

**Notice of Undertaking  
Investec Bank plc**

**SUMMARY**

Investec Bank plc is part of the Investec group of companies that provides specialist banking, wealth and investment and asset management services.

Investec Bank plc (Investec) has agreed to change terms in the contract for its investment plan, called the Investec FTSE 100 Enhanced Kick-Out Plan 21. This follows the FSA's assessment that some of the terms in that contract may be unfair.

**Why were the terms changed?**

In our view, one term gave Investec a broad discretion to cancel a customer's contract if the customer breached the contract in any way. We were therefore concerned that customers would not know when Investec could cancel the contract or have the opportunity to rectify a breach.

We also believed that a second term did not clearly explain the process for cancellations outside the 14-day cooling-off period or how much capital a customer would lose as a result of withdrawing from the plan (outside the cooling off period).

**Which customers are affected?**

These changes affect all customers who invested in the Investec FTSE 100 Enhanced Kick-Out Plan 21.

**What are the changes?**

Investec has agreed to amend the original terms to make it clear to customers:

- that Investec may cancel the contract if the customer is in breach of a material obligation and the customer has failed to remedy that breach within a reasonable period after the firm has asked them to do so;
- that Investec may cancel the contract if the customer gave it inaccurate information;
- how to cancel the plan within the 14-day cooling-off period and outside the 14-day cooling-off period; and
- how the early redemption fee (payable for cancellation outside the cooling-off period) is calculated.

**What does this mean for customers?**

Customers do not need to do anything. Investec has confirmed that for existing customers who received contracts/terms and conditions containing the old terms:

- it will treat them as though the new wording applies to them; and
- it has not relied on the potentially unfair aspects of the original terms.

New customers have been sent contracts containing the new wording from 18 February 2013.

## UNDERTAKING

<b>Name of Business</b>	Investec Bank plc (Investec)	<b>Lead Organisation</b>	FSA
<b>Trading Sector</b>	Structured Products	<b>Contract Identifier</b>	Investec FTSE 100 Kick Out Plan 21
<b>Term 1</b>			
<b>Original term</b>			
<p>Clause 11.3</p> <p>‘The Plan Manager may terminate your investment in the Plan on one month’s notice if you fail to pay any money due under these Terms and Conditions or are in breach of any of these Terms and Conditions.’</p>			
<b>Application of the Regulations</b>			
<p>Generally, a term is deemed to be unfair under Regulation 5(1) of the Regulations 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.</p> <p>In our view, clause 11.3 had the potential to cause a significant imbalance in the rights of the parties in favour of the firm. This was because the term gave the firm too broad a discretion to potentially terminate the agreement following a breach of any of the terms and conditions by the consumer. The wording of the term did not restrict the exercise of the firm’s discretion in any way, such as by limiting the term to a breach of a material term by the consumer or by providing the consumer with the opportunity to rectify any breach. As such, we considered that there was too broad a discretion for the firm to cancel the contract following a breach by a consumer. We considered that, therefore, this term could cause consumer detriment, as a consumer’s contract could be terminated following a breach of a minor term, putting the consumer at risk of losing all, or a proportion of, their investment as a result of retained charges and fees. The term also did not give the consumer an opportunity to rectify their breach.</p> <p>We consider that an assessment of good faith, according to case law, means that the firm should deal openly and fairly with consumers. In our view, clause 11.3 as drafted had the potential to be contrary to the requirement of good faith as it gave the firm the ability to terminate the agreement with the consumer following a breach by the consumer of any of the terms and conditions and the term did not provide that the consumer had the opportunity to rectify their breach. We considered that this unlimited discretion meant that the term may have been contrary to good faith.</p>			
<b>How the term has changed</b>			
Investec has agreed to replace Clause 11.3 for all new consumers. For new			

consumers, Clause 11.3 will be replaced with the new term.

In our view, the new term is less likely to be unfair under the Regulations. The new term limits the firm's discretion as it only permits the firm to terminate the agreement if the consumer is in breach of a *material* obligation. The consumer is also provided with an opportunity to remedy the breach, when asked to do so by the firm. We consider that this redresses the previous imbalance between the parties. The risk of consumer detriment is also reduced as the firm will not be able to terminate a consumer's investment for a minor breach. The new term also specifies that the firm may terminate the agreement if it is provided with inaccurate information. This provides consumers with more certainty about the circumstances in which their agreement may be terminated than that provided in the original term. We consider that the new term is more likely to ensure that the firm is dealing openly and fairly with consumers and therefore is less likely to be contrary to good faith.

For their existing consumers, Investec has agreed not to rely on clause 11.3, and to treat all consumers in a fair way, as though they were subject to the new term.

### **New term**

'The Plan Manager may terminate your investment in the Plan if:

- you are in breach of any material obligation under these terms and conditions and you have failed to remedy the breach within a reasonable time of us requesting you to do so; or
- you have given us inaccurate information and, had we received accurate information, we would not have accepted your application.'

In addition to the above undertaking, Investec has also agreed to make the following changes to its contract for Clause 11.6.

### **Term 2**

#### **Original term**

'Clause 11.6

You may terminate any investment in the Plan at any time by giving written notice to that effect to the Plan Manager. The notice must specify whether you wish the proceeds from the sale of the related Securities to be paid directly to you or for an ISA to be transferred to another ISA manager. Early redemption may result in a loss of capital (see paragraph 2 (cancellation) of the Terms and Conditions for further information). There will be a restricted market in the sale of Securities.'

Paragraph 2 (to which clause 11.6 refers) provides:

'2 Cancellation Rights

2.1 The Plan Manager will give you the right to cancel your Plan within 14 days of the Plan Manager's acceptance of your Application Form in accordance with the requirements of the FSA Handbook. You will be informed of your right to cancel in

the information that the Plan Manager sends you on receipt of your application. Alternatively, you can write to the Plan Manager at Investec Administration, PO Box 1008, St Albans, Hertfordshire, AL1 9LZ. If you do so, please provide your name and address and the Plan number with clear instructions to cancel your investment. If the Plan Manager receives your cancellation notice before the Start Date, it will return to you without interest any cash subscriptions in the Plan. If the Plan Manager receives your cancellation notice after the Start Date, it will return to you without any interest cash subscriptions that may be subject to a market value adjustment. Where you do not exercise your cancellation rights, the Plan will continue in line with the Terms and Conditions.’

### **Application of the Regulations**

Regulation 7 of the Regulations provides that firms should ensure that terms are expressed in plain, intelligible language.

We considered that Clause 11.6 was not drafted in plain, intelligible language in line with Regulation 7. This is because Clause 11.6 refers to paragraph 2 of the terms and conditions. Paragraph 2 only discusses cancellation by the consumer within a 14-day cooling-off period. As such, we considered that it was not clear what would happen to a consumer’s investment in the event that the consumer terminated the contract outside of the 14-day cooling-off period and what refund, if any, a consumer would receive back on such an early redemption outside of the 14-day cooling-off period.

### **How the term has changed**

Investec has agreed to replace Clause 11.6 for all new consumers. For new consumers, Clause 11.6 will be replaced with the new term.

We consider that the revised Clause 11.6 is more likely to be plain and intelligible under the Regulations as it is clearer what the cancellation process is: (i) for cancellations within the 14-day cooling-off period; and (ii) for cancellations outside the 14-day cooling-off period. It also gives clearer information about how the early redemption fee is calculated, which is payable for cancellations outside the 14-day cooling-off period.

In our Guidance Consultation on the product design of Structured Products, published on 2 November 2011 ([http://www.fsa.gov.uk/pubs/guidance/gc11\\_27.pdf](http://www.fsa.gov.uk/pubs/guidance/gc11_27.pdf)), we state that ‘where a precise [exit] charge cannot be stated, we would expect the term to make it clear how it will be set.’ We note that, although the precise fee for the early redemption is not specified in the term, Investec now sets out the list of factors that it takes into account in calculating the level of the fee and it is therefore clearer to consumers what refund will be payable to them.

For its existing consumers, Investec has agreed not to rely on clause 11.6 and to treat all consumers as though they were subject to the new term.

### **New term**

‘Clause 11.6

If you wish to terminate your investment in the Plan within 14 days of the Plan Manager's acceptance of your Application Form you will receive an amount as set out in paragraph 2 (Cancellation Rights).

Following this 14-day period, you may terminate your investment in the Plan at any time by giving notice to that effect to the Plan Manager. The notice must specify whether you wish the proceeds from the sale of the related Securities to be paid directly to you or, if applicable, transferred to another ISA manager. You may receive back less than you originally invested, especially in stressed market conditions. The actual amount you receive will depend on the level of the FTSE 100 (including the effect of dividends), interest rates, market volatility, time left to the Maturity Date and any costs Investec reasonably incurs for breaking the funding arrangements entered into in relation to your investment.'

#### **Other information**

The firm has told us that it has not relied on the potentially unfair aspect(s) of the original term 1, nor has it relied on the potentially unclear aspect(s) of the original term 2. The firm has changed its standard contract to reflect these changes for new customers from 18 February 2013.

For existing consumers, the firm has agreed to not rely on the original terms and to treat all consumers as though they were subject to the new terms.

The firm was fully cooperative in providing this undertaking to us.

#### **Undertaking published 26 February 2013**

### **LEGAL INFORMATION**

As a qualifying body, we, the Financial Services Authority (the FSA), can challenge firms using terms that we view as unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations). So we review contract terms referred to us by consumers, enforcement bodies and consumer organisations. This has led to Investec Bank UK plc (Investec) undertaking not to use certain terms that we consider may be unfair.

We have a duty under the Regulations to notify the Office of Fair Trading (OFT) of the undertakings we receive. The OFT has a duty to publish details of these undertakings, which it publishes on its website. We also publish the undertakings on our website. Both publications will name the firm and identify the specific term and the part of the Regulations that relate to the term's fairness.

Even if firms have not given an undertaking or been subject to a court decision under the Regulations, they should be aware of undertakings or court decisions concerning other firms as part of their risk management. These could be valuable in showing the likely attitude of the courts, the FSA, the OFT or other qualifying bodies to similar terms or terms with a similar effect. Ultimately, only a court can determine the

fairness of a term and, therefore, we do not recommend terms that have been revised by a firm to address our concerns as being definitely fair.

We cannot approve terms for the purposes of the Regulations; it is for firms to assess the fairness of their terms and conditions under the Regulations and in the context of the product or service in question.

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