



REGULATORY UPDATE 14/2009

Special Edition: MBNA charging error and the Financial Regulator's investigative process

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MBNA charging error and the Financial Regulator's investigative process **Peter Oakes, Managing Director, *Compliance Ireland***

In the days following the Financial Regulator's statement (14/12/2009) that MBNA had notified it of interest charging errors totaling €18million (dating back to June 2007) there has been much written in the press about a lack of enforcement by the regulator. The *Irish Times* went one step further by dragging in the Consumer Consultative Panel claiming "The panel wants to know why MBNA was not fined for overcharging when much smaller operators are penalised for minor infractions." (*Irish Times* Monday, December 21, 2009).

Criticism of the Financial Regulator over the MBNA announcement is, at this stage, most probably misplaced if not wrong. The Financial Regulator has no case (yet) to answer in respect of MBNA. The focus of the media and others on the MBNA matter dangerously diverts the public's attention away from the significant problems the regulator faces and for which it must be held accountable. Be that as it may, this Newsletter only looks at the issue of MBNA and, based upon the author's regulatory enforcement experience, gives an explanation of the process of investigations into such matters.

Anyone who read the Financial Regulator's statement as meaning that there is no enforcement action to come has misread the situation or knows something the rest of us don't. Those familiar with the Financial Regulator, the judgement of Justice Peter Kelly in the *Ryanair* case and indeed any regulatory process should know that regulators rarely discuss on-going investigative matters so as not to prejudice the rights of an accused. Equally the fact that a statement was made makes it impossible for the Financial Regulator not to proceed to administrative sanctions against MBNA. It is silly to think that the regulator made the statement to appease critics about its usual secretive practices. The statement was made to send a clear signal, not to MBNA, but to other credit/financial institutions that material pricing/charging errors are serious and will (at least under the new regulatory environment) be actioned.

We approached the Financial Regulator and were informed by spokeswoman (Tuesday 22/12/2009) that material charging and pricing errors are dealt with under the administrative sanction procedures. *Compliance Ireland's* reading of both the press release and yesterday's statement by the Financial Regulator is that no one should conclude that MBNA will not be sanctioned.

The facts of this matter are straight-forward. The press release of 14 December 2009 notified the public of the error. If MBNA had not reported the issue it would have (likely) breached the Consumer Protection Code for non-disclosure. The last line of the press release makes it clear that the Financial Regulator is still dealing with MBNA. There is no reasonable inference to draw that enforcement action will not follow or that MBNA's review will not be subject to independent regulatory assessment. Also, how could any regulator conclusively prove a prescribed contravention in less than a week (assuming the MBNA did in fact inform the Financial Regulator on or near 14 December). This could only be achieved if MBNA admitted the issue, agreed the facts and agreed with the regulator the appropriate sanction in this time space – this rarely happens in life.

Generally speaking, an investigation into a matter similar to that of MBNA follows a series of defined stages, some which overlap. We have set out below a summary of the investigative stages leading to an enforcement action¹.

1st stage - the regulator (and hopefully the firm) seeks to ring-fence, as quickly as possible, consumer loss. This is partly achieved by notifying the public of the issue. It provides an extra layer of scrutiny - i.e. consumers who might not otherwise know of the issue can check their statements to determine if they are affected. If they are not contacted by the product provider, the consumer can bring the matter to the attention of the firm, the Financial Regulator and possibly the Financial Services Ombudsman. This assists identifying the group of consumers affected (see 2nd stage below).

2nd stage - ensuring that the full scope of consumers affected is identified. Refunds, interest, compensation and ex-gratia payments must be properly calculated and confirmed. Thereafter the proceeds of redress can commence being paid out to consumers.

3rd stage - overlaps with 2nd stage and involves ensuring controls and procedures are effected to prevent the same failures happening again.

4th stage - in summary, this involves the regulator ramping up the investigation into the cause of the error; assessing the probability of a prescribed contravention; and assessing the likelihood of a successful regulatory action.

5th stage - engaging in exploratory talks with the accused to gauge, carefully, its position should the regulator wish to move to administrative sanctions. Thereafter the regulator, or as an alternative (depending upon its confidence), will issue notices of inquiry, provide the accused with a right of response and follow the administrative sanction procedures. *Throughout the course of an investigation a regulator must be cognisant that 'procedural fairness' is afforded to an accused otherwise it is liable to a High Court referral. The regulator, if it does not conduct a proper investigation, is also open to High Court referrals on points of law - e.g. questions of jurisdiction.*

6th stage - unless the investigation is bungled, we should expect to see an enforcement action or an explanation as to why no action arose. The length of time between the 5th and 6th stages depends upon many factors including the prowess of the regulator, the formalities of the proceedings, comprehending the evidential issues, discharging the burden of proof, maintaining a solid chain of evidence and testing the adversarial strength of the complaint. What many may not realise is that good regulators prepare their cases not just based upon the first forum in which its evidence is presented but also taking into account appeal forums.

¹ We have avoided referencing legal provisions in the Central Bank & Financial Services Authority Acts for this article so as to provide a straight-forward explanation of a process usually found only in in-house regulatory manuals.

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This may seem pedantic, especially where a regulated firm has signalled it may roll over, but only a novice regulator will not prepare for a change in heart by an accused. Should this happen the regulator's case is likely as good as dead – it may not have the requisite evidence prepared to prove its case. *Bear in mind that the regulated firm is able to appeal the decision on its facts to the Appeals Tribunal (and as noted above, to the High Court on a question of law or procedural fairness)*

7th stage - the educative benefit derived from an enforcement action. The purpose is to draft a detailed enforcement action statement (for public release) which clearly informs product producers and consumers of the reasons for the sanction and the lessons to be learned. This is an immensely valuable stage for directors, risk and compliance officers of competitors (and for other firms thinking "*but for the grace of god go I!*"). Detailed enforcement actions send clear signals to regulated firms about conduct which is not acceptable and why is it not acceptable. The publication of detailed reasons serves as a beacon to firms (i.e. *Learn from the action, or face greater sanctions for the same*). I think the phrase used by Governor Patrick Honohan is '*credible threat of enforcement action*'.

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