could be by its inclusion in letters such as those used when alerting a customer to arrears or a transaction taking them over the limit. It was also agreed that the notification could be a general advice to the customer and not a specific advice that funds would be withdrawn on a certain date. We believe that this should remain to be the case.

The LSB guidance states that a simple warning regarding ROSO is sufficient. However, as the FSA's intention is for general information to be provided along with the generic circumstances in which a firm can apply set-off, we would appreciate further guidance from the FSA regarding what this communication may look like.

Finally, we would seek more details on what is meant by 'continuing to experience difficulties', i.e. we would need to know how you would expect 'continuing to experience difficulties' to be assessed. We would also seek further detail on how often you would expect firms to reassess a customer's position and reissue the notice. You may also be aware that the LSB is currently undertaking some work on behalf of the OFT to clarify standards applicable to customers in or at risk of financial difficulties. We would urge you to liaise with LSB/OFT to make sure that the changes to BCOBS are aligned with these new standards.

Q24: *Do you agree with our proposal that customers should be promptly notified about the use of set-off on their account?*

We agree in principle, but would point to point 6 in the LSB guidance, which stipulates that the customer needs to be contacted "[A]t least on the first occasion after set-off has been used". We believe that this should also be mirrored in the BCOBS guidance. This is also because we do not think that your proposal is entirely clear in practice. For example, would showing the amount taken under ROSO on the next statement be sufficient (it would be the natural reference point for the customer and would be most cost-effective for firms), or do you envisage a separate communication being sent to the customer (which the customer may ignore)?

Q25: *Do you agree with our proposals for exercising the right of set-off fairly?*

We agree in principle, but again we would urge you to align the wording with points 3, 4 and 5 of the LSB guidance.¹ The wording used here is clear and should be incorporated into BCOBS.

We would also stress that a bank is not able by itself to assess a customer's essential living costs, as this will differ for everyone, also the current account in question may not be the only banking relationship a particular customer has. This may be possible after the bank/building society has made contact with the customer to discuss the situation, if he or she is willing to disclose his true

¹ The key points are as follows: Point 3 states that "...In all cases where set-off is to be applied and it has been established, by the provider, that the customer is in financial difficulties...". Point 4 deals with customers who do not respond to contact or are not co-operative. Point 5 deals with the number of missed payments that can be taken.

living costs. Ultimately, a bank can only use the information that is available from the past account transaction, which may only give a very partial picture.

We understand that there are individual case studies that have driven this proposal. Therefore, we would be grateful if it would be possible to have sight of the cases you have received from consumer bodies, so that we can address these points directly – provided the relevant respondent agrees with that.

Q26: *Do you have any suggestions of other ways of exercising the right of set-off fairly?*

No.

Q27: *Do you agree with our proposal that firms should not use set-off in the types of scenarios listed above?*

No. The LSB ROSO guidelines do not exclude set-off where money can be taken from joint accounts. The FSA proposals appear to prohibit this practice where it is used to settle a sole debt, but it may be beneficial to some customers to have money taken from a joint account in this way, and we would want this freedom to act to continue to be available to providers.

We also disagree with your points (i) and (ii), as both concepts are difficult for the bank/building society to establish. For (i), as long as the customer does not hold the money in a formal appointee account or does not tell his account provider that the funds are held for a third party, it is impossible for the financial institution to know about this. Therefore, it is the customer's duty to open a specific fiduciary account.

For (ii), we understand the policy intention behind the FSA's proposals; however there are some practical difficulties. Even if we are able to identify the source of income from government bodies/local authorities, it is difficult to ring-fence these amounts and to identify whether the customer has (or has not) already used them for their intended purpose. It does not appear to be proportionate or practical to exclude all recipients of benefit from the firm's right of set off as the key point is whether the customer is in financial difficulty as opposed to whether they receive specific benefits that may or may not be means tested (e.g. child benefit)

As in our reply to Q25, we would like to have sight of relevant cases from consumer bodies that have informed these proposals in order to address these issues.

Q28: *Do you agree with our proposal to apply the guidance in the information requirements to credit unions, but exempt them from our post-sale guidance on set-off?*

We leave it to the credit unions to respond to this point.

Q29: *Do you agree that our proposed guidance should take effect immediately?*

No. As outlined in the responses to individual questions above, we assume that you are trying to go beyond the standards the LSB introduced on 1 May this year. If this is indeed the case (see, in particular, our answer to Q21, 24 and 25 above), this would create development work for some banks and building societies (e.g. to create systems to show the customer the amount debited), which we anticipate will take at least six months.

Furthermore, as explained in the introduction, the LSB is currently monitoring compliance with their ROSO standards, which could then feed into the Lending Code review, with a new Code version due

on 1 March. Therefore, we would invite you to bring in your new BCOBS guidance together with the new Code or when the results of the Code review are known. At the very least, some firms are likely to need transitional arrangements of at least six months' duration to comply with the new BCOBS guidance.

Q30: *Do you have any comments on our proposed amendment to BCOBS 4.1.4G(8)?*

We have no comment on this.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Eric Leenders', written over a horizontal line.

Eric Leenders
Executive Director, BBA

On behalf of the Lending Code sponsors

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