

Notice of Undertaking

Wirex Limited

Summary

Wirex Limited (referred to as “Wirex Limited” or “the firm”) has committed to make changes to its e-money contract and given us an undertaking under the Consumer Rights Act 2015 (the CRA). This is in relation to 3 terms:

- A term excluding the firm’s liability as a result of account suspension;
- A term limiting compensation available to consumers;
- A term excluding commitments that may be implied by law.

We summarise our concerns and the action the firm has taken below.

Why did we have concerns?

Exclusion of the firm’s liability as a result of account suspension: a term stated that the firm would not be liable for any losses incurred by consumers in the event that the firm suspended the account in accordance with that term, regardless of the circumstances. We were concerned that this term was likely to be considered unfair because it could result in the firm refusing to pay compensation to consumers even where the loss was due to the firm’s fault, for example if the firm suspended a consumer’s account in error.

Limitation of compensation available to consumers: a second term included a paragraph that stated the amount of compensation a consumer could obtain from the firm in the event of a loss was limited to what the consumer had paid to the firm in the 12 months preceding a claim – and that if a consumer had not paid anything, no compensation would be payable. We were concerned that this term was likely to be considered unfair because it would be expected that compensation payable to consumers would be based on the loss incurred, irrespective of what the consumer had paid to the firm. As such, we were concerned that the term could leave consumers with less compensation than they would be entitled to.

Exclusion of commitments that may be implied by law: a third term included a paragraph that allowed the firm to exclude any commitments that may be implied by law, to the extent that the firm was permitted to do so. We were concerned that this term was likely to lack sufficient transparency as consumers were unlikely to understand what this meant in practice.

What has the firm done?

Wirex Limited has:

- agreed to remove all 3 terms from its e-money contracts with consumers from **1 January 2024**;
- agreed to not use these 3 terms (or similar terms with the same effect) in its future contracts with consumers;
- told us that the terms have been in use since **October 2021**;
- told us that it has not relied on the 3 terms in an unfair way in practice;
- fully cooperated with us in resolving our concerns.

What does this mean for consumers?

The changes that Wirex Limited has committed to make to its contracts should ensure that consumers better understand the circumstances in which the firm is liable to pay compensation. In addition, compensation will no longer be limited to how much consumers have paid to the firm in the previous 12 months, so consumers should receive appropriate amounts of compensation for their losses.

Undertaking from Wirex Limited to the Financial Conduct Authority

Wirex Limited (referred to throughout as “Wirex Limited” or “the firm”) undertakes under the Consumer Rights Act 2015 (the CRA) to:

- commit to making changes to three of its e-money contract terms as below;
- not rely on these terms in its existing contracts with consumers; and
- not use these terms (or similar terms with the same effect) in its future contracts with consumers.

Applying the CRA

Under section 62(4) of the CRA, a term is unfair if: “...contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.”

Section 68(1) of the CRA states that firms are required to “ensure that a written term of a consumer contract ... is transparent.” Under section 64(3) of the CRA, a term is transparent if “... it is expressed in plain and intelligible language and it is legible.”

Wirex Limited General Terms of Service

Wirex Limited has committed to making changes in respect of three terms in its e-money contract as follows:

Exclusion of liability during suspension of account

The first paragraph of term 18 stated: *“We may end or suspend your use of the Wirex Service without notice to you, at any time, and with immediate effect in the following circumstances: [...]”*

The second paragraph of term 18 stated: *“We exclude all liability for any losses incurred where we have suspended an account in accordance with this paragraph 18.”*

We considered the fairness of the second paragraph of term 18 in light of the CRA and relevant case law, and we were concerned that this term was likely to be considered unfair under the CRA.

In our view, the term as drafted caused a significant imbalance to the detriment of consumers contrary to the requirement of good faith. Under national law, where an individual suffers a loss due to the actions of another party, the affected individual may take legal action to obtain compensation for that loss. We were concerned that the second paragraph of term 18 derogated from the position under national law by purporting to exclude the firm’s liability for any losses incurred by the consumer due to the firm suspending the consumer’s account in accordance with that term, which could include where the firm had acted in error.

In our view, the significant imbalance was caused contrary to the requirement of good faith, because the firm, dealing fairly and equitably with consumers, could not reasonably have assumed that a consumer would have agreed to such a term in individual negotiations. This is because the term did not adequately balance the firm’s commercial interests with the

legitimate interests of consumers as consumers would have to bear any losses caused by an account suspension in accordance with that term even if the firm was at fault.

In addition, we were concerned that the term resembled Paragraph 2 of Schedule 2 of the CRA, which is a list of terms that may be regarded as unfair: *"A term which has the object or effect of inappropriately excluding or limiting the legal rights of the consumer in relation to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations[...]"*

The firm has agreed to delete the second paragraph of this term.

Limitation of consumer compensation

The fourth paragraph of term 24 stated: *"For any claim, our responsibility to you will be limited to any amounts you have paid us in the 12 months preceding your claim. If you have not paid us anything, we shall not be responsible to you for any claim arising out of the provision of the Wirex Service."*

We considered the fairness of the fourth paragraph of term 24 in light of the CRA and relevant case law.

We were concerned that the term was likely to be considered unfair under the CRA for similar reasons as the second paragraph of term 18 above. In our view, the term derogated from the position under national law, as it limited a consumer's right to obtain the proper amount of compensation in the event of a contractual breach by the firm.

In our view, the significant imbalance was contrary to the requirement of good faith, as the firm could not reasonably assume a consumer would have agreed to such a term in individual negotiations. This is because a consumer would most likely expect that if the firm had done something wrong and caused them loss, they would be entitled to compensation commensurate with that loss regardless of what they had paid to the firm. We were also concerned that the term favoured the firm's commercial interests, in that it would lead to the firm being in a virtually neutral financial position if they had to compensate a consumer – however, a consumer may still be left at a loss.

In addition, we were of the view that the term resembled Paragraph 2 of Schedule 2 of the CRA.

The firm has agreed to delete this paragraph of the term. The firm has also improved the clarity of the rest of term 24, so consumers can understand the limited circumstances where the firm will not consider itself liable for losses.

Exclusion of commitments that may be implied by law

The third paragraph of term 24 stated: *"[...]To the extent we are able to do so, we exclude any commitments that may be implied by law."*

We considered the transparency of the third paragraph of term 24 in light of the CRA and relevant case law.

We were concerned that the third paragraph of term 24 was likely to be considered insufficiently transparent under the CRA. This was because consumers may not have an

understanding of the commitments that may be implied by law or the extent to which the firm would be able to exclude their liability for them.

The firm has agreed to delete this paragraph of the term.

Other information

The firm has been fully cooperative in providing this undertaking.

Undertaking agreed on 26 September 2023 and published on 4 October 2023.

Legal information

As a regulator, we, the Financial Conduct Authority (FCA), can challenge firms using terms that we view as not being fair or transparent under Part 2 of the Consumer Rights Act 2015 (the CRA). We review contract terms that we come across in our supervision of firms. This includes contract terms that are referred to us by consumers, enforcement bodies and consumer organisations. This has led to Wirex Limited's undertaking to replace the terms that we consider are likely to be unfair or likely to lack sufficient transparency.

The FCA has a duty under Schedule 3 of the CRA to notify the Competition and Markets Authority (the CMA) of the undertakings we receive. We publish the undertakings on our website with the name of the firm, the specific term(s) and the part of the CRA that relates to the term's fairness and transparency.

Even if firms have not given an undertaking or been subject to a court decision, they should remain alert to undertakings or court decisions concerning other firms as part of their risk management. These will be of potential value in showing the likely attitude of the courts, the FCA, the CMA or other regulators to similar terms or terms with a similar effect.

Ultimately only a court can determine the fairness or transparency of a term. As such, we cannot approve terms as being definitively fair and transparent for the purposes of the CRA; it is for firms to assess the fairness and transparency of their terms and conditions under the CRA and in the context of the product or service in question.

It is important to bear in mind that wording that is fair or transparent in one agreement is not necessarily fair or transparent in another. Where we accept an undertaking given to us by a firm to revise a term, this means that, on the evidence available at that time, we consider the term to be improved enough that further regulatory action is not required.