FINANCIAL CONDUCT AUTHORITY

Review of retained provisions of the Consumer Credit Act: Interim report

Discussion Paper
DP18/7

August 2018

How to respond

We are asking for comments on this interim report by 2 November 2018.

You can send them to us using the form on our website at: www.fca.org.uk/dp18-07-response-form.

Or in writing to:
Charlie Gluckman
CCA Review
Strategy & Competition Division
Financial Conduct Authority
12 Endeavour Square
London E20 1JN

Telephone:
020 7066 7794

Email:
CCAreview@fca.org.uk

How to navigate this document onscreen

returns you to the contents list

takes you to helpful abbreviations

Contents

1 Summary

Why we are publishing

1.1 The Financial Conduct Authority (FCA) is required by legislation to arrange for a review of the Consumer Credit Act 1974 (CCA) and to report to HM Treasury (the Treasury) by 1 April 2019.[1] The review must consider whether the repeal of CCA provisions would adversely affect the appropriate degree of protection for consumers. We refer to this as 'the statutory question'.

1.2 The review must in particular consider:

- which CCA provisions could be replaced by FCA rules or guidance under the Financial Services and Markets Act 2000 (FSMA), and
- the principle that a burden or restriction which is imposed in relation to the carrying on of an activity should be proportionate to the benefits

1.3 This interim report sets out our initial views, and invites comments. It is not intended to be a draft of our final report. It does not include proposed recommendations to the Treasury but indicates, in broad terms, our direction of thinking on the statutory question and related issues. We may include recommendations in the final report.

1.4 Decisions about the future of CCA provisions will fall to the Government. Our aim is to provide sufficient analysis and evidence in our final report to enable decisions to be made. In doing so, we want to take full account of the views and evidence of stakeholders.

Who this applies to

1.5 Who needs to read this whole document?

- lenders under consumer credit agreements
- owners under consumer hire agreements
- credit brokers
- credit reference agencies
- trade bodies representing these firms
- consumer organisations

1 Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014, SI 2014/366 – Part 5 (Review of retained provisions of the Consumer Credit Act 1974).

- the legal profession

1.6 Who may only need to read this summary?

- other firms engaged in credit-related activities
- firms providing or administering regulated mortgages[2]

1.7 Who else might be interested in this document?

- consumers with a loan or other credit product, or who hire goods

The wider context

1.8 The FCA took over responsibility for regulating consumer credit in April 2014. As part of the transfer, Parliament repealed some CCA provisions and some were replaced by FCA rules. We are required to undertake a review of the remaining provisions.

1.9 We published a Call for Input in February 2016 to invite views from stakeholders on our proposed priorities, timescales and conduct of the review.[3]

1.10 We received 55 responses, which we summarise in Annex 3. We have taken these into account in our approach to the review and the issues we discuss in this report. We have also held ongoing discussions with the Treasury regarding the scope, timing and conduct of the review.

1.11 In accordance with the statutory requirement (Annex 2), we are publishing this interim report and inviting views from stakeholders.

1.12 On 16 July 2018, the Government published the Consumer Credit (Amendment) (EU Exit) Regulations 2018[4] under the European Union (Withdrawal) Act 2018.[5] The Regulations amend the CCA and related legislation to ensure the legislation functions effectively when the UK leaves the European Union (EU).

1.13 The UK and the EU have reached agreement on the terms of an implementation period following the UK's withdrawal from the EU. This is intended to operate until the end of 2020 and EU law would remain applicable in the UK during this time. However, the implementation period forms part of the withdrawal agreement, which is subject to further negotiations between the UK and EU before it is finalised. We have therefore assumed that substantive changes to provisions implementing Consumer Credit Directive (CCD) will not be possible at the current time.

1.14 Mortgage firms should note that some CCA provisions extend to regulated mortgages which are otherwise regulated under our Mortgages and Home Finance: Conduct of Business sourcebook (MCOB). These include section 126 (enforcement of land

2 See paragraph 1.14.

3 Call for Input: Review of retained provisions of the Consumer Credit Act (February 2016) – www.fca.org.uk/publication/call-for-input/call-for-input-review-retained-provisions-consumer-credit-act.pdf

4 www.gov.uk/eu-withdrawal-act-2018-statutory-instruments/the-consumer-credit-amendment-eu-exit-regulations-2018

5 www.legislation.gov.uk/ukpga/2018/16/contents/enacted

mortgages) and section 129 (time orders).[6] Additional CCA provisions continue to apply to second charge mortgages entered into before 21 March 2016, even though the loans are now regulated mortgage contracts.[7]

Overview of this interim report

1.15 This document has eight chapters:

- In Chapter 2, we set out the background and rationale for the statutory requirement to undertake a review. We also summarise the background to the retained provisions and the main legislative changes since 1974.
- In Chapter 3, we summarise our approach to the review, and to answering the statutory question. We explain the principles we have used and how we have approached the review through three key themes which are inter-related:
  - rights and protections
  - information requirements
  - sanctions (including unenforceability)
- In Chapter 4, we explore a number of overarching issues that we have identified during our analysis.
- In Chapters 5, 6 and 7 we set out our initial views on the statutory question against each of the three themes. In each case we supplement this with an annex setting out further details, including issues identified with the current provisions.
- In Chapter 8, we summarise the steps we intend to take before submitting our final report to the Treasury, and invite stakeholders to submit their views.

Our initial views

1.16 We summarise below our initial assessment for each of the three themes. In forming our initial views, we have taken into account the issues with retained provisions raised by stakeholders through the Call for Input.[8] This includes concerns that compliance with the requirements can in some cases be overly burdensome with no corresponding benefit to consumers. In other cases, stakeholders raised concerns that provisions, in their current form, may not be protecting consumers in the way they were intended to do.

1.17 As we stated in the Call for Input, our objective in reviewing retained CCA provisions is the continuing development of an effective and proportionate regulatory regime which ensures appropriate protections for consumers, recognising that some customers in this market may be vulnerable. This objective includes looking to simplify and

6 See Chapter 5 below.
7 Article 29 of the Mortgage Credit Directive Order 2015, SI 2015/910.
8 See Annex 3 for a summary of the responses to the Call for Input.

modernise the regime where possible and remove unnecessary or disproportionate burdens.

Rights and protections (Chapter 5)

1.18 This theme includes credit brokerage fees, connected lender liability, variation of agreements, default and enforcement, credit-tokens, pawnbroking, withdrawal and cancellation, early repayment, termination, time orders and unfair relationships.

1.19 Our initial view is that the protections offered by these provisions continue to be relevant, and should remain in some form, either in legislation or FCA rules.

1.20 Some provisions covered by this theme could, in principle, be replaced by FCA rules that could achieve a comparable standard of consumer protection. An example is the right to a refund of credit brokerage fees under section 155. In these cases, our initial view is that the provisions should be repealed and replaced by FCA rules.

1.21 However, for most provisions in this theme, our initial view is that they could not be repealed without adversely affecting the appropriate degree of consumer protection. This is because it would not be possible to replicate the current provisions under our current rule-making powers. They should, therefore, be retained in the CCA.

1.22 We have identified issues with some CCA provisions (for example, section 75 on joint and several liability) which may need to be considered, whether the provisions remain in legislation or are replaced by FCA rules. This is with a view to ensuring that the provisions continue to provide an appropriate level of consumer protection without imposing disproportionate burdens on firms.

Information requirements (Chapter 6)

1.23 Information requirements include pre-contract disclosure, the form and content of agreements and the provision of copy documents. They also include post-contractual requirements such as statements and notices. Some of these must be provided periodically, or when triggered, while others apply only upon request.

1.24 Our initial view is that a framework for the provision of information by firms to customers continues to provide important consumer protection.

1.25 For many of the substantive information disclosure obligations set out in the CCA and its regulations, our preliminary view is that these could, in principle, be replaced by FCA rules. However, we also consider, at this formative stage, that the resulting loss of the associated sanctions, including unenforceability, would affect the appropriate degree of consumer protection. This is considered further in Chapter 7.

1.26 One option would be to replace the CCA obligations on the form, content and timing of information disclosure with FCA rules, and retain in the CCA (or other legislation) the related provisions that provide for the civil consequence of non-compliance with these obligations. There would need to be consequential changes to those provisions to apply them to breaches of FCA rules.

1.27 On the other hand, there are some provisions where our initial view is that they could not be moved into the FCA Handbook without a loss of appropriate protection. Conversely, some provisions could be repealed and replaced in their entirety by an FCA rule without any consequential adjustment to the CCA.

1.28 A number of issues have been identified with the current provisions. As above, these may need to be considered whether the requirements are retained in legislation or replaced, in whole or part, by FCA rules.

Sanctions (Chapter 7)

1.29 It would not be possible to replicate or replace the sanctions of unenforceability (without a court order or during breach) or disentitlement to interest and default sums under the FCA's general rule-making power.[9]

1.30 Our initial view is that the 'self-policing' nature of these automatic sanctions contributes significantly to ensuring appropriate firm conduct in the consumer credit market and protecting consumers.

1.31 In particular, unenforceability incentivises firms to comply with the form and content requirements and to provide requisite information to customers at the appropriate time. In addition, the sanction of disentitlement to interest and default sums provides an additional deterrent against non-compliance in cases where there is a particular risk of harm to vulnerable consumers. We do not think it would be sufficient to rely on the FCA's disciplinary and restitutionary powers and the private right of action under FSMA as a substitute for the CCA sanctions.

1.32 As such, our initial view is that the sanctions should be retained in legislation, and that the substantive information disclosure obligations should, where appropriate, be moved into FCA rules and be subject to the CCA sanctions.

1.33 Alternatively, there might be scope to expand the FCA's rule-making powers to allow for unenforceability and disentitlement as sanctions for breach of relevant FCA rules. In general, FSMA provides that a breach of an FCA rule cannot make a transaction void or unenforceable. However, there are exceptions in relation to section 137C (cost of credit and duration of credit agreements), section 137D (product intervention powers) and section 137FBB (early exit pension charges).

1.34 We recognise that the underlying CCA provisions can be complex and may be open to more than one interpretation. As such, the application of the current sanctions can raise difficulties, and may be disproportionate in some cases. This applies particularly in relation to disentitlement to interest and default sums.

1.35 Our initial view is that the scope of application of the sanctions should be limited so that they are focussed on breaches which are likely to cause material harm to consumers, in particular, the more vulnerable or those in financial difficulties.

1.36 For example, the sanction of unenforceability could apply only if certain prescribed terms are missing, or are substantively wrong, or only if the prescribed statement or notice is not issued at all, or not remedied, within a specified period. Other breaches would attract the possibility of disciplinary sanctions, restitutionary powers and the FSMA private right of action, but would not in themselves give rise to unenforceability, and disentitlement could be further limited to a sub-set of breaches giving rise to

9 There are a number of provisions in Part 9A FSMA that amplify the FCA's general rule-making power in particular contexts and state that it includes the power to make certain specific rules, some of which constitute exceptions from the general position that a contravention of an FCA rule does not make any transaction void or unenforceable (see sections 137C, 137D and 137FBB). As we are considering rules in relation to the regulation of consumer credit generally, however, we have focused on the general rule-making power in section 137A as being relevant for the purposes of this review.

unenforceability. There may also be value in clarifying, in legislation, the meaning of 'enforcement' to put interpretational issues beyond doubt.

1.37 We could not, under our current rule-making powers, reproduce criminal offences in FCA rules. However, our initial view is that the criminal offences in the CCA may no longer be needed, given the FSMA regulatory toolkit. We have a range of disciplinary powers, including powers to require remediation or impose fines, that we can use for authorised firms and, where a firm is acting in breach of the general prohibition under FSMA, this is itself a criminal offence.[10]

1.38 However, we intend to consider this further, and will take into account any risk that abolition of criminal offences may give a false impression that certain types of conduct are no longer considered unacceptable, or not to the same extent.

Next steps

1.39 We invite comments on this interim report by 2 November 2018. Please email your comments to us at CCAreview@fca.org.uk. A list of questions is at Annex 1.

1.40 We are keen to gather a wide range of views and plan to engage with stakeholders through roundtable meetings in September and October – see Chapter 8 for details of how to be involved. We also intend to conduct further research.

1.41 We will take all views into account as we work towards our final report to the Treasury before 1 April 2019.

10 We can also hold relevant individuals to account, and have set out near-final rules to extend the Senior Managers & Certification Regime (SM&CR) to all consumer credit firms – www.fca.org.uk/publication/policy/ps18-14.pdf

2 Background and context

2.1 In this chapter, we set out the background to the review and summarise the development of the Consumer Credit Act (CCA).

The statutory question

2.2 In 2013, the Treasury and the Department for Business, Innovation and Skills (BIS) jointly consulted on transferring consumer credit regulation from the Office of Fair Trading (OFT) to the FCA.[11] The FCA's predecessor, the Financial Services Authority (FSA), consulted at the same time on high-level proposals for an FCA regime.[12]

2.3 The Treasury/BIS consultation set out the Government's view that the conduct standards set out in the CCA, and supported by OFT guidance, should continue to form the core of consumer credit regulation but, wherever possible, should be set out in rules rather than legislation to allow for greater flexibility and coherence. The FSA proposed that, where CCA provisions were repealed, the substance of the provisions, and OFT guidance, should be replicated in new FCA rules and guidance. This was done primarily through the creation of the Consumer Credit sourcebook (CONC).[13]

2.4 The Government proposed to carry forward important consumer rights and protections in the CCA where they could not be replicated easily under FSMA due to the different statutory frameworks.[14]

2.5 The legislation[15] implementing the transfer of consumer credit regulation from 1 April 2014 repealed 82 sections of the CCA, 44 of which related to the OFT's licensing regime. 167 sections were retained (including associated regulations), some with amendments. We give a list of the retained provisions at Annex 4.

2.6 The FCA is required to report to the Treasury before 1 April 2019 on whether the repeal (in whole or in part) of CCA provisions would adversely affect the appropriate degree of protection for consumers.[16] In particular, the review must consider:

- which provisions of the CCA could be replaced by FCA rules or guidance, and
- the principle that a burden or restriction which is imposed on a person in relation to the carrying on of an activity should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction

11 A new approach to financial regulation: Transferring consumer credit regulation to the Financial Conduct Authority (HMT/BIS, March 2013).

12 High-level proposals for an FCA regime for consumer credit (FSA CP13/7, March 2013).

13 The FCA consulted on detailed proposals in October 2013 (CP13/10) and published rules in February 2014 (PS14/3).

14 A new approach to financial regulation: Transferring consumer credit regulation to the Financial Conduct Authority: Summary of responses (HMT/BIS, June 2013).

15 Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013, SI 2013/1881 – Part 5 (Amendments of the Consumer Credit Act 1974 etc).

16 See footnote 1 above.

2.7 The review may also cover other relevant or connected matters, and our report may include recommendations to the Treasury. It must be preceded by at least one interim report (this report) on which we have invited stakeholders to comment.

The Consumer Credit Act

Background to the 1974 Act

2.8 Before 1974, consumer credit was regulated in the UK through a piecemeal legislative framework. This included the Moneylenders Acts of 1900-1927, the Pawnbrokers Acts of 1872-1960 and the Hire-Purchase Act 1965.

2.9 In 1968 the Government appointed a committee, chaired by Lord Crowther, to carry out a wide-ranging review of consumer credit. The Crowther Committee reported in March 1971 (the Crowther Report).[17]

2.10 The Committee concluded that the existing law was inadequate and should be replaced by a new legal framework. This would cover all credit transactions (other than loans secured on land), with an emphasis on consumer protection. The legislation would have three main aims: the redress of bargaining inequality, the control of trading malpractices, and the regulation of remedies for default, while maintaining a fair balance between the creditor and the debtor.

2.11 The Committee proposed specific protections in advertising, canvassing, disclosure, contract terms, post-contract requirements and legal proceedings. It also proposed a Credit Commissioner[18] with responsibilities for licensing, supervision and enforcement, and with powers to make regulations on specific matters or to propose new legislation, to preserve the necessary flexibility in the law.

2.12 The report noted that there were limits to what the law could achieve, so other forms of protection were also necessary. These included:

- consumer education
- credit counselling and debt management services
- mechanisms for providing customer redress which did not involve the courts, and
- using credit registers to prevent debtors from over-committing themselves and to help creditors grant credit prudently

2.13 The CCA was passed in July 1974. Its stated purpose is 'to establish for the protection of consumers a new system... of licensing and other control of traders concerned with the provision of credit, or the supply of goods on hire or hire-purchase, and their transactions... and for related matters'.[19]

17 Consumer Credit: Report of the Committee – Vol 1: Report (Cmnd. 4596), March 1971.
18 Subsequently the Director General of Fair Trading.
19 The preamble to the 1974 Act.

Reviews of the CCA

2.14 The 1974 Act was implemented in stages, with a number of statutory instruments made in 1977 and 1983. After that, it remained largely unchanged until 2004.

2.15 In 2001, the Department of Trade and Industry (DTI) published a consultation on the CCA regime. This noted that the CCA was nearly 30 years old and a major review was needed to ensure it remained relevant to the modern consumer credit market.[20]

2.16 The DTI recognised that, while the CCA had stood the test of time in many ways and continued to provide appropriate protections, changes were needed. Priority areas for reform included bringing more agreements within the regulatory regime, simplifying the advertising regulations and enabling consumers to conclude agreements online.

2.17 In 2003, the DTI published a White Paper which set out its vision 'to create an efficient, fair and free market where consumers are empowered to make fully informed decisions and lenders are able to compete'.[21] The White Paper proposed reforms to address problems in the consumer credit market, including:

- informational problems pre-purchase
- undue surprises post-purchase
- unfair practices
- illegal money lenders
- over-indebtedness

2.18 In 2004, statutory instruments were made for advertising, pre-contractual information, agreements, early settlement and electronic communications.

2.19 The Consumer Credit Act 2006 (the 2006 Act) amended the CCA in other priority areas. Its provisions were brought into force on various dates between June 2006 and October 2008. The changes included:

- removing the £25,000 financial limit for consumer lending
- a new definition of 'individual'
- repeal of provisions rendering agreements irredeemably unenforceable[22]
- replacing the extortionate credit bargain provisions with an unfair relationship test
- introducing new post-contractual information requirements including annual statements, arrears notices and default sum notices
- new powers for the OFT to impose civil penalties for failure to comply with a requirement imposed on the licensee by the OFT, and

20 Tackling loan sharks – and more!: Consultation document on modernising the Consumer Credit Act 1974 (DTI, September 2001).
21 Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century: White Paper (DTI, December 2003).
22 In respect of agreements made on or after 6 April 2007.

- extending the remit of the Financial Ombudsman Service to cover consumer credit complaints

Consumer Credit Directives

2.20 The Consumer Credit Directive 87/102/EEC came into force in January 1990. It was a minimum harmonisation Directive and did not require any amendments to UK law. A further Directive in 1990 mandated the method for calculating the annual percentage rate of charge (APR).

2.21 The European Commission (the Commission) subsequently reviewed the Directives and found substantial differences between national consumer credit laws. The Commission concluded that these could create obstacles to inter-state trade, and that it was also important to amend existing provisions to take account of new forms of credit. It therefore proposed a new Directive, to address these issues.

2.22 The new Consumer Credit Directive 2008/48/EC was adopted in April 2008 (referred to in this report as 'CCD').[23] It is a maximum harmonisation Directive. This means that Member States are not permitted to maintain or introduce national provisions which diverge from those laid down in the harmonised areas.

2.23 However, the CCD does not harmonise all aspects of credit agreements, and there are a number of exemptions. Some provisions also have specific 'carve-outs' which allow Member States to go further in the specified areas. In addition, Member States can elaborate on the CCD wording if they consider this is necessary to give practical effect to the provisions.

2.24 The CCD was implemented in the UK primarily by the Consumer Credit (EU Directive) Regulations 2010.[24] These amended the CCA in a number of areas. Further changes were made to implement Directive 2011/90/EU on APR assumptions.[25]

2.25 The Commission reported on the implementation of the CCD in May 2014.[26] It has recently launched an evaluation of the CCD, and published a roadmap for consultation on 29 June 2018.[27] It aims to publish a formal consultation by the end of 2018 and a summary report in Spring 2019.

2.26 The evaluation will consider whether CCD rules are fit for purpose or should be amended. It will gather evidence regarding the functioning of the Directive, including in relation to information disclosure and rights of withdrawal and early repayment, and will also consider cross-border implications of national regulatory practices.

23 Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

24 SI 2010/1010.

25 Commission Directive 2011/90/EU of 14 November 2011 amending Part II of Annex 1 to Directive 2008/48/EC of the European Parliament and of the Council providing additional assumptions for the calculation of the annual percentage rate of charge.

26 Report from the Commission to the European Parliament and the Council on the implementation of Directive 2008/48/EC on credit agreements for consumers (May 2014).

27 https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-3472049_en#initiative-details

Transfer of credit regulation

2.27 As noted above, responsibility for consumer credit regulation was transferred from the OFT to the FCA on 1 April 2014. Most CCA provisions were retained, but some were repealed and replaced by FCA rules. Others were subsumed into the FSMA regime, including the Regulated Activities Order (RAO)[28] which replaced the licensable activities and exemptions under the CCA.

2.28 Regulated credit agreement is now defined in article 60B of the RAO, and regulated consumer hire agreement in article 60N. The associated exemptions and exclusions are in articles 60C to 60K and articles 60O to 60R.

2.29 A credit agreement includes a loan or other form of financial accommodation, such as credit to finance the purchase of goods or services. Hire-purchase (hire with an option to purchase) is treated as a form of credit.[29] Consumer hire is covered where the hire period is capable of exceeding three months.

2.30 A regulated agreement can be with an individual or relevant recipient of credit. This includes a sole trader or a small partnership (two or three partners which are not all incorporated) or an unincorporated body of persons (which are not all incorporated). It does not include companies or limited liability partnerships.

2.31 Lending to consumers is generally regulated regardless of the amount of credit (or hire payments), but business lending and hire are regulated only up to £25,000.

2.32 There are a number of exemptions, including, for example, instalment credit where goods or services are repayable by up to 12 instalments within 12 months without interest and charges.

2.33 Stakeholders have raised issues as to whether business lending should be subject to similar provisions as lending to consumers, or whether these should be tailored to the different customer needs and circumstances. There are also issues as to whether consumer hire should be subject to lighter-touch regulation than consumer credit. These would need to be considered if CCA provisions are amended or replaced.

28 Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, as amended including by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013, SI 2013/1881.

29 This includes most motor finance, and rent-to-own agreements.

3 Our approach to the review

3.1 This chapter sets out how we are approaching the review of retained provisions, including the themes we have identified.

Principles of our approach

3.2 The starting point for our review has been the statutory question.

3.3 This requires us to consider whether repealing CCA provisions, in whole or in part, would adversely affect the appropriate degree of consumer protection. As part of this we must consider which provisions could be replaced by FCA rules or guidance.

3.4 In considering the statutory question, we have taken account of:

- our rule-making powers under FSMA[30]
- the original policy rationale for the CCA provisions
- subsequent legislative changes and the rationale for these
- the scope of the CCD and how it has been implemented in the UK
- the impact of the transfer of consumer credit regulation to the FCA
- the differences between the CCA and FSMA regimes, and
- developments in the consumer credit market

3.5 We have also taken account of other rights and protections that consumers have, including:

- taking a complaint to the Financial Ombudsman Service
- challenging unfair contract terms under the Consumer Rights Act 2015
- seeking redress through the courts under the Consumer Protection from Unfair Trading Regulations 2008
- taking a private right of action against a firm under section 138D FSMA
- the general powers of the courts

3.6 In developing our initial views, we have taken account of equality and diversity issues that may arise as a result of possible changes to the regulatory regime. We will continue to consider such issues as we carry out the review.

30 See footnote 9 above.

Thematic approach

3.7 Our analysis has identified a number of underlying issues. This led us to set three key themes for the review: rights and protections, information requirements and sanctions. Within each theme, we have identified sub-themes which cover groups of similar provisions or, in some instances, a single provision.

3.8 This thematic approach covers all key CCA provisions, including those stakeholders raised in response to our Call for Input. Provisions that do not fall within a particular theme mainly involve statutory definitions or enforcement powers, or are consequential upon other CCA provisions.

3.9 In line with the approach we proposed in the Call for Input, we have given particular attention to provisions that:

- may not be working well for consumers
- may not be functioning in line with the original policy intention, or
- may be disproportionately burdensome for firms when compared to the benefit in terms of consumer protection

3.10 We have not prioritised the review of provisions for earlier consideration by the Treasury. In reaching this position we have taken account of discussions with the Treasury regarding the desirability of considering reform of the CCA as a whole, given the interconnected nature of many CCA provisions and pressures on the legislative timetable. We have not identified provisions where we consider there is a pressing need for earlier reform.

3.11 Annex 4 sets out how we have allocated retained provisions to the themes.

3.12 If CCA provisions were to be replaced, in whole or in part, by FCA rules, this would be subject to the legal requirements that apply to the exercise of the FCA's general rule-making under FSMA and public law principles, including the requirement to publish a consultation accompanied by a cost benefit analysis.[31]

3.13 As a general point, there may be advantages to moving CCA provisions into the FCA Handbook, in terms of the coherence and flexibility of the regulatory regime. In particular, it may be easier for firms to navigate the law and understand their regulatory obligations if relevant provisions are, so far as possible, in one place. This may also assist consumers and their advisers, and other stakeholders. In addition, it would make it easier to update the provisions, as needed.

3.14 It should be noted also that trading standards services (TSS) have a role as co-enforcers, with the FCA, of CCA provisions.[32]

Rights and protections

3.15 This theme covers rights and protections for customers under regulated credit or hire agreements. Many are closely connected to duties and obligations of creditors or owners. Some enable the customer to take action, while others apply automatically.

31 Subject to any modifications or exemptions the Government might make.

32 Section 161 CCA provides that local weights and measures authorities in Great Britain, and the Department of Commerce for Northern Ireland, have a duty to enforce the CCA and its regulations.

We have broken the theme down into a number of categories and sub-themes. Our analysis can be found at Chapter 5, with a supporting annex at Annex 5.

Information requirements

3.16 These require creditors or owners to provide information to debtors or hirers, both before and after entering into an agreement. The provisions are supported by detailed regulations. We have sub-divided this theme both on the basis of cross-cutting issues and to reflect the customer journey during an agreement's lifetime. We analyse this theme in Chapter 6, with a supporting annex at Annex 6.

Sanctions

3.17 The final theme covers provisions that impose sanctions on firms for breaches of certain requirements. These underpin enforcement and encourage compliance by firms, particularly in the provision of information. We have sub-divided this theme based on the different types of sanction, including unenforceability. We analyse this theme in Chapter 7, with a supporting annex at Annex 7.

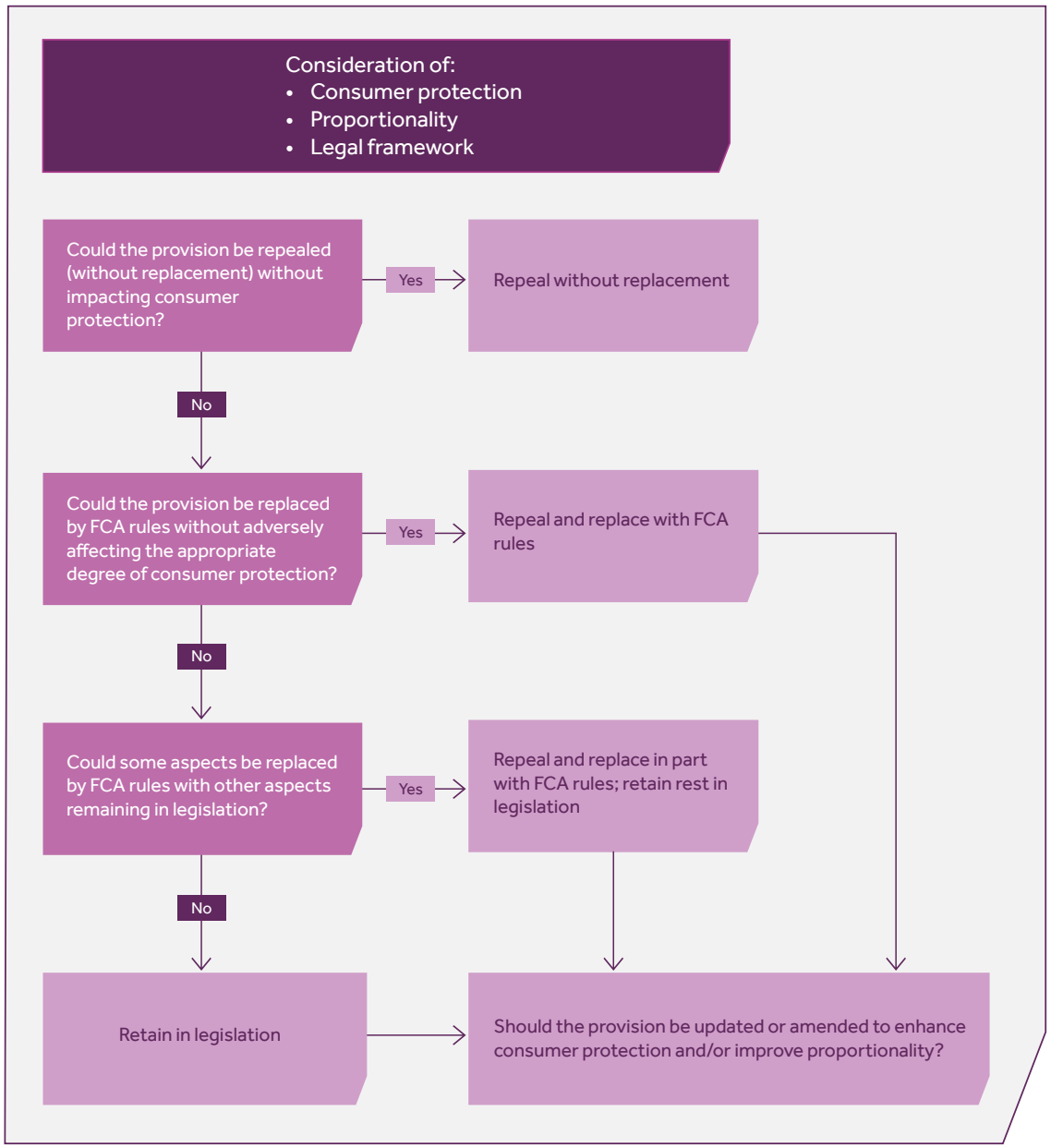
Approach to the statutory question

3.18 For the provisions and groups of provisions within each of the three themes, we have approached the statutory question by asking:

- could the provision be repealed (without replacement) with no material impact on consumer protection?
- if not, could the provision be replaced with FCA rules without adversely affecting the appropriate degree of consumer protection?
- if not, could some aspects be replaced by FCA rules with other aspects remaining in the CCA or other legislation, having regard to the balance between consumer protection and the burden on firms?

3.19 There is then a question of whether the provision should be updated or amended to strengthen consumer protection and/or improve proportionality. We note in this report some issues that may need to be considered, whether the provisions are retained in legislation or replaced by FCA rules, but in most cases without indicating an initial view. We may make recommendations in our final report to the Treasury.

3.20 This is illustrated in the diagram below.



4 Overarching issues

4.1 This chapter focuses on some of the overarching issues that we have identified during our analysis, and their implications for the review. These are:

- how consumer credit markets have changed since 1974
- the differences between the CCA and FSMA frameworks
- the impact of FCA regulation, and
- how the approach to regulation of consumer credit differs from that of other retail sectors, particularly mortgages

Changes in consumer credit markets

4.2 The Crowther Committee's report predicted that the use of credit would continue to grow, reinforcing the importance of adequate consumer protections. But it could not have anticipated the scale of the increase, the emergence of new products or the rapid developments in technology.

4.3 Respondents to our Call for Input emphasised the significant changes in consumer credit markets since 1974 and the implications these might have for our review. We have considered these by reference to the fundamental purpose of the CCA regime, which is to provide a regulatory framework focused on consumer protection. We agree it is important that CCA provisions continue to be relevant, and are updated and future-proofed where possible.

4.4 In this section, we cover some key developments in consumer credit markets and how these have affected the interactions between customers and firms.

Changes in demand

4.5 In 1969, outstanding debt on hire-purchase and other instalment credit was reported to be just over £1 billion.[33] By May 2018, the total amount outstanding on consumer credit had grown to £211.6 billion.[34] This represents 13.3% of total outstanding debt, including mortgages, held by individuals, which was £1,588 billion in May 2018.

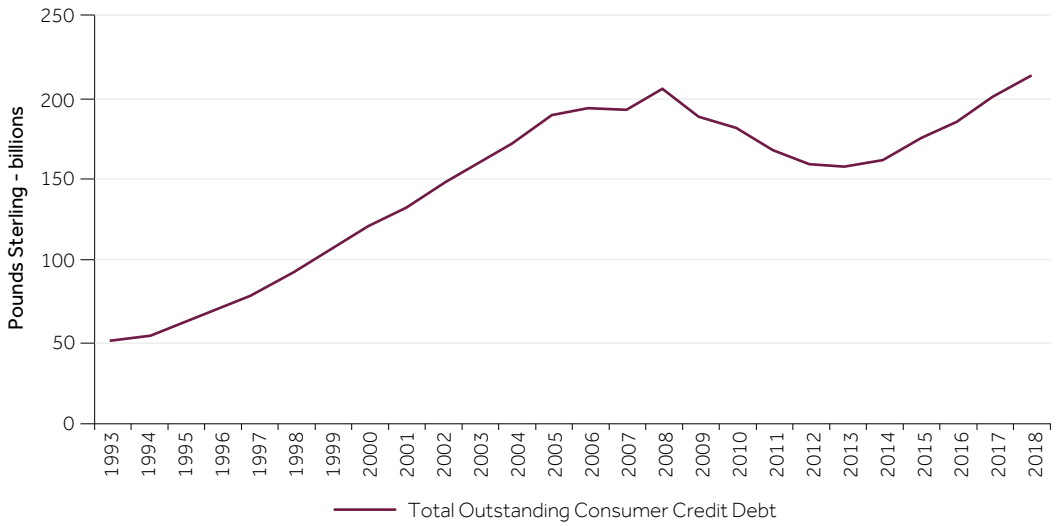
4.6 Figure 1 shows how outstanding consumer credit debt grew from £50 billion in 1993 and peaked at just over £200 billion in 2008. The amount fell during the financial crisis, but has since returned to pre-crisis nominal levels. However, adjusting for inflation, the amount outstanding is 18.4% below the level in January 2008.[35]

33 Crowther Report, paragraph 3.1.13.

34 Bank of England Statistical Release: Money and Credit: May 2018 (published 30 June 2018) – www.bankofengland.co.uk/statistics/money-and-credit/2018/may-2018

35 Source: Bank of England data and Office of National Statistics (ONS) data.

Figure 1 Bank of England Statistics: Money and Credit[36]



4.7 Not only has the value of debt increased, so too has the proportion of the population using consumer credit. The Crowther Report noted that 23% of the population had borrowed this way in 1969.[37] In comparison, our Financial Lives Survey estimated that in 2017, 75% of UK adults currently held, or had held in the previous 12 months, some form of consumer credit product.[38]

4.8 Recent growth in consumer credit has been largely attributed to motor finance, 0% credit cards and unsecured personal loans.[39] However, the past decade has also seen significant increases in the use of high-cost credit products.

4.9 This significant growth in demand for consumer credit, by an increased proportion of the population, demonstrates the importance of credit for many consumers, including those who may be vulnerable, as well as its macro-economic importance. This needs to be taken into account when considering the appropriate degree of protection.

Changes in supply

4.10 In the early 1970s, the main products in the consumer credit market included hire-purchase, television rental (hire), mail order catalogues and check trading.[40]

4.11 Credit cards were first introduced in the UK in 1966, and the credit card market has since grown from two cards to over 180 products.[41] Total outstanding debt on credit cards has grown from £32 million in 1971[42] to £71.6 billion in May 2018.[43] Credit cards

36 Bank of England Database - www.bankofengland.co.uk/boeapps/iadb/fromshowcolumns.asp?Travel=NIxSSxSCx&ShadowPage=1&SearchText=bI2O&SearchExclude=&SearchTextFields=TC&Thes=&SearchType=&Cats=&ActualResNumPerPage=&TotalNumResults=2&XNotes=Y&C=NZO&XNotes2=Y&ShowData.x=38&ShowData.y=9

37 Crowther Report, paragraph 3.5.2. The report noted that 51% of the population had borrowed in the past but not in 1969, and 26% had never borrowed at any time.

38 Understanding the financial lives of UK adults: Findings from the FCA's Financial Lives Survey 2017 (October 2017) – www.fca.org.uk/publications/research/understanding-financial-lives-uk-adults

39 Record of Financial Policy Committee meeting held on 20 September 2017 – www.bankofengland.co.uk/record/2017/financial-policy-committee-september-2017

40 Crowther Report, Table 3.7 (page 132).

41 Moneyfacts, May 2018.

42 Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century: White Paper (DTI, December 2003).

43 See footnote 36 above.

offer flexibility of drawdown and repayment but this comes with some specific risks, which we are addressing in our rules.[44]

4.12 There has been considerable growth in the number and range of high-cost credit products, including high-cost short-term credit (payday loans), rent-to-own, logbook loans and guarantor loans. These products enable non-prime[45] consumers to regulate cash flow and purchase essential goods. We are consulting on proposed changes to our rules, and other measures, in relation to high-cost credit[46] and overdrafts.[47]

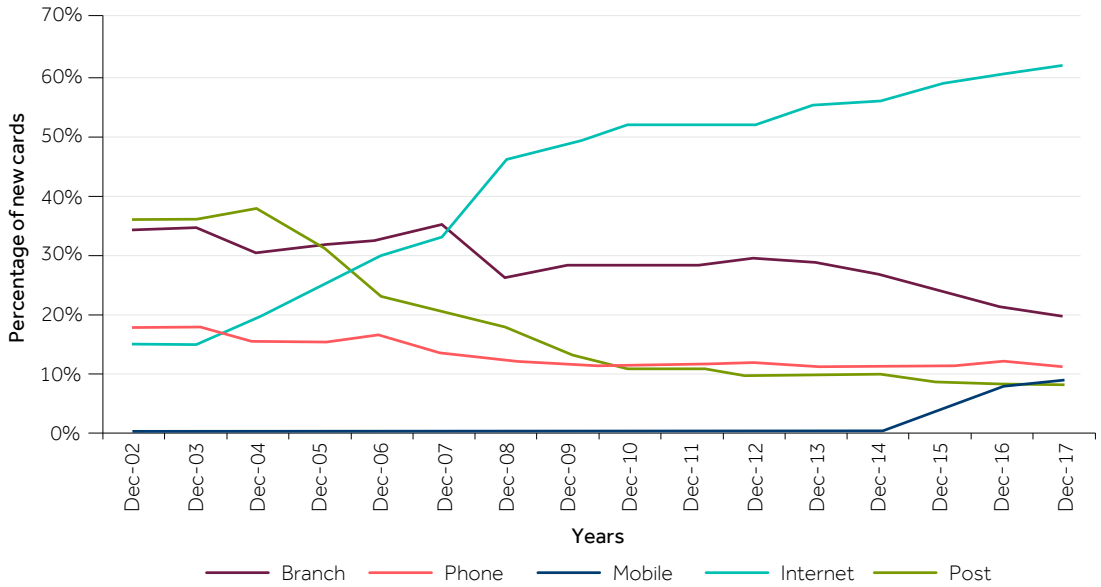
4.13 New types of products and business models, and the growth of mainstream credit products, can present new or additional risks of harm to customers. This is particularly the case for the more vulnerable and those with limited credit options. We will continue to take these into account as we carry out the review.

Changes in interaction between customers and firms

4.14 There have also been significant changes in the ways in which customers and firms interact. These have partly been driven by technological developments. The mass use of digital technology has led firms to develop new ways of marketing and selling loans and communicating with customers. In response to this, the CCA was amended in 2004 to allow the electronic conclusion of agreements.

4.15 Since then, there have been further developments in the use of internet and mobile technology. Figure 2 shows the significant increase in use of the internet to take out a credit card, compared to more traditional methods such as in branch or by post. It also shows that, while the use of mobile technology is still low, it is increasing.

Figure 2 GFK data: Channel of credit card (method of arrangement)[48]



44 PS18/4: Credit card market study: Persistent debt and earlier intervention – feedback to CP17/43 and final rules (February 2018) – www.fca.org.uk/publication/policy/ps18-04.pdf

45 Non-prime (or sub-prime) consumers include those with an adverse credit history or 'thin' credit file.

46 CP18/12: High-cost Credit Review: Consultation on rent-to-own, home-collected credit, catalogue credit and store cards, and alternatives to high-cost credit; Discussion on rent-to-own pricing (May 2018) – www.fca.org.uk/publication/consultation/cp18-12.pdf

47 CP18/13: High-cost Credit Review: Overdrafts (May 2018) – www.fca.org.uk/publication/consultation/cp18-13.pdf

48 GfK FRS data. Base: all new credit cards opened in the last 12 months, 6 months rolling data. 2,880 new credit card accounts, representing 2,525 new credit card holders.

4.16 There has been a similar trend in the channels by which consumers manage their credit card accounts, for example to check the balance and make payments. Since 2012, the proportion of consumers using only digital methods has increased significantly and is now almost the same as those using only offline methods.[49]

The CCA and FSMA regimes

4.17 The CCA and the regulations made under it give consumers various substantive rights and protections that sit alongside the FSMA provisions. The CCA includes provisions making individual contractual rights and remedies invalid or unenforceable and making contract terms void in certain circumstances where a lender has acted in a way that is incompatible with the protections in primary and secondary legislation.

4.18 The CCA governs not only credit and hire agreements, but also certain linked non-financial services agreements with third parties who are not regulated by the FCA. It also provides for judicial control over individual credit relationships.

4.19 FSMA places more emphasis on rules made by the FCA that apply to authorised persons, supported by statutory powers of the regulator to supervise and discipline firms and to require redress or restitution.[50] FSMA does, however, confer certain rights on private persons to take court action for damages where they have suffered loss as a result of a breach of an FCA rule.[51]

4.20 The civil consequences of non-compliance with CCA requirements tend to differ significantly from those that apply to contraventions of FCA rules. An individual agreement is not generally void or unenforceable as a result of a breach of an FCA rule, although there are certain potential exceptions to this for consumer credit price-capping powers, product intervention rules and early exit pension charges.[52] We exercised the power to make an agreement unenforceable when making the rules providing for the price cap for high-cost short-term credit.[53] In general, however, the sanction of making an agreement unenforceable is limited to a breach of the general prohibition[54] or entering into a credit agreement without the correct FSMA permission[55] or a breach of the financial promotion restrictions.[56]

4.21 A contravention of the general prohibition is also a criminal offence. However, a contravention of an FCA rule does not make a person guilty of a criminal offence. In contrast, persons can incur criminal liability under the CCA in certain situations, for example, where they do not comply with the ban on canvassing off trade premises.[57]

49 GfK FRS data. Base: all credit cards, 6 months rolling data end December 2002-2017. 21,242 credit card accounts, representing 13,498 credit card holders.

50 The power to require restitution is set out in section 384 FSMA.

51 Section 138D FSMA (actions for damages) – this is similar to breach of statutory duty under the CCA, but the latter applies only in relation to a small number of CCA provisions, whereas the private right of action under section 138D applies to almost all breaches of FCA rules.

52 Section 137C (cost of credit and duration of credit agreements) and section 137D (product intervention) were added by the Financial Services Act 2012, and section 137FBB (early exit pension charges) was added by the Bank of England and Financial Services Act 2016.

53 PS14/16: Detailed rules for the price cap for high-cost short-term credit, including feedback on CP14/10 and final rules (November 2014) www.fca.org.uk/publications/policy-statements/ps14-16-detailed-rules-price-cap-high-cost-short-term-credit.

54 Section 19 FSMA provides that no person may carry on, or purport to carry on, a regulated activity in the UK unless he is an authorised person or an exempt person.

55 Sections 26, 26A and 27 FSMA – see also section 28A which provides for validation orders and compensation.

56 Section 21 FSMA.

57 See Chapter 7.

4.22 The differences between the CCA and FSMA regimes, and the scope of our current rule-making powers, are key elements of our analysis and initial views.

Impact of FCA regulation

4.23 Consumer credit regulation was transferred from the OFT to the FCA in April 2014. Some respondents to the Call for Input argued that the FCA's greater powers mean that CCA protections are no longer necessary.

4.24 In reviewing the retained provisions, we have considered whether, and to what extent, FCA regulation may negate the need for CCA protections. In doing so, we have used the general approach to regulation set out in our Mission[58] as elaborated for consumer credit in CP17/27 in July 2017.[59]

4.25 We have also recently set out our approach to consumers, including how best we can protect consumers from harm across our regulatory responsibilities.[60] We have a particular focus on vulnerable consumers, and plan to consult early next year on guidance setting out our expectations of firms in identifying and addressing issues of vulnerability.[61]

4.26 Our authorisations gateway acts as a preventative tool to avoid harm.[62] Firms must meet our threshold conditions. Since 2014, we have considered applications from around 40,000 consumer credit firms. These include firms which had OFT licences and were operating under interim permissions. Around 2,300 firms either refused authorisation or decided to withdraw their application before we made a decision.

4.27 We supervise against our high-level principles and specific requirements in the FCA Handbook.[63] Firms are required to report specified information to us at regular intervals and to notify us of certain events, such as significant CCA or FSMA breaches. We are a proactive supervisor, using intelligence to identify emerging and actual harm. As well as data gathering, firm visits and skilled person reports, we can impose requirements on firms to address issues we have identified, or revoke or limit a firm's permissions. We supervise higher-risk firms more closely, and our thematic work addresses systemic issues by taking a market-wide approach.

4.28 We have a range of powers to take enforcement action against firms for non-compliance with our rules, and with CCA provisions.[64] This can include levying fines (with no statutory limit) and requiring firms to set up redress and restitution schemes for their customers. We can also hold relevant individuals to account.[65]

4.29 However, this does not mean that CCA rights, protections and self-policing sanctions have no place in the modern consumer credit market. The increase in the number of

58 Our Mission 2017: How we regulate financial services (April 2017) – www.fca.org.uk/publication/corporate/our-mission-2017.pdf
59 CP17/27: Assessing creditworthiness in consumer credit: Proposed changes to our rules and guidance (July 2017), Chapter 3 – www.fca.org.uk/publication/consultation/cp17-27.pdf
60 www.fca.org.uk/publication/corporate/approach-to-consumers.pdf
61 www.fca.org.uk/publications/corporate-documents/approach-consumers
62 FCA Mission: Our Approach to Authorisation (December 2017) – www.fca.org.uk/publication/corporate/our-approach-authorisation.pdf
63 FCA Mission: Our Approach to Supervision (March 2018) – www.fca.org.uk/publication/corporate/our-approach-supervision.pdf
64 FCA Mission: Our Approach to Enforcement (March 2018) – www.fca.org.uk/publication/corporate/our-approach-enforcement.pdf
65 See also footnote 10 above.

consumers using consumer credit, and the vulnerability of many of those consumers, must be taken into account. The risk of harm may increase as new products emerge or products become more complex. In addition, the FCA has finite resources and we cannot closely supervise all firms in the market and take action every time an issue is identified. We have to prioritise use of our resources on the basis of risk and taking account of the decision-making framework set out in our Mission.

4.30 Given the need for regulation to keep pace with a growing and changing market, and challenges in regulating high-cost credit products, the Government decided to transfer consumer credit regulation to the FCA to ensure strong regulation of the sector. However, it decided to retain CCA provisions where they could not be easily replicated under FSMA. In doing so, the Government recognised the importance of statutory consumer rights, supported by automatic sanctions, alongside the FSMA suite of regulatory powers.

4.31 We have had a significant impact since taking over consumer credit regulation, both through making new rules to address conduct issues and by tackling harm directly through the authorisation process and supervision and enforcement. However, much of this has been to deal with historical conduct issues that existed before the transfer, or that came to light as firms started coming through authorisation. Existing CCA provisions have operated in support of public enforcement, to further incentivise compliance and protect consumers.

Regulation of consumer credit vs mortgages

4.32 There are differences in the way that consumer credit is regulated when compared to other retail sectors we regulate. We have considered this with particular reference to mortgages, given that it is also a retail lending product.

4.33 In principle, it is desirable that there is a degree of consistency between the regulation of different sectors. However, there may be good reasons for differences, based on the nature of the products and customers. This section looks at some of the differences between mortgages and consumer credit.

4.34 For example, consumers tend to take out mortgages only occasionally, and the sales process typically allows for more reflection on the customer's part than is the case for most consumer credit products. In addition, mortgage borrowers tend to have better credit scores on average and, on the whole, are less financially vulnerable.

4.35 Users of high-cost credit products are more likely to be vulnerable. They may use multiple products, and may need to get credit quickly to meet a need. The ease and speed of applying, especially online, make it more likely that consumers do not fully consider the costs and risks. This can be reinforced by behavioural biases. We have therefore made high-cost credit a key FCA priority in our 2018/19 Business Plan.[66]

4.36 As noted above, there are also particular risks in relation to credit cards and similar products. Customers can draw down and repay on a revolving basis, for an indefinite period, which carries risks of persistent debt.

66 Business Plan 2018/19 (April 2018) – www.fca.org.uk/publication/business-plans/business-plan-2018-19.pdf

4.37 Figures 3 and 4 compare customer characteristics for consumers that hold a range of consumer credit and mortgage products. Compared to residential mortgage customers, high-cost credit customers are more likely to be renting, have lower or variable incomes, less likely to be financially resilient and more likely to be over-indebted.

Figure 3 Financial Lives Survey, FCA 2017[67]

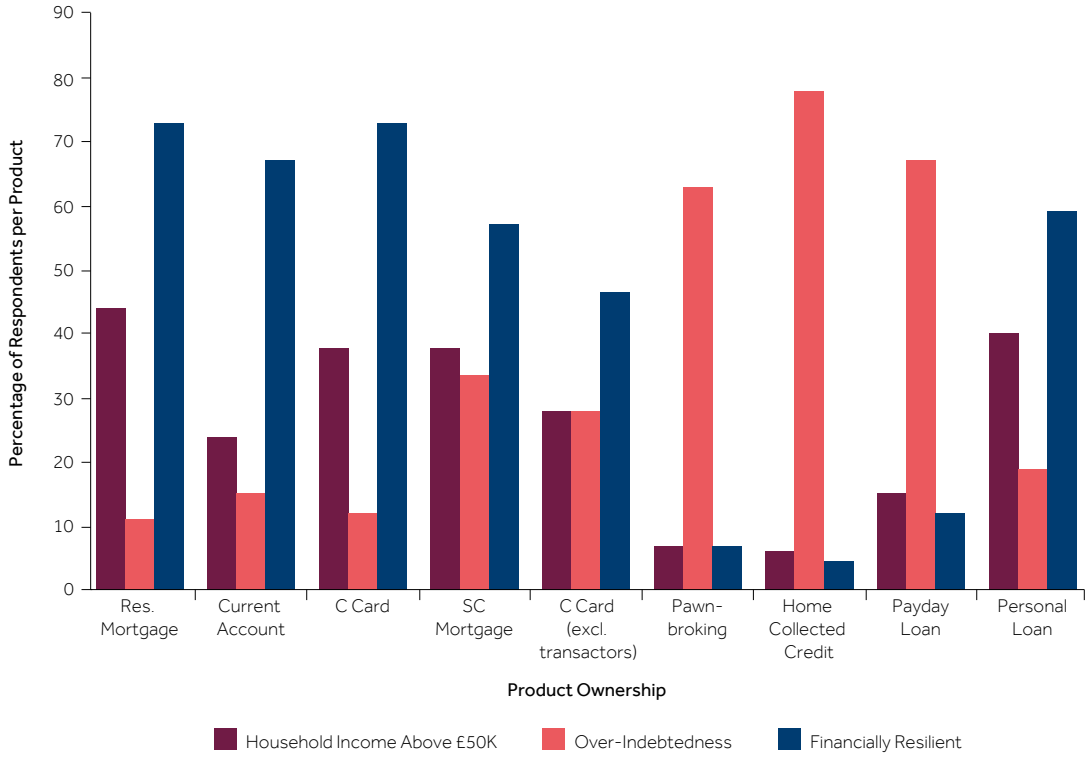
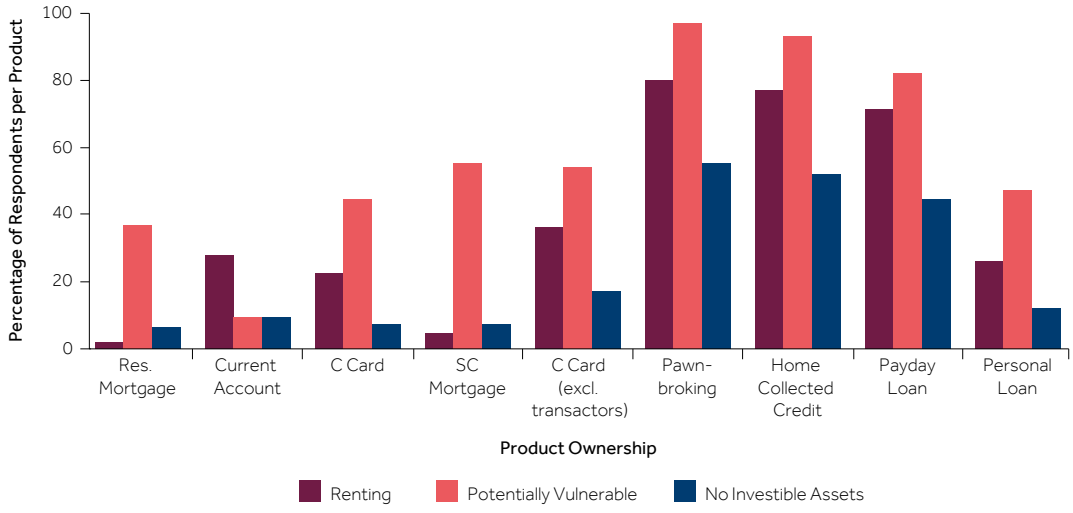


Figure 4 Financial Lives Survey, FCA 2017



67 www.fca.org.uk/publications/research/understanding-financial-lives-uk-adults. Credit card customers include both revolvers and transactors.

4.38 On the supply side, there are just over 37,000 authorised firms in consumer credit, including 4,800 lenders and 3,300 owners.[68]

4.39 In contrast, there are only around 300 firms with permissions to enter into regulated mortgage contracts, and only around 100 active lenders in 2016.[69] The six largest lenders account for some three-quarters of outstanding balances.

4.40 Some aspects of the CCA extend to mortgages, in particular time orders and certain enforcement orders. In addition, some CCA rights and protections apply to second charge mortgages that existed when regulation was transferred to the MCOB regime.

4.41 We have taken into account the differences between consumer credit and other retail sectors, in particular mortgages, in our analysis of themes and provisions. Where we propose an approach for consumer credit which is substantively different than in other areas, we justify this on the basis of the specific issues, and having regard to relevant similarities and differences between the markets.

Q1: Do you have any comments on the overarching issues or their implications for our review?

68 These figures include limited permission firms. There are just under 2,000 lenders who have limited permission, and just under 3,000 owners with limited permission. These figures relate to a snapshot as at 18 June 2018.

69 MS16/2.2 Mortgages Market Study: Interim Report (May 2018), paragraph 3.15 www.fca.org.uk/publication/market-studies/ms16-2-2-interim-report.pdf.

5 Rights and protections

5.1 This chapter focuses on the key CCA provisions that directly give rights and/or protections to customers under credit and/or hire agreements.

5.2 We have divided this chapter into sub-themes, as set out in Table 1 below. Against each sub-theme, we have indicated the principal CCA provisions under that sub-theme. In some cases, there is overlap with the other themes (information requirements and sanctions).

5.3 In the following sections, we consider how far the meaning and effect of the relevant CCA provisions could be reproduced by FCA rules and, in light of that, give our initial view on whether the CCA provision could be repealed and replaced with an FCA rule without adversely affecting the appropriate degree of consumer protection.

5.4 An important consideration is the extent to which the rights and protections that are currently provided for in the CCA, as an Act of Parliament, could be replicated using the general rule-making power delegated to the FCA.[70] In particular, the CCA (among other things):

- directly gives consumers specific rights and entitlements in their contractual relationships with firms, and makes any contract terms inconsistent with these void
- imposes obligations on consumers or non-authorised persons, including in relation to non-financial linked transactions
- can make a firm's exercise of private contractual rights invalid where CCA standards are not met
- governs the passing of title in goods in certain circumstances
- creates a statutory joint and several liability for misrepresentations or breaches of contract in certain circumstances, and
- provides for judicial control and powers in relation to agreements and for onus of proof in certain court proceedings

5.5 We have taken this into account in our analysis. In most cases, it would not be possible to replicate the CCA provisions under our current rule-making powers. The question then is whether they could be replaced by FCA rules, without adversely affecting the appropriate degree of consumer protection. Our initial view is that, in most cases, this would not be possible. We explain why we take this view.

5.6 We set out supplementary detail on the nature and purpose of the relevant provisions, and issues we have identified with the provisions, in Annex 5.

70 See footnote 9 above.

Table 1: List of sub-themes and key provisions

Sub-theme	Key CCA provisions
Before entry into the agreement	
Refund of credit brokerage fees	s155
Prospective agreements	s55C, ss57-59, s61
Antecedent negotiations	s56
Multiple agreements	s18
During the currency of the agreement	
Non-contracting out	s173
Connected lender liability	s75, s75A
Variation of agreements	s82, s78A
Notices in relation to enforcement	s76, ss87-89, s98
Death of debtor or hirer	s86
Other restrictions on remedies for default	ss90-92
Provisions about interest	s86F, s93, s130A
Security	s106, s113
Unauthorised payments and credit-tokens	s66, s83, s84
Pawnbroking	ss114-122
Exiting the agreement	
Withdrawal and cancellation	s66A, ss67-74
Early repayment	ss94-98A
Termination	ss99-103
Judicial protections	
Time orders	ss129-133, s136
Unfair relationships	s140A-C
Enforcement of land mortgages	s126

Before entry into the agreement

Refund of credit brokerage fees

5.7 Subject to a few exceptions, a customer is entitled to a refund (less £5) of the fee paid to a credit broker (or, if the fee has not already been paid, it stops being payable) where the customer does not enter into a relevant agreement within six months of an introduction to a creditor or owner, or another credit broker.

5.8 Although it would need to be formulated differently, in principle we consider that we could achieve a comparable standard of protection if we replaced this CCA provision with an FCA rule that placed an obligation on firms to provide a refund in the same or similar circumstances.

5.9 Our initial view, therefore, is that section 155 could be repealed and replaced by an FCA rule without adversely affecting the appropriate degree of consumer protection.

One of the benefits of replacing this provision with an FCA rule is that it would bring it together with existing CONC rules and guidance relating to credit broker fees.

5.10 We would, however, need to consider the precise content of such a rule, having regard to issues identified with the current CCA provision (see Annex 5).

Prospective agreements

5.11 The CCA provides a number of rights and protections to consumers that govern the parties' dealings before a regulated agreement is entered into.

5.12 Section 55C derives from the CCD and entitles a customer (subject to certain exceptions) to request a copy of the proposed credit agreement unless the firm is unwilling to proceed. A breach is actionable as a breach of statutory duty.

5.13 In principle, section 55C could be replaced by an FCA rule imposing a duty to provide a draft copy of the prospective agreement.[71] However, our initial view is that its repeal and replacement by an FCA rule, while other related provisions remain in the CCA, would result in an undue degree of fragmentation of the regulatory regime. As such, it should be considered as part of wider decisions on the relevant provisions.

5.14 Section 57 sets out how a party can withdraw from a prospective regulated agreement and the effects of this. In principle, we could make a rule providing that either party may withdraw from a prospective agreement either orally or in writing. However, there are a number of aspects that could not, under our current rule-making powers, be replicated in rules.

5.15 An FCA rule could not require that withdrawal from a prospective agreement renders a linked transaction[72] automatically void. In addition, a third party to the linked transaction may not be an authorised person, and we could not make a rule applying to a person who is not an authorised person. An FCA rule also could not deem a person (who may not be an authorised person) to be another's agent for the purposes of receiving a notice of withdrawal and deem that person to be under a contractual duty to pass on the notice straight away.

5.16 Therefore, our initial view is that section 57 should be retained in the CCA, as its repeal would adversely affect the appropriate degree of consumer protection.

5.17 In relation to certain prospective agreements secured on land, section 58 imposes an obligation on the creditor to give the customer an advance copy of the unexecuted agreement in the prescribed form. Section 58 is supplemented by section 61(2) which provides that an agreement is not properly executed where the requirements of section 58 apply but are not complied with. An improperly-executed agreement is only enforceable against the debtor on an order of the court.

5.18 The obligation under section 58 could, in principle, be replaced by FCA rules, but we could not under the FCA's general rule-making power reproduce the consequences

71 The application of the private right of action for damages under section 138D FSMA could achieve the same effect as breach of statutory duty under section 55C(3).

72 This is defined in section 19 and includes a transaction entered into in compliance with a term of the principal agreement, or to facilitate entry into that agreement, or which is financed (or to be financed) by the agreement.

of non-compliance. Our initial view is that section 58 should be retained in the CCA to maintain an appropriate degree of consumer protection.[73]

5.19 Section 59 provides that an agreement is void if, and to the extent that, it binds the customer to enter into a future regulated agreement. An FCA rule could not provide that, in those circumstances, an agreement is to be treated as if it had never been entered into. Our initial view is that this provision could not be repealed without adversely affecting the appropriate degree of consumer protection. The provision should, therefore, be retained in the CCA.

Antecedent negotiations

5.20 Section 56 provides that, in certain circumstances, negotiations with a customer conducted by a credit broker or supplier (the negotiator) before a regulated agreement is entered into are deemed to be conducted in the capacity of agent of the creditor.

5.21 The creditor may be liable for misrepresentations or contractual undertakings given by the negotiator to the customer. Section 56 also provides that an agreement is void if, and to the extent that, it claims to treat the negotiator as agent of the customer or to exclude liability for acts or omissions of the negotiator.

5.22 We could not make an FCA rule that provides that the relationship between a creditor and a credit broker or supplier is, for the purposes of contract law and the law of tort, to be regarded as one of principal and agent such that, for example, if there is a misrepresentation by the broker or supplier, the debtor may be entitled to rescind the credit agreement and the creditor may be liable for it in damages, and that statements by the broker or supplier may constitute contract terms of the credit agreement. A supplier acting as negotiator may not necessarily be an authorised person and our rules cannot apply to non-authorised persons. Although CONC 1.2.2R requires firms to take reasonable steps to ensure that persons acting on their behalf comply with CONC, this is very different to creating a deemed agency.

5.23 Our initial view is that section 56 should be retained in the CCA, on the basis that its repeal would adversely affect the appropriate degree of consumer protection.

Multiple agreements

5.24 Section 18 creates the concept of 'multiple agreements'. These are agreements that combine two or more 'parts' and/or two or more 'categories'.[74]

5.25 One of the original purposes of section 18 was to prevent avoidance of the CCA by putting together transactions that were in reality two or more separate transactions in a single agreement, with a view to taking it above the monetary limit for CCA regulation. Although the £25,000 limit was removed for most credit agreements by the 2006 Act, it continues to apply to business lending.[75]

5.26 Another key purpose of s.18 is to clarify that, if an agreement falls into two or more disparate categories of credit agreement, and more than one set of CCA requirements is therefore relevant to the agreement (for example, in relation to information disclosure at the pre-contract stage, in the agreement itself and over the lifetime of

73 Unless the decision is taken to disapply the CCA and CONC regimes to all new lending secured on land – section 58 is likely to apply to only a very small number of credit agreements, given the transfer of second-charge mortgage regulation to the MCOB regime and the exemptions in articles 60C and 60D of the RAO.

74 See for example *Southern Pacific Mortgage Ltd v Heath* [2009] EWCA Civ 1135.

75 Article 60C(3) RAO – see also article 60C(4) in relation to green deal plans.

the agreement), the CCA requirements that relate to each respective category apply cumulatively. The review of section 18 cannot, therefore, be wholly disentangled from the review of the related CCA provisions that contain the information disclosure requirements and other conduct requirements; section 18 helps to describe how those other requirements apply.

5.27 Section 18 also includes provisions relating to apportionment by the court of sums payable under certain multiple agreements and disapplying the CCA to certain agreements to the extent that they relate to goods where payment takes the form of rent (for example, furnished lettings). We could not confer functions on the courts or switch off the application of the CCA.

5.28 Our initial view is that we could not replace section 18 in its entirety with an FCA rule, and its repeal would adversely affect the appropriate degree of consumer protection. However, the impact of section 18 will be reduced in so far as information requirements and other CCA provisions are repealed and replaced by FCA rules.

During the currency of the agreement

Non-contracting out

5.29 Section 173 renders a contractual term void if, and to the extent that, it is inconsistent with a provision for the protection of the debtor or hirer contained in the CCA or regulations made under it.

5.30 This provides a strong consumer protection measure which underpins CCA rights and protections. The application of section 173 to CCA rights and protections – but not to FSMA rules – is part of the background to the analysis of whether the repeal of CCA provisions would result in an inappropriate reduction in protection.

5.31 Section 173 applies to a term contained in a regulated agreement or a linked transaction or in any other agreement relating to an actual or prospective regulated agreement or linked transaction. The persons who are forbidden from contracting-out of the CCA include both authorised persons and persons who may not be authorised persons. The FCA could not make a rule that applies to a person who is not an authorised person.

5.32 FSMA expressly provides that a breach of an FCA rule cannot make any transaction void. However, a contract term that is inconsistent with FCA rules may be unfair and unenforceable under the Consumer Rights Act.

5.33 Our initial view is that section 173 should be retained for those CCA provisions that remain in the CCA, as its repeal would adversely affect the appropriate degree of consumer protection.

Connected lender liability

5.34 Under section 75, a creditor is jointly and severally liable in certain circumstances for a supplier's breach of contract or misrepresentations for goods or services. This means that, where the customer has a claim against the supplier, they also have a like claim against the creditor. The customer may choose to pursue a claim against either or both parties. The creditor cannot insist that the customer should first claim against the supplier.

5.35 There is a parallel provision in section 75A, which derives from the CCD but is limited to 'second-in-line' liability and applies only to linked credit agreements which exclusively finance the transaction. Unlike section 75, the customer must have tried but failed to obtain satisfaction from the supplier before the creditor is liable under section 75A. It applies only in cases where section 75 does not apply.

5.36 We do not consider that we could use our general rule-making power under FSMA to make a rule that replicated the meaning and effect of section 75.

5.37 We note that there is wide agreement that section 75 provides a strong consumer protection measure that consumers are relatively familiar with, and often use. It can give consumers the confidence to buy from unknown suppliers, or online or from abroad. We also note that that this protection drives business for credit providers as it encourages consumers to use credit cards over other means of payment. There is helpful case law on the interpretation of section 75 that would be lost if we sought to replace it. On the other hand, stakeholders have raised issues about the scope and application of section 75 given that the nature of consumer credit markets has changed considerably since the protection was introduced.

5.38 For example, the use of third party payment processors or other intermediaries may break the link between the creditor and supplier, and there are issues about how purchases by additional cardholders are treated. The cash values in section 75 can also create difficulties, particularly for multiple purchases. More generally, there are arguments that liability under section 75 should be limited to the amount of credit advanced, and exclude consequential losses, or alternatively that it should be extended to include debit cards and charge cards.

5.39 Our initial view is that sections 75 and 75A should be retained in legislation, as their repeal would adversely affect the appropriate degree of consumer protection. The protection provided also provides an incentive for consumers to use their credit cards to make purchases where they welcome the protection. However, we think there is a case for considering the issues identified with sections 75 and 75A (see paragraph 5.38 above and Annex 5), to ensure that they provide an appropriate level of consumer protection without imposing undue or disproportionate burdens on firms, and to clarify or update aspects.

Variation of agreements

5.40 Section 82(1) applies to the situation where the creditor or owner varies a regulated agreement under a power contained in the agreement. In such a case, before the variation can become effective, the creditor or owner must provide notice of the variation to the customer in the prescribed manner.

5.41 For variations in the rate of interest, section 78A requires a creditor, subject to certain exceptions[76], to inform the customer of certain matters in writing before the variation can take effect. This provision implements the CCD.

5.42 We could, in principle, make rules imposing similar obligations on creditors to give notice of unilateral variations to the terms of the agreement, and to communicate information to the debtor where there will be a change in the interest rate. These would sit alongside the provisions of the Consumer Rights Act[77] relating to unfair contract

76 For example, the agreement is secured on land, where section 82(1) applies.

77 And the Unfair Terms in Consumer Contracts Regulations 1999 for contracts entered into before 1 October 2015.

variation terms and the consequences of any such unfairness (broadly that such terms are not binding on the consumer).[78] A breach of such rules could potentially attract disciplinary sanctions and the FSMA private right of action. It could not, however, automatically render the variation invalid.

5.43 In light of this, our initial view is that repeal of section 82(1) would adversely affect the appropriate degree of consumer protection and it should, therefore, be retained in the CCA.

5.44 In principle, section 78A could be replaced by an FCA rule, as non-compliance does not render the variation invalid or impact on enforceability of the agreement. However, our initial view is that it should be considered alongside section 82(1), to avoid undue fragmentation of the regulatory regime.

5.45 Section 82(2) deals with the situation where an agreement varies or supplements an earlier agreement. The CCA treats this as a modifying agreement, which revokes the previous agreement and contains provisions reproducing the combined effect of the two agreements. Regulations set out the process the creditor or owner must follow where they vary or supplement an agreement via a modifying agreement.

5.46 We could, in principle, make a rule that sets out the requirements that apply where there is a mutual variation that constitutes a modifying agreement. We could not, however, replicate the unenforceability sanction if the modifying agreement is not documented in accordance with the relevant form and content requirements.

5.47 Our initial view is that section 82(2) should remain in the CCA, but with the associated information requirements being repealed and replaced by FCA rules (see Chapter 6). We note in Annex 5 some issues that have been raised in relation to the current provisions.

Notices in relation to enforcement

5.48 The CCA provides that a creditor or owner is not entitled to take certain enforcement action in relation to a regulated agreement unless notice is given in the prescribed manner.

5.49 Section 76 applies in non-default cases and requires at least seven days' notice of the firm's intention to enforce a term of the agreement by demanding earlier payment, recovering possession of goods or land, or treating a right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred.

5.50 Section 87 provides that the creditor or owner is not entitled to enforce the agreement (in the ways described in section 76), or to terminate the agreement or enforce any security, as a result of a breach of the agreement by the debtor or hirer, unless at least 14 days' notice is given. This gives the customer an opportunity to remedy the breach or to pay compensation.

5.51 Section 88 provides for the form and content of default notices, and section 89 provides that, if the customer takes the specified action to remedy a breach or pay compensation by the specified date, the breach is treated as not having occurred.

78 GC18/2: Fairness of variation terms in financial services contracts under the Consumer Rights Act 2015 (May 2018).

5.52 Section 98 applies in non-default cases, other than in the case of open-ended agreements. It requires the creditor or owner to give at least seven days' notice in the prescribed manner before terminating the agreement.

5.53 While we could, in principle, make a rule requiring a firm to give notice of its intention to take one of the steps described in sections 76, 87 and 98, and specifying the timing, form and content of the notice, we could not reproduce the consequences of an infringement. We could not, for example, provide that a creditor is potentially liable in an action for conversion if it wrongfully seizes goods or for trespass if it purports to repossess land in contravention of the provision. We could also not restrict the court's jurisdiction to grant an order for the enforcement of an agreement, or make rules applying to non-authorised persons.

5.54 Our initial view is that repeal of these provisions would adversely affect the appropriate degree of consumer protection. In particular, section 87 (default notices) is a key protection for vulnerable customers or those in financial difficulties.

Death of debtor or hirer

5.55 For similar reasons, we do not consider that section 86 (restrictions on taking one of the actions set out in section 87(1) because of the death of the debtor or hirer) could be replaced by an FCA rule. Section 86 expressly invalidates the exercise of common law rights or contractual rights a creditor or owner may have under the regulated agreement, and gives the court discretion to allow a creditor or owner to take one of those actions unless the agreement is fully secured, in a way an FCA rule could not.

Other restrictions on remedies for default

5.56 Section 90 provides that a creditor is not entitled to recover possession of goods under a regulated hire-purchase or conditional sale agreement following breach by the debtor, where at least one-third of the total price of the goods has been paid, except on an order of the court. The goods are treated as 'protected goods'.

5.57 This is supported by section 91, the effect of which is that, if a creditor improperly recovers protected goods in contravention of section 90, the agreement terminates, the debtor is released from all liability under the agreement and is entitled to recover from the creditor all sums paid under the agreement.

5.58 Section 92 prohibits a firm from entering premises to take possession of goods under a regulated hire-purchase or conditional sale agreement, or a consumer hire agreement, except under an order of the court.

5.59 A breach of an FCA rule, although potentially actionable by the debtor who suffers loss as a result of the contravention under section 138D FSMA, could not recreate these civil consequences of non-compliance provided for in section 91. Neither could an FCA rule confer a role on the court.

5.60 Our initial view is that sections 90 to 92 should be retained in the CCA because their repeal would adversely affect the appropriate degree of consumer protection. Although the sanction provided for in section 91 for contravention of section 90 has been described as 'draconian' [79], our initial view is that it promotes appropriate emphasis on compliance with the key provisions in relation to protected goods.

79 See for example the summary of the argument submitted to the court in paragraph 46 of the Judgment of Lord Justice Briggs in Grace and another v Black Horse Limited [2014] EWCA Civ 1413 (paragraph 46).

Provisions about interest

5.61 Section 93 provides that the debtor is not obliged to pay default interest at a rate which exceeds the rate included in the total charge for credit. Section 173 forbids contracting out of section 93.[80]

5.62 Section 86F is relevant to sums (other than interest) payable in connection with a breach of a regulated agreement, and states that a debtor or hirer is liable to pay interest in relation to such default sums only if the interest is simple interest.

5.63 Section 130A requires a creditor or owner, who wants to be able to rely on a term of the agreement to recover interest on sums after the giving of a court judgment for their payment, to communicate certain information to the debtor or hirer. Where the firm fails to do so, the customer is not liable under the agreement to pay the post-judgment interest.

5.64 In principle, we could make rules that placed obligations on creditors and owners that reflected the substance of sections 93, 86F and 130A. Such rules could also be relevant to the application and effect of the unfair contract terms provisions of the Consumer Rights Act, and could be taken into account by the Financial Ombudsman Service in considering what is fair and reasonable in all the circumstances of the case when determining an individual complaint (DISP 3.6.4R). In addition, a customer could bring a court action for damages under section 138D FSMA for a breach if they could show it had caused them loss. The FCA's supervisory, restitutionary and disciplinary powers would also apply.

5.65 However, an FCA rule could not automatically render void or invalidate a private contractual liability to pay increased default interest or to pay compound interest on default sums or to pay post-judgment interest. Our initial view, therefore, is that repealing sections 93, 86F and 130A would adversely affect the appropriate degree of consumer protection, and so they should be retained in the CCA.

Security

5.66 The CCA protections for debtors, hirers and sureties in relation to security for regulated agreements and linked transactions are closely inter-connected with the provisions that relate to the regulated agreement itself.

5.67 Section 106 and section 113 contain important provisions designed to ensure that a security cannot be used to evade or frustrate the protections of the CCA. They achieve this by providing that, in certain circumstances, a security can be enforced only to a certain extent, only at a certain time or only on an order of the court, or is even treated as never having effect.

5.68 A general FCA rule could not operate in a similar way. Our initial view is that preserving sections 106 and 113 in the CCA is necessary to ensure there is an effective anti-evasion mechanism and to support the other components of the regime for securities.

80 Academic commentators argue that the effect of section 173 is that, where a contract term seeks to increase interest on default, it is only the difference between the rate permitted by section 93 and the rate the term purports to charge that is void, rather than the term being void altogether. However, a contract term providing for increased default interest appears to have been considered wholly void in *McMullon v Secure the Bridge Limited* [2015] EWCA Civ 884.

Unauthorised payments and credit-tokens

5.69 The CCA includes provisions limiting a customer's liability for misuse of a credit facility. It also includes specific provisions about misuse of a credit-token, which is defined broadly and includes credit cards, store cards and vouchers.

5.70 Section 66 establishes acceptance of a credit-token as the earliest point at which a customer may become liable in respect of use of the credit-token.

5.71 Regulation 73(2) of the Payment Services Regulations 2017 (PSRs) makes provision in a similar area, and potentially covers credit cards, store cards and other credit-tokens if they constitute payment instruments regulated under Part 7 of the PSRs. The effect of regulation 73(2) is that, if the payment service provider sends a payment instrument or personalised security credentials, such as a credit card or PIN, to the customer, any risk involved in the sending of the card or PIN will remain with the provider.[81] So, if a card and PIN were intercepted before they were received by the customer, any losses arising from their misuse would lie with the provider rather than the customer. There is, therefore, a degree of overlap between section 66 of the CCA and regulation 73(2) of the PSRs.

5.72 Given the above, our initial view is that the repeal of section 66, in so far as it applies to payment instruments to which the protection in regulation 73(2) of the PSRs also applies, would not undermine an appropriate degree of protection. However, where a credit-token is not covered by regulation 73(2), section 66 should continue to apply.

5.73 Section 83 protects a customer from liability for any loss arising from use of a credit facility by another person not acting, or to be treated as acting, as the debtor's agent. Section 84 enables a creditor to impose certain liability, however, on the customer for misuse of a credit-token in certain circumstances.

5.74 Although we could not make a rule that directly releases a debtor from contractual liability for loss arising out of unauthorised payments in the same way as section 84, there would, in principle, be scope to make a rule placing a duty on the creditor to restore the balance of the credit facility to the state it would have been in had the unauthorised payment not taken place.[82]

5.75 The PSRs include provisions governing liability for unauthorised payment transactions within their scope. These are currently dis-applied in some cases for CCA-regulated agreements. Our initial view is that there may be merit in moving towards a uniform, consistent regulatory regime in relation to unauthorised payment transactions, whether or not they are covered by a credit line provided under a CCA-regulated agreement.

5.76 There are some respects in which sections 83 and 84 arguably achieve a higher standard of protection than the corresponding provisions of Part 7 of the PSRs; if another person – who does not have actual or ostensible authority – acquires possession of a credit-token without the debtor's consent, the debtor cannot be made liable for more than £50, even if they may have acted with gross negligence. In other respects, however, it may be argued that Part 7 of the PSRs contains stronger protections; for example, there is a specified period for giving a refund (as soon as

81 Payment Services and Electronic Money – Our Approach: The FCA's role under the Payment Services Regulations 2017 and the Electronic Money Regulations 2011 (FCA, July 2018 (version 2)) – www.fca.org.uk/publication/finalised-guidance/fca-approach-payment-services-electronic-money-2017.pdf

82 See BCOBS 5.1.11R and TR15/10: Fair treatment for consumers who suffer unauthorised transactions (July 2015).

practicable, and in any event no later than the end of the business day following the day on which the payment service provider becomes aware of the unauthorised transaction).

5.77 However, we consider that the overall level of protection is broadly comparable, and the advantages of creating a more unified regime suggest that it would be appropriate to replace sections 83 and 84 with regulations 75 and 76 of the PSRs where a CCA-regulated agreement is also an agreement for payment services.

5.78 However, section 83 should be retained in respect of CCA-regulated credit facilities that do not involve the provision of payment services within Part 7 of the PSRs.

Pawnbroking

5.79 The CCA provides specific rights and protections in relation to pawnbroking agreements, where an item is taken in pawn under a regulated agreement.

5.80 We could, in principle, make general rules under FSMA achieving similar outcomes in terms of compliant standards of behaviour to some of the provisions of sections 116 to 121 (although these would need to be reformulated as conduct obligations on pawnbrokers, rather than rights conferred on customers). There are, however, elements that are integral to the overall CCA regime for pawnbroking that could not be replaced in FCA rules.

5.81 On section 117, we could not relieve a pawnbroker from potential liability in tort or delict[83] where they had delivered the pawned item to the bearer of the pawn-receipt in accordance with the regulatory requirements, as section 117(3) does.

5.82 On section 120, we could not under our general rule-making power make a rule providing for the passing of property in the pawned item to the creditor. Nor could we provide for a power of the pawnbroker to sell the pawned item subject to the restrictions set out in section 121.[84]

5.83 Our initial view, therefore, is that repeal of these provisions would adversely affect the appropriate degree of consumer protection, and so they should be retained in the CCA. In light of this, we think there are arguments for keeping all of sections 116 to 121 in the CCA, to avoid undue fragmentation of the regulatory regime.

Exiting the agreement

Withdrawal and cancellation

5.84 The CCA provides for a right of withdrawal from a regulated credit agreement, and there is a parallel right of cancellation for agreements that fall outside the scope of the withdrawal provisions.

5.85 Section 66A provides the customer with a 14-day right of withdrawal from a regulated credit agreement. For agreements outside the scope of section 66A, including hire agreements, the cancellation provisions under sections 67-73 apply where the agreement is signed off trade premises following oral representations.

83 A civil wrong which is a breach of a legal duty and is distinct from a breach of contract.

84 However, it is possible that the pawnbroker would in any event have certain rights under the Torts (Interference with Goods) Act 1977 in respect of uncollected goods.

5.86 Section 137B(3) FSMA allows for the making of rules which (i) confer rights on persons to rescind agreements with, or withdraw offers to, authorised persons within a specified period and (ii) make provision for the restitution of property and the making or recovery of payments where those rights are exercised. In principle, we could exercise our power under section 137B to replace most of sections 66A and 73. However, other aspects are more difficult.

5.87 In particular, section 66A(7)(b), which implements the CCD, extends to third parties providing an ancillary service. Where the third party is an authorised person, it would be possible, in principle, to make a rule enabling the customer to rescind the ancillary service contract, although this would not make the contract automatically void (as currently provided by section 66A(7)(b)). However, the third party providing the ancillary service may not be an authorised person and we could not make rules that apply to non-authorised persons.

5.88 We also could not under our general rule-making power make a rule governing the passing of title to the customer to goods subject to a conditional sale, hire-purchase or credit sale agreement, as currently provided for in section 66A(11). It should be noted that section 66A relates only to the credit agreement, and not, for example, to a sale of goods which are financed by the credit agreement. Therefore, where a customer exercises the right to withdraw from the credit agreement under section 66A, the customer is still liable to pay the entire purchase price of the goods. This applies even if the goods are being hired under a hire-purchase agreement.

5.89 Similarly, while in principle we could make rules conferring the right to cancel a cancellable agreement under section 67, and providing for a cooling-off period as in section 68, there are associated provisions that we could not reproduce. A cancellation notice operates to cancel a linked transaction and the supplier who is the party to that linked transaction may not be an authorised person. In addition, we could not give a debtor or hirer a lien (a form of security interest) over goods in their possession for sums they are entitled to recover, or provide that a creditor and supplier are under a joint and several liability to repay those sums accompanied by an entitlement of the creditor to be indemnified by the supplier.

5.90 Sections 72 and 73 describe the rights and obligations of the parties where the debtor or hirer has acquired possession of goods under an agreement that is cancelled or a linked transaction, or where a negotiator (such as a motor dealer) has taken delivery of goods given in part-exchange. We could not, using our general rule-making power, replicate elements of these rights and obligations that contribute to the effective operation of the cancellation provisions and achieve a fair balance between protecting consumers and respecting the legitimate commercial interests of creditors, suppliers and negotiators.

5.91 We could not place a statutory duty on a customer to take reasonable care of the goods. We also could not apply a rule to a negotiator who is not an authorised person, or provide for the vesting of title to the part-exchange goods in the negotiator in certain circumstances. As mentioned above, we could also not make provision that the debtor or hirer enjoys a lien over goods in certain situations, or that creates a joint and several liability of the creditor and negotiator to the debtor or hirer and gives the creditor a statutory right to be indemnified by the negotiator for loss suffered in satisfying that liability.

5.92 Our initial view, therefore, is that the provisions relating to withdrawal and cancellation in sections 66A and 67-73 should remain in the CCA on the grounds that their repeal would adversely affect the appropriate degree of consumer protection.

Early repayment

5.93 Section 94 entitles the debtor to settle a regulated credit agreement ahead of time, either in full or partially, by giving notice to the creditor and making the necessary payment to discharge their debt less any rebate of charges. The debtor may also be liable, in certain limited cases, to pay compensation to the creditor.

5.94 In principle, we could make a rule requiring a creditor to permit a debtor to make an early repayment, in full or in part, at any time. We could oblige creditors to include in their regulated agreements a contractual right for the debtor to do so. A breach of such an FCA rule would be actionable as a breach of statutory duty by the customer and would be subject to the FCA's supervisory, restitutionary and disciplinary powers. Our rule-making powers could also, in principle, replicate the rebate provisions under section 95.[85]

5.95 We could not provide in an FCA rule, however, that a debtor has a statutory right to make full or partial early payment, and prescribe that such early performance has the effect on the individual contractual relationship of reducing or extinguishing the indebtedness, an attempt to contract out of which or to fetter is automatically void.

5.96 On sections 95A and 95B, an FCA rule could not expressly confer a right on the creditor to claim compensation. In principle, however, a rule could provide that a creditor may include a term in the credit agreement entitling them to recover compensation from the debtor, provided that this incorporates the limits and conditions set out in the CCD.

5.97 We could not replicate section 96, which discharges a debtor and their relatives from contractual liability under a linked transaction, especially as the other party to the linked transaction may not be an authorised person.

5.98 We could, in principle, replace the substantive duties on the creditor in sections 97 and 97A to provide a settlement statement and information with FCA rules, but we could not apply the unenforceability sanction in section 97(3). We also could not provide that the settlement statement is binding on the trader in court proceedings in the same way as section 172.

5.99 Our initial view is that, as we could not replace elements of the early settlement provisions without adversely affecting the appropriate degree of consumer protection, the provisions should remain in the CCA in order to preserve the coherence of the regulatory regime. There may, however, be merit in considering transferring the associated information requirements into FCA rules, so that they can more easily be kept up to date.

Termination of agreements

5.100 The CCA entitles customers to terminate a hire-purchase, conditional sale or hire agreement, or an open-ended credit agreement.

5.101 We could not replicate sections 99 and 100 which deal with voluntary termination of a hire-purchase or conditional sale agreement. We could not, for example, make rules

85 Consumer Credit (Early Settlement) Regulations 2004, SI 2004/1483.

unravelling the passing of title to goods. In addition, we could not make FCA rules involving the role of the courts as provided for in section 100.

5.102 Our initial view is that the provisions should be retained in the CCA, because their repeal would adversely affect the appropriate degree of consumer protection. However, we note that issues have been raised about the current provisions, as summarised in Annex 5.

5.103 We consider that most of the protections in sections 101 to 103 could be replaced by FCA rules, although section 172(2) (statements binding on creditor or owner) would no longer apply to termination statements. The current CCA sanction in section 103(6) that a failure to provide a notice under section 103 is actionable as a breach of statutory duty is similar to section 138D FSMA.

5.104 We think these provisions should be considered for repeal and replacement by FCA rules, which could achieve a comparable level of protection.

Judicial protections

Time orders

5.105 The power of the court to make a time order under section 129, and consequential provision under section 136, is a strong consumer protection measure with no analogy in the FSMA framework. If the court considers it 'just' to make a time order, it has a wide discretion to reschedule payments by the debtor, hirer or surety or to give the debtor or hirer time to remedy a breach of the agreement.

5.106 The provisions apply to all regulated credit and hire agreements, and also – by virtue of section 126(2) – to regulated mortgage contracts.

5.107 Our initial view is that the provisions should be retained in the CCA, on the grounds that their repeal would adversely affect the appropriate degree of consumer protection, in particular for vulnerable consumers in financial difficulties.

Unfair relationships

5.108 The court has extensive powers under the CCA to re-open credit agreements if it determines that there is an unfair relationship between the creditor and the debtor arising out of the agreement, or the agreement taken together with any related agreement.

5.109 Section 140A bears some similarities to Principle 6, which requires a firm to pay due regard to the interests of its customers and treat them fairly, and some of the conduct rules in CONC. A contravention of Principle 6 does not give rise to a cause of action for damages in court under section 138D.[86] There are, however, certain rules in CONC that relate to fair treatment of customers to which section 138D applies (for example, CONC 7.2.1R which requires a firm to establish and implement clear, effective and appropriate policies and procedures for the fair and appropriate treatment of customers who the firm understands or reasonably suspects to be particularly vulnerable).

86 PRIN 3.4.4R.

5.110 A contravention of Principle 6 would be taken into account by the Financial Ombudsman Service when deciding what is fair and reasonable and what redress to award for the purposes of determining a complaint referred to it. A breach of Principle 6 may also form the basis of the exercise of the FCA's power to require a firm to take remedial action, including the payment of redress, or to require restitution (although a formal consumer redress scheme under section 404 FSMA cannot be used for breaches of the Principles, unless PRIN is amended to make the Principles actionable in court).

5.111 In comparison, the court has a very broad discretion under the CCA to order a creditor (or an associate or former associate, who may not necessarily be an authorised person) to take the steps described in section 140B on an application made by a debtor or a surety, if the court considers that that the particular relationship between the debtor and the creditor is unfair in the individual circumstances of the case.

5.112 Another important point is that the definition of 'credit agreement' for the purposes of the unfair relationships provisions is wider than the definition of regulated credit agreement in article 60B of the RAO for the purposes of the scope of the regulated lending activity. The effect of this is that where a non-regulated credit agreement (such as an exempt agreement) is involved, a debtor may potentially be protected by section 140A even if they are not a 'consumer' for the purposes of the FSMA consumer protection objective. In those circumstances, the creditor may also not necessarily be an authorised person.

5.113 The broad power to re-open and recalibrate an individual contractual relationship between a debtor and a creditor, where it is appropriate to restore a fair balance between the parties, has been a key protection in consumer credit regulation for a number of years. Our initial view is that we do not consider that it would be appropriate, from a consumer protection perspective, to remove the ability of a debtor or surety to ask the court for relief from the consequences of an unfair relationship.

Enforcement of land mortgages

5.114 The court's powers to make enforcement orders under the CCA extend to certain mortgage agreements, by virtue of section 126. Where a land mortgage secures a regulated agreement, a regulated mortgage contract or a credit agreement which would, but for the investment mortgage exemption, be a regulated agreement, the creditor cannot enforce the mortgage agreement without a court order.

5.115 We could not replicate this provision with an FCA rule. Our initial view is that it should be retained in the CCA or other legislation because repeal would adversely affect the appropriate degree of consumer protection.

Q2: Do you have any comments on our analysis and initial views on rights and protections or the associated issues in Annex 5?

6 Information requirements

6.1 In this chapter, we consider the provisions of the CCA which contain requirements on creditors and owners in relation to pre-contractual information, the form and content of agreements, and providing copy documents.

6.2 We also look at post-contractual information requirements such as statements and notices. Some of these must be provided by firms periodically, some when triggered, and others only upon the request of the customer.

6.3 There is some overlap between these provisions and those discussed in Chapters 5 and 7. In particular, by imposing an obligation on firms, some provisions at the same time create a right for the customer to receive or request the information. Most information requirements also include unenforceability as the sanction for breach.

6.4 In Annex 6, we provide supplementary detail on the nature and purpose of the relevant provisions, and set out the key issues we have identified with the information requirements.

Overview of information requirements

6.5 A number of CCA provisions require firms to provide information to customers. In particular, firms must:

- provide pre-contractual and contractual information
- give customers information throughout the lifetime of the agreement, either periodically or at the customer's request
- give notices to customers advising that an event has occurred which may require the customer to take action, or before the firm can take specified actions

6.6 Many CCA information requirements did not feature in the original 1974 Act but were instead introduced more recently, for example in the 2006 Act or as part of the implementation of the CCD in 2010. Much of the detail around the form and content of the required information is set out in regulations made under the CCA.

6.7 While their specific purpose may differ, information requirements aim to protect consumers by reducing the information asymmetry between firms and customers. In the 1970s, the emphasis was on informing customers and reducing the inequality of bargaining power. The 21st century has seen a shift in focus towards enabling and empowering customers to make informed decisions. Information requirements contribute to creating good outcomes for consumers and reduce the risk of harm.

6.8 Against this background, our initial view is that repealing the CCA information requirements would adversely affect the appropriate degree of consumer protection. Therefore, our starting point is that, in principle, they should not be repealed without replacement.

6.9 In the following sections, we consider how far the CCA information requirements could be reproduced in FCA rules. We then give our initial views on whether the CCA information requirements could be repealed and replaced with FCA rules without adversely affecting the appropriate degree of consumer protection.

6.10 In some cases, it may be appropriate to repeal or amend individual requirements if they are not delivering appropriate consumer protection in their current form or if the burden on firms is not proportionate to the level of consumer protection provided. These issues are highlighted towards the end of the chapter.

Replacing CCA provisions with FCA rules

6.11 In this section, we consider the extent to which we could, in principle, exercise our general rule-making power to reproduce the various CCA provisions on information requirements with FCA rules.

6.12 We summarise our initial views on this in Table 2 at paragraph 6.20 below.

Provisions replaceable in whole

6.13 We have identified four CCA provisions which we consider could, in principle, be replaced in whole by FCA rules:

- section 55C requires firms to give potential customers a copy of the proposed credit agreement upon request[87]
- section 77B requires a creditor to provide a customer, on request, with a statement of account showing details of payments made in respect of fixed-sum credit agreements
- section 176 defines when a document is deemed to have been properly served on or given to a customer
- section 176A defines when a document is deemed to have been transmitted electronically

6.14 Although sections 176 and 176A do not contain information requirements, we include these provisions in the chapter as they are relevant to all information that must be provided to customers under the CCA.

6.15 On section 77B, it would be possible, in principle, to replace the obligation to provide the statements with an FCA rule. By way of contrast, we could not make a rule which provides that a customer has no liability to pay any sum for the preparation or giving of the statement as in section 77B(7). However, we could in principle make a rule which prohibits firms from charging customers for preparing and giving these statements. We consider that such a rule would achieve substantially the same effect as section 77B(7). To the extent that a breach of such a rule causes loss to the customer, the breach would be actionable by the customer under section 138D FSMA in the same way as the existing breach of statutory duty sanction under section 77B.

87 However, as noted in Chapter 5, even if section 55C could be replaced without a loss of appropriate protection, we suggest that it should be considered alongside other provisions, to avoid undue fragmentation of the regulatory regime. The same applies to section 77B in relation to post-contractual information.

Provisions replaceable in part

6.16 Most of the CCA provisions that require firms to provide information to customers also set out the associated sanctions for breach of those obligations.

6.17 Our initial view is that most of the information requirements set out in the CCA and its regulations could, in principle, be replaced by FCA rules (see Table 2 below). However, as explained in Chapter 7, the associated sanctions cannot be replaced by FCA rules under our current rule-making powers. These are:

- unenforceability of agreement without a court order
- unenforceability of agreement during the period of non-compliance
- disentitlement to interest and default sums in respect of the period of non-compliance

6.18 We discuss these sanctions in Chapter 7, and set out our initial view that the loss of these sanctions would adversely affect the appropriate degree of consumer protection.

Provisions not replaceable with substantially the same effect

6.19 We consider the information requirements in sections 76, 78A, 82(1), 87 and 98 in Chapter 5, and set out our initial view that we could not reproduce these provisions in FCA rules without adversely affecting the appropriate degree of consumer protection.

Summary of provisions

6.20 In Table 2, we summarise our initial views on the extent to which we could exercise our general rule-making power to reproduce the CCA provisions on information requirements (and the regulations made under them) with FCA rules. The regulations made under the various CCA provisions are discussed in Annex 6.

Table 2: Replacing CCA information requirements with FCA rules

Extent to which replaceable	Category	Section of CCA	Subject
Provisions replaceable in whole	**n/a**	55C	Copy of draft credit agreement
		77B	Statement of account on request (fixed-sum credit)
		176	Service of documents
		176A	Electronic transmission of documents
Provisions replaceable in part: obligation to provide information could be replaced but not the associated sanctions	**Unenforceability without a court order**	55	Form and content of pre-contractual information
		60	Form and content of contractual information
		61	Signing of agreement
		61A, 61B, 62, 63	Copy of agreement
		64	Information about cancellation rights
		82(2) to (6B)	Modifying agreements
	Unenforceability during non-compliance	77	Statement of account and copy agreement on request (fixed-sum credit)
		77A	Periodic statements of account (fixed-sum credit)
		78	Statement of account and copy agreement on request / periodic statements (running-account credit)
		79	Statement of account and copy agreement on request (hire)
		85	Copy agreement on issue of new credit-token
		86B	Notice of sums in arrears (fixed-sum credit)
		86C	Notice of sums in arrears (running-account credit)
		86E	Notice of default sums
		97	Settlement statement
	Disentitlement to interest and default sums	77A	Periodic statements of account (fixed-sum credit)
		86B	Notice of sums in arrears (fixed-sum credit)
		86C	Notice of sums in arrears (running-account credit)
		86E	Notice of default sums

Initial views

6.21 We now look at whether it would be desirable from a policy perspective to repeal the CCA information requirements and replace them with FCA rules. We consider the potential impact of doing this, and give our initial view on whether the repeal and replacement would adversely affect the appropriate degree of consumer protection.

Repealing the provisions in whole

6.22 As set out above, sections 55C and 77B could, in principle, be reproduced in whole in FCA rules without adversely affecting the appropriate degree of consumer protection. However, we think there is merit in considering them alongside other relevant provisions, to avoid undue fragmentation of the regulatory regime.

6.23 In principle, sections 176 and 176A could also be replaced by FCA rules, depending upon the extent to which CCA information obligations are repealed and replaced.

Repealing the provisions in part

6.24 In respect of the provisions that could only be replaced in part, our initial view is that the obligations to provide information should be replaced by FCA rules, except where this would adversely affect the appropriate level of consumer protection or would result in an undue degree of fragmentation of the regulatory regime.

Replacing CCA information requirements with FCA rules

6.25 As noted in Chapter 3, there are a number of potential advantages to moving CCA provisions into the FCA Handbook. These seem particularly relevant in the context of information requirements due to the nature and purpose of the provisions:

- **Less complexity:** Stakeholders have told us that the current complexity of the regulatory regime for consumer credit makes it difficult to navigate the law. It would be easier for firms to access and understand the information requirements if the current provisions in the CCA, associated regulations and CONC were to be brought together in a single location in the FCA Handbook. This would provide greater clarity and may be especially helpful for smaller firms without extensive legal resources. It may also benefit consumers and consumer organisations. At the same time, we acknowledge that fragmentation may only be eliminated where it is possible to repeal and replace all provisions (and regulations made under them) on a certain topic.

- **Opportunity to review information requirements:** Making new FCA rules would provide an opportunity to review in detail the substance of the information requirements and, where appropriate, to make amendments to address issues that have been identified.[88] This would help to ensure that they provide an appropriate level of consumer protection without imposing a disproportionate burden on firms.

- **Simpler to amend in the future:** Changes in the consumer credit market, the needs of customers and the practices of providers may require amendments which can be difficult to implement through primary or secondary legislation. Having the information requirements in the FCA Handbook would allow for quicker and more agile responses where amendments or additions are needed (subject to the constraints of EU law). This seems particularly appropriate in the context of information requirements which may become outdated as customers' needs evolve.

6.26 Against this background, our initial view is that, in principle, it would be desirable to replace the obligations to provide information in these CCA provisions with FCA rules.

Information requirements with associated sanctions

6.27 Chapter 7 discusses the importance of sanctions for the appropriate degree of consumer protection. If the information requirements contained in CCA provisions and regulations were replaced with FCA rules, one option, as discussed in Chapter 7, would be to retain in the CCA the related provisions on the consequences of non-compliance. There would need to be consequential changes to the CCA provisions that contain the sanctions for non-compliance to apply them to breaches of FCA rules.

88 It would not be possible to amend CCA requirements implementing the CCD or other EU Directives.

6.28 For example, section 77 could be repealed and replaced, with the exception of section 77(4) on unenforceability. This subsection would remain in the CCA but would need to be amended to apply the sanction to breaches of FCA rules.

6.29 This could apply to a large majority of CCA information requirements, including those in regulations (but see also other options for sanctions in Chapter 7).

6.30 We acknowledge that separating the information requirements from the associated sanctions would result in fragmenting the regime and might make it more difficult for firms to navigate. However, our initial view is that, taken as a whole, this is outweighed by the advantages of bringing all information requirements together in the FCA Handbook.

Issues identified with information requirements

6.31 We have identified a number of issues in relation to information requirements which may not be working well for customers and/or firms. We explore these issues in Annex 6. We consider the form and content of the requirements, whether they are fulfilling their intended purpose, and whether the burden of compliance on firms is proportionate to the customer benefit.

6.32 In our view, the issues identified should be taken into account, whether the relevant provisions are retained in legislation or replaced with FCA rules.

6.33 One of these issues is the level of prescription in the CCA and the regulations made under it. This is a recurrent topic raised by many industry representatives in response to the Call for Input. The concerns relate both to the extent to which the content of the information is prescribed and the form in which it must be provided.

6.34 Our initial assessment of the overall level of prescription can be summarised as follows:

- On the whole, the **required information** does not seem excessive, and most elements contribute to ensuring the customer is adequately informed. However, amending or reducing some requirements might help to ensure they are more targeted at the needs of customers, and so deliver an appropriate degree of consumer protection while not imposing disproportionate burdens on firms.

- **Prescribed wording** tends to be limited to the most important issues, for example advising customers of their legal rights. In most cases the wording appears to be reasonably clear and concise. However, amendments to some of the wording may make it more relevant and readily comprehensible for customers in different situations. In some cases there may be merit in allowing firms some additional flexibility.

- The **form requirements** are generally minimal and common-sense, although it may be possible to simplify or improve aspects, or to tailor them more closely to the type of product and customer needs. We recognise that stakeholders have raised some concerns about the Standard European Consumer Credit Information form (SECCI) but this cannot be amended due to EU law obligations.

- The **level of prescription in relation to default and arrears notices** tends to be higher than for other types of information. In principle, this may be justified given the greater potential for harm to customers receiving these notices, who are likely to be in financial difficulties and may be particularly vulnerable. Nevertheless, changes might lead to better outcomes for customers and reduced burdens on firms.

6.35 We also consider in Annex 6 some CCA provisions which may give rise to difficulties for customers and firms due to developments in communication methods. Our initial view is that some of these provisions may not reflect the type or level of protection needed by customers in different circumstances today.

Q3: Do you have any comments on our analysis and initial views on information requirements or the associated issues in Annex 6?

7 Sanctions (including unenforceability)

Introduction

7.1 This chapter summarises the key issues relating to sanctions under the CCA. In many cases these arise from breaches of information requirements as discussed in Chapter 6. Others reinforce rights and protections as discussed in Chapter 5.

7.2 The sanctions are mostly 'automatic' and 'self-policing': they apply if there is a breach of a particular requirement without the customer or the FCA needing to take specific action.

7.3 The key sanctions are:

- unenforceability of agreement without a court order
- unenforceability of agreement during breach
- disentitlement to interest and default sums ('disentitlement')
- criminal offences
- breach of statutory duty

7.4 In the following sections, we consider the intended effect of the sanctions, their practical impact, and how far they could be replicated within the FSMA regime.

7.5 We give more detail on the nature and policy rationale of the relevant provisions, and issues identified with the current CCA sanctions, in Annex 7.

Background

7.6 The Crowther Report noted that the regime at that time lacked effective machinery for enforcing compliance, but was also excessively technical. The report made recommendations to remedy weaknesses in the regime, including sanctions to prevent trading abuses. These included restriction or deprivation of the civil remedies that a creditor would otherwise have.

7.7 The report considered that, although sanctions should be effective in penalising wilful or reckless wrongdoing, while also acting as a deterrent, they should be tailored to the gravity of the offence. The court should be given a general power to excuse inadvertent breaches that have not misled or prejudiced consumers.

7.8 The CCA included unenforceability and criminal sanctions from 1974. These were extended as part of the 2006 changes, which also introduced disentitlement as an additional sanction for breaches of key post-contract information requirements.

7.9 The CCD requires Member States to ensure that penalties for infringements of national implementing provisions are effective, proportionate and dissuasive.

7.10 When consumer credit regulation was transferred to the FCA, the legislation effecting the transfer included provisions applying many of the FSMA supervisory, restitutionary and disciplinary powers to failure to comply with the CCA.[89] As such, a substantial part of the FSMA toolkit can be applied not only to breaches of FCA rules which replaced CCA provisions, but also those provisions that remain in the CCA.

7.11 As noted in Annex 3, industry respondents to the Call for Input broadly felt that the sanctions associated with information requirements (unenforceability and disentitlement) are disproportionate. They felt this is particularly the case where a breach is technical and the customer has not suffered harm. We were told that some customers take advantage of this. Respondents also argued that these sanctions are inconsistent with the approach taken in other FCA-regulated sectors, and are no longer needed given the applicability of the FSMA regulatory toolkit.

7.12 But consumer groups felt that unenforceability provides an important protection for consumers, who need a clear route to challenge creditors. They argued that unenforceability and disentitlement incentivise firms to comply with requirements, which it is crucial to maintain, given the absence of equivalent provisions in FSMA. They noted that, when considering whether to grant an enforcement order, the court is required under the CCA to have regard to prejudice and culpability, which ensures an appropriate balance between the interests of firms and customers.

7.13 Some industry respondents argued that the ban on canvassing off trade premises is obsolete and creates a barrier to innovation and more flexible ways of conducting business. Consumer groups argued that knowingly marketing to minors should be considered further with a view to strengthening protections.

Unenforceability without court order

7.14 There are a number of provisions that give rise to the automatic sanction of unenforceability without a court order, where the court has discretion under section 127(1) to allow enforcement of the agreements, taking into account any prejudice caused and the degree of culpability for the breach.[90]

7.15 This applies in particular where an agreement is improperly-executed (section 65) which may arise from failure to comply with provisions regarding pre-contract disclosure (section 55), form/content of agreements (section 60), signing of agreements (section 61) and provision of copy documents (sections 61A-64).

7.16 The sanction also arises in relation to form/content of securities (section 105), the requirement to give a copy notice to a surety (section 111) and the use of negotiable instruments (section 124). In addition, section 126 provides that a land mortgage can be enforced only on a court order.

89 Financial Services Act 2012 (Consumer Credit) Order 2013, SI 2013/1882.

90 Prior to 6 April 2007, certain breaches gave rise to irredeemable unenforceability. This was removed in respect of new agreements from that date by the 2006 Act, so enhancing proportionality of the regime.

Unenforceability during breach

7.17 A number of provisions give rise to the automatic sanction of unenforceability during breach, whereby a firm is prevented from enforcing an agreement until it has remedied the breach.

7.18 We have focused on the application of this sanction in relation to annual statements for fixed-sum credit agreements (section 77A) and notices of sums in arrears for fixed-sum and running-account credit (sections 86B-86D).

7.19 The sanction also arises in relation to sections 77-79 (duty to give information upon request) and the parallel requirements where security is involved (sections 107-110). In addition, it applies to section 85 (duty on issue of new credit-token), section 86E (notice of default sums) and section 97 (settlement statements).

Disentitlement to interest and default sums

7.20 In addition to unenforceability, breach of section 77A (annual statements) and section 86D (arrears notices) means that the customer has no liability to pay interest or default sums in respect of the period of non-compliance.[91]

Criminal offences

7.21 There are a number of CCA provisions that give rise to a criminal offence.

7.22 In particular, this applies in relation to canvassing off trade premises (sections 49 and 154) and circulars to minors (section 50).

7.23 There are also criminal offences at section 80 (failure by debtor/hirer to give information about goods), section 114 (pawn-receipts) and section 119 (refusal to deliver pawn), and at sections 157-160 in relation to information held by credit reference agencies (CRAs) or relating to the use of such information.

Breach of statutory duty

7.24 A limited number of CCA provisions give rise to breach of statutory duty. These are section 55C (copy of draft agreement), section 72 (return of goods upon cancellation), section 77B (statement of account on request), section 92 (recovery of possession of goods or land) and section 103 (termination statements).

7.25 We consider that breach of statutory duty under CCA is substantially similar to the private law right of action provided by section 138D FSMA (see Annex 7). As such, we do not consider it further in this chapter.[92]

91 A 'default sum' is defined in section 187A and means a sum (other than interest) payable by the debtor or hirer under a regulated agreement in connection with a breach of the agreement.

92 See Chapters 5 and 6 for discussion of whether the substantive provisions could be replaced by FCA rules.

Transferability of provisions

7.26 It would not be possible to replicate unenforceability under our FSMA rule-making powers. In general terms, breach of an FCA rule cannot render transactions void or unenforceable, with some limited exceptions.[93] It would also not be possible to replicate the sanction of disentitlement.

7.27 However, it may in principle be possible to retain these sanctions within the CCA, or other legislation, while replacing the substantive information disclosure obligations that give rise to these sanctions by FCA rules. We discuss this further below.

7.28 It would not be possible to replicate the criminal offences under our FSMA rule-making powers. Under section 138E FSMA, a person who breaches an FCA rule does not incur criminal liability as a result. Instead, such a breach is generally actionable as a breach of statutory duty, and may also give rise to disciplinary sanctions or form the basis of the exercise of our supervisory or restitutionary powers.

7.29 In contrast to CCA, FSMA generally limits criminal liability to where regulated activities are undertaken by persons outside the regulatory perimeter, in breach of the general prohibition.[94]

Impact on consumer protection

7.30 As it would not be possible to replicate the unenforceability, disentitlement and criminal offence sanctions within the FSMA regime, under the FCA's current rule-making powers, the rest of this chapter assesses how far their absence may affect the appropriate degree of consumer protection. We also consider the potential options and approaches to reform.

Unenforceability and disentitlement

Unenforceability of agreement

7.31 Unenforceability plays an important role in the 'self-policing' element of the CCA regime. It incentivises firms to comply with requirements and provide required information to customers at the appropriate time.

7.32 This reflects the clear policy rationale of transparency. It gives customers the opportunity to understand in detail their rights and obligations, to inform their decision-making at every stage of the process. This may be particularly important where the customer is in arrears or default under the agreement or may be accumulating debt which may be difficult to repay.

7.33 There are differences in the way that unenforceability applies. In particular, unenforceability during breach can be 'cured' by the firm rectifying the breach. So the firm is empowered, and incentivised, to rectify breaches that would otherwise mean

93 Section 138E FSMA states that no contravention of an FCA rule makes a transaction void or unenforceable, other than in the case of section 137C (cost of credit and duration of credit agreements), section 137D (product intervention) and section 137FBB (early exit pension charges). The first two were introduced in 2012 and the third in 2016.

94 There are also offences under other FSMA provisions, including section 25 (restrictions on financial promotion), section 85 (dealing in transferable securities), section 177 (information gathering and investigations), sections 191F and 301L (changes of control) and section 352 (disclosure of confidential information).

the agreement remains unenforceable, without the need to go to court. On the other hand, while rectifying the breach ends the bar on enforcement (from that point), the firm is not entitled to interest and default sums for the period of breach.

7.34 There are complex interactions with how unenforceability may arise under FSMA, where firms enter into agreements without an appropriate permission.[95] For regulated credit agreements, we can (instead of the court) validate agreements and allow the firm to retain monies or property if it is just and equitable in the circumstances.[96] This function is unique to consumer credit, and was carried over from the OFT regime. However, our power to validate agreements under FSMA cannot remedy any separate unenforceability under the CCA.

7.35 The practical impact of the unenforceability sanction may also be affected by caselaw, where it is relevant. In particular, the ruling in McGuffick took a view on the meaning of enforcement in relation to section 77 CCA.[97] We have published guidance on the meaning of enforcement in relation to guarantees, in which we say, in the context of enforcement of security, that we do not consider that it is limited to obtaining a court judgment but can include exercising some forms of 'self-help' remedy relating to security if the remedy is sufficiently coercive.[98]

7.36 In the absence of unenforceability, the remedy available to customers under FSMA for breach of an FCA rule would be the private law action of breach of statutory duty under section 138D FSMA. We do not think that breach of statutory duty, as a substitute for unenforceability, would achieve a comparable standard of protection for consumers in the consumer credit market.

7.37 In particular:

- A key difference between unenforceability under the CCA and section 138D FSMA is the automatic nature of the civil consequence of unenforceability. Under the FSMA regime, a lender could still enforce the agreement by issuing court proceedings and obtaining a court judgment against a defaulting customer.

- The customer in such a case would need to initiate a claim for breach of statutory duty by counter-claiming for damages when sued by the creditor for the debt, to reduce liability, rather than wait for the creditor to invoke the discretion of the court when enforcing the agreement under section 127 CCA.

- The remedies available to customers under a breach of statutory duty action would be restricted, as damages would be limited to losses caused by the breach of the FCA rule. The customer would need to demonstrate that the firm's breach caused loss.

- In addition, the tortious measure of damages for 'loss' in a claim brought under section 138D is unlikely to be the same as under section 127.

- The court under the CCA has a more extensive jurisdiction when an application for an enforcement order is made. This includes the power to reduce the customer's

95 Under article 60B of the RAO in the case of regulated credit agreements.

96 Section 28A FSMA applies where a credit-related agreement is unenforceable under sections 26, 26A or 27. The FCA can, upon request, allow the agreement to be enforced and/or money or property to be retained.

97 *McGuffick v The Royal Bank of Scotland plc* [2009] EWHC 2386 – see also CONC 13.

98 FG17/1: Guarantor loans: default notices (January 2017) – www.fca.org.uk/publication/finalised-guidance/fg17-01.pdf

liability (section 127(2)), make a time order rescheduling payments (section 129) or otherwise alter the terms of the agreement in consequence (section 136). In any proceedings to enforce the agreement, the customer may also apply to re-open the agreement under the unfair relationships provisions.

- In practice, pursuing a section 138D claim is unlikely to be undertaken other than by customers with the financial capability to pursue potentially costly litigation where significant losses have occurred.

- Unenforceability may make firms more likely to engage with the customer to avoid having to go to court for an enforcement order. The ability of consumers and advisers to cite the unenforceability sanction when dealing with firms would be removed, potentially affecting the outcome of disputes.

7.38 Taken together, the above factors may contribute to a weakening of the overall incentive for firms to comply with regulatory requirements. In particular, unenforceability provides a potent consumer protection measure in incentivising firms to comply with the form and content requirements for agreements, and to provide requisite information to customers at the appropriate time.

7.39 In the absence of unenforceability, firms may perceive that the risks associated with non-compliance are lower, and may shift resources to adopt a more 'reactive' approach, rather than proactively ensuring processes meet relevant requirements.

7.40 As noted in Chapter 4, the consumer credit market is fundamentally different from other markets we regulate. This is partly due to the number and nature of firms in the market, which in the case of consumer credit includes a much larger number of providers, including smaller lenders. This impacts on our ability, in practice, to proactively supervise firms and identify and act against non-compliance.

7.41 But it is also due, significantly, to the nature of consumers in the credit market. The customer base in consumer credit comprises much of the UK population. Compared to other financial services markets, they are more likely to be vulnerable or in financial difficulties. They may also be less able to enforce their rights. They may not realise that there has been a breach, or that they have a cause for complaint, or may be unsure as to their rights. Even when they realise there is a problem, they may be reluctant to complain or to seek redress. As a consequence, firms may put less effort into ensuring compliance.

7.42 This reinforces the importance of automatic sanctions in the consumer credit market, to protect consumers and incentivise firms to comply.

Disentitlement to interest and default sums

7.43 Disentitlement raises a number of additional issues. These include how far, in practice, it acts as an additional incentive over and above that already provided by the unenforceability sanction; how far the FCA's public enforcement powers (including the ability to require restitution) may provide for similar outcomes where they are used; and how likely it is to create inconsistent outcomes.

7.44 We understand that firms' practices vary in relation to disentitlement. Some firms proactively refund interest and charges in respect of a period of non-compliance, while others may do so only in so far as there is demonstrable evidence of harm to customers. Some may adjust their approach according to the circumstances.

7.45 Industry respondents to the Call for Input argued that disentitlement can be disproportionate and unfair where an error is minor and causes no, or no material, harm, and that this amounts to an undeserved windfall to the customer – a form of unjust enrichment. It can also have prudential implications. They also argue that deficiencies in the underlying regulations mean that breaches can be inadvertent and technical, and so the sanction applies in circumstances that were never intended.

7.46 Against that, consumer bodies argue that this is money to which the firm was not legally entitled, and so firms should refund in all cases. In support of this, they point to the original policy intention (see Annex 7) and argue that firms should have policies and procedures in place to avoid breaches.

7.47 The transfer of consumer credit regulation to the FCA has increased the available supervisory and enforcement powers and resources to pursue breaches. For example, unlike the OFT, the FCA has the power to require restitution where there has been a breach of a relevant requirement (which includes CCA breaches) and profits have accrued to an authorised person, or persons have suffered loss or been otherwise adversely affected as result (section 384 FSMA).

7.48 However, we cannot intervene in all cases where there may be regulatory breaches, as we must prioritise our resources. As noted in Chapter 4, there are currently around 4,800 consumer credit lenders and 3,300 owners. Therefore, there may be a limit to the extent to which FCA supervision can provide the same dissuasive affect as this sanction in the CCA.

7.49 It is relevant that disentitlement was introduced in 2006 alongside enhancements to the OFT licensing regime and the extension to consumer credit of the remit of the Financial Ombudsman Service. It is clear that the Government at the time did not consider that those changes on their own were sufficient, and so additional sanctions were needed. We consider this further in Annex 7.

7.50 Disentitlement is limited to breach of CCA requirements on arrears notices and annual statements. In the former case, the customer will have missed at least two payments and may be in financial difficulties. They need sufficient opportunity to remedy the position or seek debt advice, and so the arrears notice must be accompanied by the FCA arrears information sheet which gives options for dealing with arrears and a list of not-for-profit debt advice providers.[99] In the latter case, the customer needs to be aware if the debt is accumulating, again so that they can take steps to remedy this or seek advice.

Our initial view

7.51 Our initial view is that the provisions giving rise to unenforceability and disentitlement could not be repealed without adversely affecting the appropriate degree of consumer protection. This is because of our inability to replicate these sanctions under FSMA rule-making powers and our view that the self-policing nature of these automatic sanctions contributes significantly to ensuring appropriate firm conduct and protecting consumers.

7.52 We do not think it would be sufficient to rely on FCA disciplinary powers, the private right of action for damages, and restitutionary powers, as a substitute for these

99 www.fca.org.uk/firms/information-sheets-consumer-credit

sanctions. We note also that the original legislative scheme, as recommended by the Crowther Report, combined both a public enforcement and self-policing element.

7.53 However, we recognise that there have been issues with the sanctions and proportionality.

7.54 In particular, there is some force in the argument, advanced by stakeholders, that they can apply where a breach is relatively technical and minor, and can therefore result in financial burdens that are disproportionate to the intended benefits of the sanctions as an effective deterrent against non-compliance.

7.55 For example, a contravention of the requirement to give a statement or notice in the prescribed form can have a pronounced effect on the economic interests of the lender, in terms of loss of entitlement to interest. This underlies the importance of the substantive requirements about the form and content of the statements and notices being very clear, and being able to respond nimbly to changes in the market (see Chapter 6). The principle of proportionality suggests that such effects should not arise in circumstances where a contravention is minor and technical.

7.56 We recognise that regulation 41 of the relevant CCA regulations[100] was introduced with the purpose of mitigating this issue. This provides that, where a notice or statement contains an error or omission which does not affect the substance of the required information or forms of wording, the notice or statement does not breach the regulations on this ground alone.[101]

7.57 However, as noted in Annex 7, there are uncertainties over the interpretation of this provision, and little guidance from the courts as to which defects fall within the scope of regulation 41. Case law has, however, confirmed that if a breach does not fall within regulation 41, the statutory statement or notice is entirely ineffective; it is as if no statement or notice had been given at all.[102] As a result, we recognise that firms may be reluctant to rely on regulation 41 where there is doubt as to its application.

7.58 Firms may also be uncertain how to remedy any breach, in terms of issuing compliant statements or notices, and what information should be included in these.

7.59 The CCA review provides an opportunity to review the relevant requirements. In Chapter 6 we argue that there is a case for transferring information requirements to FCA rules so they can be amended and updated more easily, but retaining the sanctions in the CCA (or other legislation). If this is done, firms may have greater clarity over the meaning of relevant requirements and what is needed to comply, and the risk of inadvertent non-compliance should be reduced.

7.60 However, there may still be cases where breaches of the information obligations arise as a result of a misunderstanding of the relevant provisions, or uncertainties over how they apply in a particular situation. This is likely to be the case even if regulation 41 is amended, to clarify the sorts of defects in statements and notices which are considered technical and can be overlooked.

100 Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007, SI 2007/1167.

101 There is no equivalent of regulation 41 for most other CCA breaches, although firms may be able to rely on the common law principle of 'de minimis' – see Annex 7.

102 JP Morgan v Northern Rock [2014] CTLC 33.

7.61 In particular, a breach may be substantive but unlikely to cause consumer harm. Arguably the sanctions should be disapplied in such cases, and it should be sufficient to rely on FCA disciplinary powers and the FSMA private right of action.

7.62 Section 127 requires the court to consider any prejudice caused and the degree of culpability for the breach in deciding whether to make an enforcement order. This ensures an appropriate balance between the interests of customers and firms.

7.63 There is no equivalent process for unenforceability during breach and disentitlement. In the former case, the firm can bring the period of non-compliance to an end by issuing a compliant statement or notice(s), and can argue in court that there was no breach on the basis of regulation 41. However, there is no arbiter for disentitlement, as the current sanctions are 'all or nothing'.

7.64 Having established a breach of section 77A or sections 86B/C, the firm is not legally entitled to retain interest or default sums charged to customers in respect of the period of non-compliance, even if customers receive a substantial windfall in relation to minor errors or omissions which may have caused them no detriment at all.

7.65 We recognise that this may be disproportionate. Conversely, we would not wish to dilute the application and effect of the sanction in a way that would undermine its value as a commercial incentive to ensure the transparency of important information.

Possible options

7.66 As outlined above, our initial view is that the 'self-policing' nature of the automatic sanction of unenforceability (without a court order, and during breach) should be retained, as it has a significant effect in ensuring appropriate firm conduct in the consumer credit market and protecting consumers.

7.67 This could be achieved by moving the substantive information disclosure obligations into FCA rules, where appropriate, but retaining the sanctions in the CCA. They would need to be amended to apply to breach of FCA rules.

7.68 We consider that this would be possible, although may require primary legislation if such amendments to the CCA could not be achieved by virtue of the Treasury's order-making power under section 107 of the Financial Services Act 2012.

7.69 An alternative option might be to amend FSMA rule-making powers to enable us to apply unenforceability as a sanction for breach of FCA rules in a wider set of circumstances than currently provided under FSMA. Section 138E expressly provides that a breach of an FCA rule cannot make a transaction void or unenforceable, but there are exceptions in relation to section 137C (cost of credit and duration of credit agreements), section 137D (product intervention) and section 137FBB (early exit pension charges). This could be limited to breach of certain types of FCA rules.

7.70 In either case, consideration should be given to amending the scope of application of the sanction. In principle, it should apply only to breaches that are likely to cause material harm, to incentivise firms to comply and so avoid such harm. This would be in line with the original policy intention and the Crowther Report.

7.71 For example, breach of FCA rules could attract unenforceability only if certain prescribed terms[103] are missing or substantively wrong, or only if the prescribed statement or notice is not issued at all, or not remedied, within a specified period. Other breaches would attract the possibility of disciplinary sanctions and private right of action, but would not in themselves give rise to unenforceability.

7.72 Disentitlement raises more difficult issues. As outlined above, our initial view is that it should be retained as it provides an additional incentive for firms to comply where there is a particular risk of harm to vulnerable customers. However, as with unenforceability, the scope of the sanction should be narrowed.

7.73 One option might be to split the unenforceability and disentitlement sanctions for annual statements and arrears notices, so that disentitlement applies only in a small sub-set of cases giving rise to unenforceability. This would ensure that it applies only to serious breaches which are most likely to cause harm.

7.74 Finally, there may be merit in clarifying in legislation the meaning of 'enforcement' to put this beyond doubt.[104]

Criminal offences

7.75 Criminal offences are intended to be a strong deterrent to firms and a strong incentive to comply with key requirements.

7.76 We could not, under the FCA's current rule-making powers, reproduce the CCA criminal offences with FCA rules. However, our initial view is that they may no longer be necessary, given the FSMA regulatory toolkit, and that the conduct which they target may be better addressed through public enforcement. Where firms are acting in breach of the general prohibition, this is itself a criminal offence.

7.77 Any conduct issues for authorised persons could be addressed through targeted supervisory/enforcement action based on FCA rules and by reference to the FSMA regulatory toolkit, including powers to require remediation or impose fines. In addition, firms would be required to take appropriate responsibility for individuals acting on their behalf. Customers would have a private right of action under section 138D FSMA to the extent that any loss has been caused.

7.78 We are not aware of any prosecutions (by OFT or trading standards) or of customers using the provisions as a way of holding firms to account. We also recognise that applying criminal offences to authorised persons is inconsistent with the general approach under FSMA.

7.79 For non-authorised persons, we consider that any loss of consumer protection would be mitigated by the application of the wider FSMA regime. In particular, firms canvassing off trade premises, or sending circulars to minors, are likely to receive commercial benefit from doing so only by straying into regulated activity (in particular, lending or credit broking). As such, they are likely to be committing a criminal offence by breaching the general prohibition.

7.80 However, we intend to consider this further. For example, one option might be to retain the criminal sanction for activities by persons outside the regulatory perimeter so that

103 Prescribed terms were core to the concept of irredeemable unenforceability prior to 2007.

104 The term is also used in sections 26(1), 26A(1) and 27(1A) FSMA, which provide that, unless the FCA decides otherwise in the context of a validation order application, the agreement shall be 'unenforceable'.

it applies irrespective of whether the person is engaging in a regulated activity by way of business.

7.81 We will also take into account any risk that abolishing criminal offences may inadvertently send a signal that certain types of conduct are no longer considered unacceptable, or not to the same extent.[105] This may undermine the overall deterrent effect of the regime, which is certainly not our intention.

Summary

7.82 We recognise that the approaches outlined above would require legislative change, and so are a matter for the Government.

7.83 However, we would be interested in stakeholders' views on these approaches, to inform our thinking as the review progresses.

Q4: Do you have any comments on our analysis and initial views on sanctions or the associated issues in Annex 7?

Q5: In particular, do you have any views on our proposals in relation to unenforceability and disentitlement?

105 For example, we have consulted in CP18/12 (May 2018) on proposed guidance setting out our view of the application of sections 48-49 CCA (ban on canvassing cash loans off trade premises). We see this as an important element of the regime for regulating home-collected credit and protecting consumers.

8 Next steps

8.1 This chapter sets out the next steps for the review.

Sending us your response

8.2 We invite comments on this interim report by 2 November 2018. Please email your comments to us at CCAreview@fca.org.uk.

8.3 We have included specific questions in the report, and list these in Annex 1. We would also welcome views on any other issues raised in the report, or that may be relevant to our review. Where possible, please provide supporting evidence or data or examples to illustrate the points you are making.

Further opportunities to input

8.4 We are keen to gather a wide range of views. So we plan to engage with stakeholders through a series of roundtable meetings in September and October. These will enable in-depth discussion of issues raised in this report, and may also help stakeholders' written responses to the consultation.

8.5 If you would like to take part in these discussions, please email us at CCAreview@fca.org.uk, preferably by 31 August. Please indicate in the email:

- which organisation you are representing, or whether you are responding in an individual capacity, and
- whether there are particular aspects of the review, or particular issues raised in this report, that you are especially interested in

8.6 We will do our best to include as many stakeholders as possible in our roundtables but this will depend on how many expressions of interest we receive. We may not be able to accept all requests we receive. We will ensure a broad spread of stakeholders so may also need to limit numbers to one representative per organisation.

What we will do

8.7 In parallel with the roundtable discussions, we intend to conduct consumer research to better understand how far the CCA provisions meet consumers' needs. We may also undertake other research, involving firms and other stakeholders.

8.8 We will analyse responses to this report and take these, the roundtable discussions and our research findings into account as we work towards our final report.

8.9 In line with the statutory requirement, we will present our final report to the Treasury before 1 April 2019 and publish it on our website.

Review of retained provisions of the Consumer Credit Act: Annexes to the Interim Report

Annex 1
List of questions

Q1: Do you have any comments on the overarching issues or their implications for our review?

Q2: Do you have any comments on our analysis and initial views on rights and protections or the associated issues in Annex 5?

Q3: Do you have any comments on our analysis and initial views on information requirements or the associated issues in Annex 6?

Q4: Do you have any comments on our analysis and initial views on sanctions or the associated issues in Annex 7?

Q5: In particular, do you have any views on our proposals in relation to unenforceability and disentitlement?

Annex 2
The statutory requirement

PART 5 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014, SI 2014/366

Review of retained provisions of the Consumer Credit Act 1974

20.

(1) — The FCA must arrange for—

(a) a review of the matter specified in paragraph (2);

(b) the review to result in a report.

(2) The matter is whether the repeal (in whole or in part) of provisions of the Consumer Credit Act 1974 would adversely affect the appropriate degree of protection for consumers.

(3) The FCA may extend the review to other matters which are relevant to or connected with the matter specified in paragraph (2).

(4) The FCA may appoint one or more persons to conduct the review or, where the FCA is conducting the review, to provide advice to the FCA in connection with the review.

(5) The review must in particular consider—

(a) which provisions of the Consumer Credit Act 1974 could be replaced by rules or guidance made by the FCA under the Financial Services and Markets Act 2000;

(b) the principle that a burden or restriction which is imposed on a person in relation to the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction.

(6) The report may include recommendations to the Treasury, including in particular recommendations relating to the exercise of their power to make an order under section 107 of the Financial Services Act 2012.

(7) The FCA must—

(a) submit the report to the Treasury before 1st April 2019;

(b) publish the report in the way appearing to the FCA most likely to bring it to the attention of the public.

(8) The Treasury must lay a copy of the report submitted under this article before Parliament.

Conduct of review

21.

(1) The person conducting the review ('R') must prepare an interim report of the initial views of R on the matter specified in paragraph (2) of article 20 and (where appropriate) setting out proposed recommendations to the Treasury.

(2) R may prepare additional interim reports.

(3) The FCA must—

(a) provide a copy of any interim report to the Treasury;

(b) publish an interim report in the way appearing to the FCA most likely to bring it to the attention of the public.

(4) An interim report must, when published, be accompanied by notice that representations about the interim report and any proposed recommendations may be made to R within a specified time.

(5) Before making the report under article 20, R must have regard to any representations made to it in accordance with paragraph (4).

(6) The Treasury may make a recommendation to the FCA in relation to—

(a) the scope of the review;

(b) the period during which the review is to be carried out (subject to article 20(7)(a));

(c) the conduct of the review;

(d) the making of reports.

(7) Recommendations under paragraph (6) may in particular recommend—

(a) confining the review to particular matters (subject to article 20(2));

(b) extending the review to matters additional to the matter in article 20(2);

(c) making additional interim reports.

(8) The FCA must have regard to any recommendation made to it under paragraph (6).

Annex 3
Call for Input: summary of responses

1. In February 2016, we published a Call for Input on the review of the CCA.[106] In this Annex, we summarise the feedback we received to the Call for Input and set out our responses.

2. We received 55 responses from a range of stakeholders including firms, trade bodies, consumer groups and other interested parties (see list of non-confidential respondents at the end of this Annex).

Q1: Do you agree that the review should focus on particular retained CCA provisions?

3. Most respondents broadly agreed that the review should focus on CCA provisions that have the greatest potential impact – in particular, where they currently lead to poor outcomes for consumers or unnecessary or disproportionate burdens on firms. However, respondents had different views on what the review's focus should be. It was generally felt that, because of the number and complexity of the retained provisions, reviewing them all would be too large a task.

4. Some respondents felt that, because of the interconnected nature of the CCA provisions, reviewing certain provisions and not others could create further complications and unintended consequences. They felt that even if the review focused on certain key areas, other sections of the CCA should not be ignored. A few respondents argued that the CCA regime as a whole is outdated and acts as a barrier to innovation and market competitiveness. As a result, they felt that the review should therefore look at the entire regime rather than take a piecemeal approach.

Our response

We agree that there are significant interactions between CCA provisions and that they should not be reviewed in isolation. For example, there is a clear interaction between the various information requirements and the sanctions for non-compliance.

For this reason, we have taken a thematic approach that considers key underlying themes in the context of the CCA as a whole. This has enabled us to focus our resources most effectively.

Depending on decisions taken by the Government in light of our final report, further work may be needed subsequently to address issues in more detail, including in relation to specific CCA provisions.

Q2: What should be the main criteria for prioritising provisions for review?

106 www.fca.org.uk/publication/call-for-input/call-for-input-review-retained-provisions-consumer-credit-act.pdf

5. Most responses supported the suggestion in the Call for Input that the review should prioritise areas which:

- provide particular benefits for consumers
- are particularly burdensome on firms without a commensurate benefit, or
- are particularly complex

6. One respondent expressed concern that the prioritisation process should not lead to a reduced level of consumer protection. To avoid this, we should take into account the potentially contradictory nature of the proposed criteria for prioritising provisions and ensure that the review is able to achieve a balance.

7. Another respondent questioned whether provisions should be prioritised because they provide particular benefits for consumers. This seemed to be a reason not to prioritise a provision for review, to avoid reducing the current level of protection afforded to consumers. Another respondent questioned why provisions should be prioritised because of their complexity.

8. Respondents suggested additional criteria that could be used to prioritise provisions for review. These could focus on provisions which:

- act as a barrier to modernisation, innovation or competition
- could be better clarified for consumers and firms
- could easily be transferred into the FCA Handbook
- create duplication
- offer a legal right or remedy to consumers
- relate to court jurisdiction

Our response

Additional criteria suggested by respondents have helped to inform our approach, and have been instructive in unpacking the broader criteria that we suggested in the Call for Input.

We have taken a thematic approach which captures the key CCA provisions, including those highlighted by stakeholders, with the aim of protecting consumers appropriately without placing undue burdens on firms.

Q3: Are there particular provisions that you would include or exclude from reviewing, and why?

9. Respondents had many different views on what should be included in, or excluded from, the scope of the review.

10. Some industry respondents suggested reviewing (with a view to amending or repealing) provisions that they considered have a disproportionate impact on firms with no commensurate consumer benefit. These included in particular the information requirements at sections 77-79 and sections 86A-88, which prescribe a range of statements and notices that must be provided to customers in different circumstances. Industry respondents argued that these provisions are overly prescriptive and complex and generally act as a barrier to innovation as they prevent firms from using new ways to interact with customers. They also felt that the inflexible approach of these provisions can lead to unintended consumer detriment. An example given was the confusion created for a customer in arrears who after informally agreeing a repayment plan with a firm receives a notice of sums in arrears.

11. Industry respondents were also particularly concerned about the consequences of non-compliance. In particular, they argued that unenforceability is not a proportionate outcome in instances where the breach is merely technical and the customer has not suffered any detriment, and suggested that some consumers may take unfair advantage of this (particularly in relation to section 77A and section 86D which also provide for non-liability for interest and charges). Industry respondents also pointed out that the provisions are inconsistent with the approach taken to enforcement and redress in other regulated sectors under FSMA, and argued that they are no longer needed, given the other sanctions available in the FCA toolkit.

12. Industry respondents suggested that the review should include provisions which create substantive rights for consumers to seek redress. For example, the rights for consumers under section 75 making creditors jointly and severally liable in certain circumstances for breach of contract or misrepresentation by a supplier, and the unfair relationships provisions under sections 140A-C. Respondents said that these provisions are overly burdensome on firms, both financially and operationally, and are potentially open to misuse by consumers. They also argued that the provisions are no longer required to provide an adequate degree of protection for consumers, given the FCA's high-level rules on treating customers fairly and the other avenues for consumers to seek redress (for example, via the Financial Ombudsman Service).

13. Consumer groups generally agreed that such provisions should be included in the review, but for very different reasons. They argued that the provisions should be retained and enhanced to ensure adequate levels of consumer protection. For example, they argued that unenforceability represents an important protection for consumers who need a clear route for challenging creditors who fail to comply with their statutory obligations, and the courts provide the most appropriate venue for doing so. Consumer groups pointed out that unenforceability incentivises firms to comply, and felt it was crucial this was maintained as there are no equivalent provisions in FSMA. They noted that the courts are required to have regard to the prejudice caused to any person and the degree of culpability of the creditor when considering whether to grant an enforcement order, which ensures an appropriate balance between the interests of the parties.

14. Consumer groups also said that provisions such as section 87, which requires the creditor to issue a default notice before taking certain actions, provide important information and advice to consumers. Similarly, the requirements relating to arrears notices and periodic statements ensure that consumers are aware of the outstanding balance on their account and any charges that have been imposed.

15. Consumer groups argued that section 75 and the unfair relationships provisions

provide important consumer protections that cannot be replicated under the FSMA regime. These and other provisions (such as the section 66A right of withdrawal) should be included in the review to ensure they are delivering an appropriate degree of consumer protection.

16. Other provisions highlighted by respondents to cover in the review included:

- The requirements in sections 176 and 176A on how documents need to be served, which were generally felt to be outdated and in need of review.
- The provisions entitling consumers to voluntarily terminate hire-purchase and conditional sale agreements under sections 99-100. Some industry respondents felt that these provisions are not always used by consumers in genuine financial difficulties but by those wishing to renege on their commitments. However, consumer groups felt these provisions provide an important remedy for consumers who are unable to meet their commitments.
- Variation of agreements under section 82 which requires firms to issue a modifying agreement where an agreement is varied or supplemented. Some industry respondents felt that the provisions are complex and difficult to comply with. It was also felt that they are difficult for consumers to understand and can lead to poor customer experiences, or make it difficult for firms to offer forbearance.
- The ban on canvassing loans off trade premises under sections 48-49. Some industry respondents argued that these provisions are obsolete and act as a barrier to innovation and more flexible ways of conducting business.
- The ban on circulars to minors under section 50. Some consumer groups argued that knowingly marketing to minors should be included in the review but with a view to retaining or strengthening the protections.
- Some respondents called for CCA provisions to be updated to avoid the need to send statements and notices when a debtor has 'gone away' or is deceased.

17. Respondents also noted the multiple avenues open to consumers to seek redress. They pointed to a number of CCA provisions that create substantive rights for consumers to seek relief or redress from the courts – for example, in relation to unenforceability and unfair relationships. Consumers also have a right to pursue a dispute and seek redress through the Financial Ombudsman Service. This is in addition to the FCA's power to require firms to provide redress to consumers who suffer loss in the event of a firm's failure to comply with its regulatory obligations. Some industry respondents argued that these multiple avenues for redress have the potential to cause confusion for both firms and consumers and place undue burdens on firms. Whilst industry respondents called for the various avenues to be reviewed, streamlined and simplified, consumer groups felt they should be maintained to ensure adequate means of redress for consumers.

18. Provisions recommended by some respondents for exclusion from the review tended to be those they felt were well understood by consumers and firms, as well as provisions perceived to be operating effectively and providing valued consumer protections.

Our response

We note the diversity of responses and the divergence of views on which provisions should be included, and which should be excluded from the review, and the desired outcomes. We have taken these into account in deciding on themes for the review. This has enabled us to consider the overall approach of the CCA in a number of key areas, taking account of the interconnected nature of CCA provisions.

Q4: Do you agree that the review should not extend more broadly, other than where necessary?

19. The majority of respondents agreed that the scope of the review should not extend more broadly than the CCA provisions except where necessary, for example where there is a significant interaction with a provision being considered.

20. Some respondents nevertheless felt that we should have regard to other financial services markets and explore issues of consistency. Others said that the review should include interactions with other legislation such as the Data Protection Act 1998, the Consumer Rights Act 2015, the Payment Services Regulations 2009 and the Small and Medium Sized Business (Credit Information) Regulations 2015.

21. Some respondents argued that the review presented an opportunity to take a holistic view of the consumer credit regulatory regime and to shape a regime that is fit for purpose. Others argued that we should also look at the regulatory perimeter that is set by Parliament, and consider areas which are not currently covered by the consumer credit regulatory regime.

Our response

We are taking a holistic and coherent approach by considering broad themes in the review. Where appropriate, we are looking at other financial services markets and interactions with other legislation.

However, given the scale and complexity of the CCA provisions, we have not extended the review to the regulatory perimeter, or to aspects of the overall regulatory regime that are not linked directly to CCA provisions.

Q5: Do you have any further thoughts on the scope of the review?

22. Some respondents suggested that we consider:

- seeking to achieve a single regulatory regime
- how the review sits with other ongoing work
- the continued application of CCA provisions to some second charge mortgages

- the treatment of business customers and clarification of the application of rules and guidance in comparison to the position for consumers
- the proportionality of the application of CCA provisions to the general insurance market given the reduced risk of harm associated with this sort of credit
- the risks associated with transferring CCA provisions to FSMA or our Handbook which could have an adverse effect on consumer protection
- provisions that place requirements on non-authorised third parties that cannot be replicated by the FCA
- maintaining the courts' jurisdiction unless the FCA is prepared to replicate the functions of the courts
- ensuring that the work is sufficiently resourced

Our response

We welcome the various suggestions, and have taken them into account in developing the approach to the review.

Q6: **Do you have any views on timescales for the review?**

Q7: **Are there particular provisions that you believe should be considered for earlier review, and why?**

23. Most respondents agreed with keeping to the timetable set out in the legislation. One respondent said there was no reason to bring the review forward and risk making recommendations that could lead to unintended consequences. Some respondents emphasised the importance of adequate transitional provisions to enable firms to adapt to any changes and avoid disruption for both firms and consumers.

24. A few respondents expressed concern that the review will not be completed by 1 April 2019 given the scale of the task.

25. A number of respondents felt that, while the statutory timescale would be sufficient for non-urgent changes, changes that are more urgent should be implemented sooner.

26. Some of the provisions suggested for earlier review mirrored those provisions that were seen as a priority in response to Q3. These included:

- information requirements
- unenforceability
- joint and several liability
- service of documents electronically

- modifying agreements
- voluntary termination

Our response

It has not been practical nor realistic to review certain provisions earlier as those provisions suggested for earlier review are some of the more complex ones, and fast-tracking these would have risked negative unintended outcomes. In addition, due to the interconnected nature of the CCA provisions, we considered that it would be difficult in practice to isolate provisions and review them out of context. We also note that any legislative changes will depend on availability of parliamentary time. We are therefore progressing with the review in line with the statutory timetable.

Q8: Do you have any views on the proposed conduct of the review and engagement with stakeholders?

27. Respondents agreed with the proposal to conduct the review in-house with the option of external assistance. They welcomed the intention to engage with stakeholders from across consumer credit markets and consumer groups.

28. Some respondents suggested that we should talk separately with consumer bodies and industry groups. They felt this would allow for more in-depth discussion. It was also suggested that all stakeholders should meet together to understand each other's views and allow for constructive challenge and debate.

29. Some respondents urged us to take account of the broad range of firms and consumers involved in consumer credit markets, to understand how the CCA provisions operate in practice and the challenges experienced by both firms and consumers.

Our response

We are conducting the review in-house using our resources and expertise.

We plan to engage with stakeholders through a series of roundtable meetings. We also intend to conduct research to better understand, amongst other things, how far the CCA provisions meet consumers' needs.

List of non-confidential respondents

ABTA

AdviceUK

Ageas UK

Alexander Hill-Smith

Anthony Sharp

Association of British Credit Unions Limited

Baringa Partners

BGL Group Limited

British Vehicle Rental and Leasing Association

Cabot Credit Management

Call Credit

Citizens Advice (England & Wales)

Citizens Advice Edinburgh

City of London Law Society

Consumer Council for Northern Ireland

Consumer Credit Trade Association

Consumer Services Association

Consumer Finance Association

Co-operative Bank

Deborah Jefferys

DLA Piper UK LLP

Equifax

FCA Practitioner Panel

Finance & Leasing Association

Institute of Money Advisers

Lucy Walker

MBNA Bank of America

Money Advice Trust

Money.co.uk

National Pawnbrokers Association

P B Jepson

Portkabin Group

Professor Eva Lomnicka

Royal Sun Alliance

StepChange Debt Charity

The Royal Bank of Scotland

Tony Hall

Trading Standards Institute

Annex 4
CCA provisions: allocation to themes

CCA retained provisions

Section number	Description	Rights and protections	Information requirements	Sanctions
Part 2: Credit agreements, hire agreements and linked transactions				
8	Consumer credit agreements			
9	Meaning of credit			
10	Running-account credit and fixed-sum credit			
11	Restricted-use credit and unrestricted-use credit			
12	Debtor-creditor-supplier agreements			
13	Debtor-creditor agreements			
14	Credit-token agreements			
15	Consumer hire agreements			
17	Small agreements			
18	Multiple agreements	✓	✓	
19	Linked transactions			
20	Total charge for credit			
Part 4: Seeking business				
48	Definition of canvassing off trade premises (regulated agreements)	✓		✓
49	Prohibition of canvassing debtor-creditor agreements off trade premises	✓		✓
50	Circulars to minors	✓		✓
Part 5: Entry into credit or hire agreements				
55	Disclosure of information		✓	✓
55C	Copy of draft consumer credit agreement	✓	✓	✓
56	Antecedent negotiations	✓		
57	Withdrawal from prospective agreement	✓		
58	Opportunity for withdrawal from prospective land mortgage	✓		✓
59	Agreement to enter future agreement void	✓		
60	Form and content of agreements		✓	✓
61	Signing of agreement	✓	✓	✓
61A	Duty to supply copy of executed consumer credit agreement		✓	✓

61B	Duty to supply copy of overdraft agreement		✓	✓
62	Duty to supply copy of unexecuted agreement: excluded agreements		✓	✓
63	Duty to supply copy of executed agreement: excluded agreements		✓	✓
64	Duty to give notice of cancellation rights		✓	✓
65	Consequences of improper execution			✓
66	Acceptance of credit-tokens	✓		
66A	Withdrawal from consumer credit agreement	✓		
67	Cancellable agreements	✓		
68	Cooling-off period	✓		
69	Notice of cancellation	✓		
70	Cancellation: recovery of money paid by debtor or hirer	✓		
71	Cancellation: repayment of credit	✓		
72	Cancellation: return of goods	✓		✓
73	Cancellation: goods given in part-exchange	✓		
74	Exclusion of certain agreements from Part 5			
Part 6: Matters arising during currency of credit or hire agreement				
75	Liability of creditor for breaches by supplier	✓		
75A	Further provision for liability of creditor for breaches by supplier	✓		
76	Duty to give notice before taking certain action	✓	✓	✓
77	Duty to give information to debtor under fixed-sum credit agreement	✓	✓	✓
77A	Statements to be provided in relation to fixed-sum credit agreements		✓	✓
77B	Fixed-sum credit agreement: statement of account to be provided on request	✓	✓	✓
78	Duty to give information to debtor under running-account credit agreement	✓	✓	✓
78A	Duty to give information to debtor on change of rate of interest	✓	✓	
79	Duty to give hirer information	✓	✓	✓
80	Debtor or hirer to give information about goods			✓
82	Variation of agreements	✓	✓	
83	Liability for misuse of credit facilities	✓		
84	Misuse of credit-tokens	✓		
85	Duty on issue of new credit-tokens		✓	✓
86	Death of debtor or hirer	✓		

86A	FCA to prepare information sheets on arrears and default		✓	
86B	Notice of sums in arrears under fixed-sum credit agreements etc		✓	✓
86C	Notice of sums in arrears under running-account credit agreements		✓	✓
86D	Failure to give notice of sums in arrears			✓
86E	Notice of default sums	✓	✓	✓
86F	Interest on default sums	✓		
Part 7: Default and termination				
87	Need for default notice	✓	✓	✓
88	Contents and effect of default notice	✓	✓	✓
89	Compliance with default notice	✓		
90	Retaking of protected hire-purchase etc goods	✓		✓
91	Consequences of breach of s.90	✓		✓
92	Recovery of possession of goods or land	✓		✓
93	Interest not to be increased on default	✓		
93A	Summary diligence not competent in Scotland	✓		
94	Right to complete payments ahead of time	✓		
95	Rebate on early settlement	✓		
95A	Compensatory amount	✓		
95B	Compensatory amount: green deal finance	✓		
96	Effect on linked transactions	✓		
97	Duty to give information	✓	✓	✓
97A	Duty to give information on partial repayment	✓	✓	
98	Duty to give notice of termination (non-default cases)	✓	✓	✓
98A	Termination etc of open-end consumer credit agreements	✓		
99	Right to terminate hire-purchase etc agreements	✓		
100	Liability of debtor on termination of hire-purchase etc agreement	✓		
101	Right to terminate hire agreement	✓		
102	Agency for receiving notice of rescission	✓		
103	Termination statements	✓		✓
104	Goods not to be treated as subject to landlord's hypothec in Scotland	✓		
Part 8: Security				
105	Form and content of securities		✓	✓
106	Ineffective securities	✓		

107	Duty to give information to surety under fixed-sum credit agreement	✓	✓	✓
108	Duty to give information to surety under running-account credit agreement	✓	✓	✓
109	Duty to give information to surety under consumer hire agreement	✓	✓	✓
110	Duty to give information to debtor or hirer	✓	✓	✓
111	Duty to give surety copy of default etc notice	✓	✓	✓
113	Act not be evaded by use of security	✓		
114	Pawn-receipts	✓		✓
116	Redemption period	✓		
117	Redemption procedure	✓		
118	Loss etc of pawn-receipt	✓		
119	Unreasonable refusal to deliver pawn	✓		✓
120	Consequence of failure to redeem	✓		
121	Realisation of pawn	✓		
122	Order in Scotland to deliver pawn	✓		
123	Restrictions on taking and negotiating instruments	✓		✓
124	Consequences of breach of s.123	✓		✓
125	Holders in due course			✓
126	Enforcement of land mortgages	✓		✓
Part 9: Judicial control				
127	Enforcement orders in cases of infringement	✓		✓
128	Enforcement orders on death of debtor or hirer	✓		
129	Time orders	✓		
129A	Debtor or hirer to give notice of intent etc to creditor or owner	✓		
130	Supplemental provisions about time orders	✓		
130A	Interest payable on judgement debts etc	✓	✓	✓
131	Protection orders	✓		
132	Financial relief for hirer	✓		
133	Hire-purchase etc agreements: special powers of court	✓		
134	Evidence of adverse detention in hire-purchase etc cases	✓		
135	Power to impose conditions, or suspend operation of order	✓		✓
136	Power to vary agreements and securities	✓		✓
140A	Unfair relationships between creditors and debtors	✓		✓

140B	Powers of court in relation to unfair relationships	✓		✓
140C	Interpretation of ss.140A and 140B	✓		✓
141	Jurisdiction and parties	✓		
142	Power to declare rights of parties	✓		
143	Jurisdiction of county court in Northern Ireland	✓		
144	Appeal from county court in Northern Ireland	✓		
Part 10: Ancillary credit businesses				
145	Types of ancillary credit business			
153	Definition of canvassing off trade premises (agreements for ancillary credit services)	✓		✓
154	Prohibition of canvassing certain ancillary credit services off trade premises	✓		✓
155	Right to recover brokerage fees	✓		
157	Duty to disclose name etc of agency	✓	✓	✓
158	Duty of agency to disclose filed information	✓		✓
159	Correction of wrong information	✓		✓
160	Alternative procedure for business consumers	✓		✓
Part 11: Enforcement of Act				
161	Enforcement authorities			
162	Powers of entry and inspection			
163	Compensation for loss			
164	Power to make test purchases etc			
165	Obstruction of authorised officers			
166	Notification of convictions and judgements to FCA			
167	Penalties			✓
168	Defences			✓
169	Offences by bodies corporate			✓
170	No further sanctions for breach of Act			✓
171	Onus of proof in various proceedings	✓		
172	Statements by creditor or owner to be binding	✓	✓	
173	Contracting-out forbidden	✓		
Part 12: Supplemental				
174A	Powers to require provision of information or documents etc			
175	Duty of persons deemed to be agents	✓		
176	Service of documents	✓	✓	
176A	Electronic transmission of documents	✓	✓	
177	Saving for registered charges	✓		
178	Local Acts			

179	Power to prescribe form etc of secondary documents			
180	Power to prescribe form etc of copies			
181	Power to alter monetary limits etc			
182	Regulations and orders			
183	Determinations etc by FCA			
184	Associates			
185	Agreement with more than one debtor or hirer			
186	Agreement with more than one creditor or owner			
187	Arrangements between creditor and supplier			
187A	Definition of 'default sum'			
188	Examples of use of new technology			
189	Definitions			
189B	Green deal plans			
189C	Section 189B: supplementary provision			
190	Financial provisions			
191	Special provisions as to Northern Ireland			
192	Transitional and commencement provisions, amendments and repeals			
193	Short title and extent			

Annex 5
Rights and protections: supplementary analysis

1. This Annex relates to Chapter 5 on Rights and Protections. It gives a summary of the key provisions under each sub-theme, including how they operate. We also set out, where appropriate, the policy rationale for the provisions and highlight issues identified with the current provisions.

Before entry into the agreement

Credit brokerage fees

2. Under section 155, an individual is, subject to limited exceptions, entitled to a refund (less £5) of the fee paid to a credit broker if the individual does not enter into a relevant agreement within six months of an introduction to a creditor or owner, or another credit broker. If the fee has not already been paid, it stops being payable.

3. A relevant agreement includes a regulated credit or hire agreement, but also includes certain types of exempt agreement, as set out in section 155(2).[107]

4. It is immaterial why the individual does not enter into an agreement. For example, the credit broker may have identified an offer of credit, matching the relevant criteria, but the individual decides this is unsuitable, or they may simply have changed their mind or decided not to proceed.

5. Section 155 applies to any fee or commission the credit broker charges for their services. It also includes any other sum paid or payable to the credit broker if it enters, or would enter, into the total charge for credit.

6. Section 155 is designed to protect consumers from unscrupulous practices where credit brokers make inappropriate introductions but try to keep fees paid. This is reinforced by FCA rules, in CONC 4.4.3R, which prohibit a credit broker from charging fees for their services, or requesting payment details for this purpose, unless they have first given the customer an information notice with specified information, and got the customer's confirmation.

7. Consumers also have rights under the general law of contract and other consumer protection legislation. If there has been no introduction, and so section 155 does not apply, the consumer may be entitled to the refund of their fee in common law on the basis of total failure of consideration. For example, if no introduction is made within a reasonable period. In addition, if the broker fails to adhere to the brokerage contract, the consumer may be able to claim damages for breach of contract without waiting six months. The consumer also has a right to cancel a distance brokerage contract, although this is limited to a 14-day cooling-off period.[108]

107 Section 155 does not apply where the introduction is for a regulated mortgage contract or a home purchase plan and the person charging the fee is an authorised person or an appointed representative.

108 Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013/3134.

8. Issues have been identified with section 155, including the following:

- Section 155 is only triggered where an introduction occurs. It does not apply where the credit broker fails to make an introduction.
- The individual is only entitled to a refund where they actively request one. It has been suggested that brokers should be required to proactively refund the individual, or inform them of their right to a refund, as soon as it becomes clear that no introduction will be made or no agreement will be entered into.
- There is no entitlement to a refund until six months have elapsed. This may not be appropriate in the digital age, given that most introductions take place online and consumers expect an early offer of an agreement.
- Some consumer groups have called for a ban on upfront fees, or a ban on charging fees until an introduction has been made or an agreement entered into.
- The amount which can be retained has not been reviewed since 1998.
- It has been suggested that a £5 limit is unfair on credit brokers who may undertake considerable work on the individual's behalf, only for the individual to change their mind and demand a refund. It may also encourage a move towards commission arrangements, which may be less transparent to the consumer and create conflicts of interest, potentially influencing any advice given.

Prospective agreements

9. The CCA provides a number of rights and protections to consumers that govern the parties' dealings before entry into a regulated agreement.

10. The CCA does not define at what point a contemplated agreement becomes a 'prospective' agreement. It would seem necessary that the parties should be engaged in negotiations for an agreement that would fall within the definition of regulated agreement. In the period between the customer signing the unexecuted agreement, and its signature by the creditor (and hence execution), there is no concluded agreement and the customer may withdraw from it.

11. Section 55C entitles the customer to request a copy of the prospective credit agreement (or such of its terms as have at that time been reduced to writing), unless the firm is unwilling to proceed. Failure to comply is actionable as a breach of statutory duty. This provision implements the CCD. Its aim is to give the customer adequate opportunity to consider the proposed agreement, and to pause and reflect away from any sales pressure.

12. Section 57 sets out how either party may withdraw from a prospective regulated agreement, and the effects of withdrawal. The customer can give notice either verbally or in writing, and certain persons (including a credit broker or supplier who acted as negotiator in antecedent negotiations, see section 56 below) are deemed to be the agent of the creditor or owner for receiving a notice of withdrawal.

13. Withdrawal from a prospective regulated agreement not only terminates any outstanding offer in relation to the agreement, making this incapable of acceptance, but also operates to apply sections 68-73 relating to the consequences of cancellation of a regulated agreement (see below). These include cancellation of any linked

transaction; withdrawal of any offer by the prospective customer to enter into a linked transaction; recovery of payments made; and the return of part-exchange goods or payment of the part-exchange allowance.

14. Section 58 requires the creditor or owner, in the case of certain prospective agreements secured on land, to give the customer an advance copy of the unexecuted agreement containing a notice in the form prescribed by regulations.[109] This notice must state the customer's right to withdraw from the prospective agreement and how and when the customer can exercise that right.

15. Section 61(2) supplements section 58 and provides that an agreement to which section 58(1) applies is not properly executed unless:

- the requirements of section 58 are complied with
- the firm has allowed a period of consideration of not less than seven days before an unexecuted agreement is sent to the customer for signature
- the firm has not approached the customer during this consideration period, and
- the firm has not received a notice of withdrawal from the customer before sending the unexecuted agreement

16. Section 59, subject to certain exceptions[110], renders an agreement void if, and to the extent that, it seeks to bind the customer to enter into a future regulated agreement. This acts as an additional limitation to the pressure that creditors or owners could exert on customers to enter into regulated agreements.

Antecedent negotiations

17. Section 56 provides certain protections to customers in respect of antecedent negotiations, conducted by the creditor or owner, or by a credit broker or supplier in relation to a transaction the agreement will finance (the negotiator).

18. Antecedent negotiations are taken to begin when the negotiator and the customer first enter into communication (including by advertisement). This includes any representations made by the negotiator to the customer and any other dealings between them.

19. Where antecedent negotiations take place, the negotiator is deemed to have conducted the negotiations as agent of the creditor or owner as well as in its actual capacity (the deemed agency principle). This means that the creditor or owner will be liable for any misrepresentations by the negotiator and for any contractual undertakings the negotiator gives. An agreement is void if, and to the extent that, it claims to treat the negotiator as agent of the customer or to exclude liability for the negotiator's acts or omissions.

20. What a negotiator says leading up to a regulated agreement may influence the customer's decision to enter into the agreement. So section 56 ensures the accountability of the creditor or owner for representations made by such persons and prevents the firm from contracting out of responsibility.

109 Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983, SI 1983/1557.
110 Consumer Credit (Agreements to Enter Prospective Agreements) (Exemptions) Regulations 1983, SI 1983/1552.

21. Under the general law of agency, a firm is bound by the acts of its agent acting within the scope of the agent's actual, apparent or usual authority. However, there is no general rule that a dealer, for example, through whom a hire-purchase agreement is concluded, acts as agent of the creditor or owner, rather than on its own behalf, in inducing the customer to enter into the agreement.

22. CONC 1.2.2R requires a firm to ensure that its employees and agents comply with CONC and to take reasonable steps to ensure that other persons acting on its behalf also comply with CONC. However, this does not create a deemed agency or make the firm responsible for the acts or omissions of a broker.

23. It has been suggested that there is a potential loophole in this protection. For example, following antecedent negotiations, the goods may be sold to an intermediary who then sells the goods to the creditor. In such cases the deemed agency link may be broken, with the result that the customer may not be able to hold the creditor liable for any misrepresentations by the negotiator.

Multiple agreements

24. The CCA sets out various categories of agreement, but recognises that an agreement may fall into more than one statutory category. To address this, section 18 makes provision for multiple agreements.

25. Section 18 distinguishes between two types of multiple agreement:

- Where part of an agreement is within one category of regulated agreement and another part is within a different category or is unregulated. This is sometimes referred to as a 'multi-part' agreement.

- Where the agreement as a whole is within two or more categories of regulated agreement. This is referred to as a 'unitary' agreement.

26. The policy rationale for section 18 is twofold. Firstly, to ensure that the CCA is not avoided by artificially combining distinct agreements together, in order to exceed the regulatory limit.[111] Secondly, to determine how multiple agreements are to be documented and what CCA requirements apply. The agreement must comply with the statutory requirements for each category into which it falls, not merely with the requirements that apply to the predominant category.

27. An agreement will be improperly executed, and so enforceable only on an order of the court, if each category is not documented in accordance with the prescribed CCA form and content requirements relevant to that category.

28. Stakeholders have suggested that the provisions are complex and ambiguous and are no longer required, particularly given the changes to the financial limit. It is also suggested that the provisions create a level of prescription that does not exist in other regulated sectors, and they should be simplified and clarified.

29. It is argued that the law in this area is uncertain, despite court judgments.[112] In particular, the provisions can create uncertainty and complexity, for example where creditors seek to offer flexible products that combine different forms of credit.

111 The £25,000 financial limit was removed for consumer borrowing in April 2008 but remains for business borrowing.

112 For example, *Southern Pacific Mortgage Limited v Heath* [2009] EWCA Civ 1135.

30. In 2003, the Department of Trade and Industry (DTI) considered whether to amend section 18 or to repeal it entirely. In the end it decided to leave the law as it stood. In its White Paper, the DTI commented:

> 'Difficulty has been caused when single advances are to be applied for two or more purposes, attracting different categories. In recent years, the introduction of more complex retail lending products – e.g. credit cards with different terms for balance transfers, cash advances and purchases – has led to uncertainty as to how the provisions apply to the different elements of the agreement'.[113]

During the currency of the agreement

Non-contracting out

31. Section 173 contains a 'no contracting out' protection. This is designed to protect a customer from signing away rights and protections under the CCA.

32. A term in a regulated credit or hire agreement (or a linked transaction), or in any other agreement relating to an actual or prospective regulated agreement or linked transaction, is void to the extent that it is inconsistent with any provision of the CCA for the protection of the customer. In addition, any term that seeks to impose an additional duty or liability on a customer, or a relative, that exceeds the obligations under the CCA is deemed to be inconsistent with the CCA and void and not binding.

33. The policy rationale is to prevent firms from circumventing the CCA provisions through including inconsistent terms in agreements. For example, a firm cannot seek to limit its obligations under section 56 (antecedent negotiations) by excluding its liabilities for the misrepresentations of a credit broker.

34. Section 173(3) provides that where certain action can only be taken (against the customer) by an order of the court or the FCA, this does not prevent it being done with the customer's consent given at the time. For example, the creditor can recover possession of goods without a court order under section 90 if the customer has given consent to this at the time of the repossession. However, this must be genuine consent, given freely, and the customer must not be liable in any way if they refuse to give consent.

35. In principle, a customer could challenge a contractual term that is inconsistent with the CCA or FCA rules as an unfair term and unenforceable under the Consumer Rights Act. The customer could also make a complaint to the Financial Ombudsman Service. However, unlike section 173 which automatically renders inconsistent terms void and unenforceable, these would require the customer to take action to enforce their rights and there would be no guarantee of the outcome of such a challenge.

Connected lender liability

36. Section 75 provides that where the debtor has, in relation to certain types of transactions financed by a debtor-creditor-supplier agreement, a valid claim against the supplier in respect of misrepresentation or breach of contract, the debtor has a like claim against the creditor, who is jointly and severally liable with the supplier. The

113 Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century: White Paper (DTI, December 2003).

customer may, therefore, choose to pursue a claim against either the supplier or the creditor or both of them. The creditor cannot insist as a pre-condition of its liability under section 75 that the customer should first claim against the supplier.

37. For the provision to apply, the cash price of the goods or services purchased must be over £100 but not more than £30,000.

38. Section 75 does not apply where the creditor and supplier are the same person (as may be the case for hire-purchase and conditional sale agreements). It also does not apply to unconnected loan agreements or hire agreements.

39. A creditor's liability under section 75 can be compensated in two ways. Firstly, subject to any agreement between them, the creditor is entitled under section 75(2) to be indemnified by a supplier for loss suffered in satisfying a customer's claim, including costs reasonably incurred in defending proceedings. Secondly, the creditor is entitled to have the supplier made a party to such proceedings.

40. These statutory rights for creditors are additional to any separate contractual arrangements the creditor may have with the supplier's acquiring bank as part of the card payment scheme chargeback rules.

41. However, the chargeback procedure is fundamentally different from section 75 liability. Under chargeback, only the amount paid on the credit card can be recovered by the creditor under the chargeback process. In contrast, under section 75 paying any part of the price of the goods or services triggers liability for the whole amount, and the liability can be far in excess if the damage caused by the defect or failure to perform is greater than the price of the goods. The creditor cannot claim compensation for such amounts through the chargeback process.

42. Section 75A was inserted into the CCA in 2010 as part of the UK's implementation of the CCD. It differs from section 75 in that the customer can make a claim only if (i) the supplier cannot be traced; (ii) the customer has contacted the supplier but the supplier has not responded; (iii) the supplier is insolvent; or (iv) the customer has taken reasonable steps to pursue a claim against the supplier but has not obtained satisfaction. As such, section 75A provides for 'second-in-line' liability rather than joint and several liability as under section 75.

43. In addition, section 75A applies only to a linked credit agreement which exclusively finances the transaction. As such, it does not apply to credit cards, for example. It is also limited to breach of contract.

44. The Crowther Report noted that a consumer buying goods that proved to be defective would still be required to meet the terms of the credit agreement which financed the transaction even when seeking redress against the supplier. It concluded that this was an unsuitable position for the consumer:

> '... if the delinquent seller is worth powder and shot it ought to be easier for the lender to put pressure on [the seller] to deal with the complaint than it is for the borrower. The lender is not likely to be so inhibited by expense from using the seller; and in most cases proceedings by the lender would be unnecessary because the lender is in a position to say to the seller that future financing facilities will be withdrawn unless the seller attends to the

complaint and takes greater care in the conduct of his business.'[114]

45. The report recommended that a creditor whose relationship with the supplier was that of a 'connected lender' should be answerable in damages to the debtor for misrepresentations or breaches of contract by the supplier.

46. The report gave a number of reasons for drawing this distinction:

- Where goods are bought from a seller under arrangements with a connected lender, the sale and loan aspects are closely entwined. The firms are, in effect, engaged in a joint venture to their mutual advantage.

- The supplier acts as agent for the finance provider in relation to representations made about the goods during negotiations leading to the conclusion of the credit agreement.

- The finance provider is not in the position of a purely independent lender. To a considerable extent, it controls the contract documents used by the dealer. It competes keenly with other finance houses to obtain the dealer's credit business. In some cases it pays the dealer a commission for the introduction, thus incentivising the dealer to ensure the credit transaction goes through. It provides general financial support for the dealer, the cost of which may be materially influenced by the volume of credit business introduced to it by the dealer. It also relies on the dealer as a medium of promoting its own business.

- Although the supplier should be held ultimately responsible for any misrepresentation or defective goods, it is not right that the finance provider should be able to disclaim all responsibility and insist on repayment of the credit. The pressure for business exerted by the finance provider, and the financial inducements it offers the supplier, may have induced the supplier to boost sales by making false representations.

- A dishonest supplier may be able to continue in business only because of the financial support received from a finance provider.

- The consumer may find that the only way to secure redress is to incur the worry and expense of litigation, bearing the burden of initiating the action. Even if the claim is successful, the supplier may not be financially capable of paying out.

- It is generally easier for the finance provider to put pressure on the supplier to deal with a complaint than it is for the consumer. The finance provider is not likely to be inhibited by expense from suing the supplier, and such proceedings would in most cases be unnecessary, given the relationship with the supplier.

- In response to the argument that a finance provider should only be liable up to the amount of any loan, the report noted that if the sale of faulty goods leads to a disaster, the seller would be financially liable in full and its liability would not be limited to the cash price of the goods. There is no logic in applying a different principle if creditors are to have joint liability. The report also noted that this is likely to ensure that finance providers attend to complaints, to avoid litigation.

114 Crowther Report, paragraph 6.6.29.

47. The OFT reviewed section 75 in the mid-1990s, although this did not result in any changes to the statutory regime. In its first report, while recognising that only a court could provide a definite interpretation of section 75, the OFT concluded that the protection afforded by the provision was neither unclear nor unambiguous.[115] In a subsequent report, the OFT recommended a number of changes including limiting the creditor's liability to the amount of credit advanced, and subrogating a consumer's claim against a creditor under section 75 to any rights which the consumer may have against an insurer or bond administrator.[116]

48. Following substantial litigation about whether section 75 applies to transactions with foreign suppliers, the OFT brought a test case to resolve this question. The House of Lords concluded that where the relevant transaction had a foreign element, so long as the underlying credit agreement was a UK credit agreement, it was covered by section 75. It also held that creditors under four-party transactions (involving merchant acquirers) were liable under section 75.[117]

49. The use by suppliers of third party payment processing firms has more recently raised issues about a customer's ability to make a claim. There may be circumstances where the use of a payment processor breaks the link between the debtor, creditor and supplier, and so may render section 75 inapplicable.

50. Other issues that have been identified with section 75 include:

- Some respondents to the Call for Input complained that consumers unfairly use section 75 as a form of insurance, enabling the customer to claim the full amount of a large purchase from the creditor despite having only paid a small deposit using their credit card. It could also encourage customers to make frivolous purchasing decisions. They called for a limitation of the creditor's liability to the amount paid on the card.

- Respondents also argued that the customer's ability to make a claim against the creditor for consequential losses arising from the supplier's breach of contract or misrepresentation is a disproportionate burden on firms.

- There may be uncertainty about the scope of section 75 where the payment may be to an intermediary which is not itself providing the relevant services and may not be acting as agent of the supplier (for example, travel agents).

- There may also be uncertainty about the treatment of purchases by additional cardholders. The debtor is the principal cardholder (so would need to make any claim under section 75) but the other cardholder may not have been acting as their agent or on their behalf.

- There may be issues about the application of the cash value limits, in particular in respect of multiple purchases where a group of items are bought together. The application of section 75 may depend upon whether the items could have been purchased separately, and how the sale was promoted.

115 Connected Lender Liability: A review by the Director General of Fair Trading of section 75 of the Consumer Credit Act 1974 (March 1994).

116 Connected Lender Liability: a second report by the Director General of Fair Trading on section 75 of the Consumer Credit Act 1974 (May 1995).

117 *Office of Fair Trading v Lloyds TSB Bank plc* [2007] UKHL 48.

- The cash value limits were last increased in 1984 and 1985.

Variation of agreements

51. Under the law of contract, parties to an agreement are generally free to include variation clauses in their contracts as they deem fit, subject to compliance with unfair contract terms legislation.[118] However, the CCA regulates certain aspects of the variation of regulated credit and hire agreements.

Unilateral variation

52. Section 82(1) deals with the situation where the creditor or owner unilaterally varies the agreement, under a power contained in the agreement. The firm must give notice to the customer before the variation takes effect. Regulations prescribe the manner in which such notice is to be given.[119]

53. The Crowther Report expressed concern that, while many regulated agreements contained unilateral variation powers that were entirely legitimate, there was evidence of consumer detriment resulting from use of this power and a failure to notify the consumer prior to the variation taking effect.

54. We have recently consulted on draft guidance on the fairness of variation terms in financial services consumer contracts under the Consumer Rights Act, including in relation to interest rate variations.[120]

55. Section 78A of the CCA, which implements the CCD, requires the creditor to provide information in writing before a change in the interest rate under a regulated credit agreement can take effect.

56. The information that must be given to the debtor under section 78A includes (i) the variation in the rate of interest (including the new rate of interest); (ii) the amount of payments to be made under the agreement (expressed as a sum of money where practicable) where this changes as a result of the variation; and (iii) details of any change in the number or frequency of payments.

57. A customer could also challenge an unfair term under the Consumer Rights Act, or make a complaint to the Financial Ombudsman Service. Under the Consumer Rights Act the court can also, on its own motion, consider any unfair contract terms issues even if the customer does not raise them. As noted in paragraph 5.42 of the interim report, unfair terms are not binding on the consumer. However, these options require action to be taken, unlike the CCA which automatically precludes the variation from taking effect even if the term on which that variation relies is fair, if the requisite notice is not given.

Modifying agreements

58. Section 82(2) deals with the situation where a credit or hire agreement is varied or supplemented by mutual agreement. The CCA treats this as giving rise to a new modifying agreement, which replaces and revokes the previous agreement.

59. Modifying agreements must comply with the CCA regulations on pre-contract disclosure and agreements, which include specific provisions for modifying

118 www.fca.org.uk/firms/unfair-contract-terms
119 Consumer Credit (Notice of Variation of Agreements) Regulations 1977, SI 1977/328.
120 GC18/2: Fairness of variation terms in financial services contracts under the Consumer Rights Act 2015 (May 2018).

agreements, and with Part 5 of the CCA. In particular, the customer must be informed of, and consent to, the proposed changes.

60. The Crowther Report took the view that to ensure adequate consumer protection, a modifying agreement should generally comply with the same requirements as to content, signing and supplying copies as the original agreement.

61. Some respondents to the Call for Input argued that the level of prescription that applies to modifying agreements makes the process complex and cumbersome. This presents an obstacle to simple variation or to assisting customers in financial difficulties to reschedule repayments. Some called for a simplification of the requirements with a view to reducing the administrative hurdles for both firms and consumers. A few respondents called for outright repeal.

62. It should be noted that, if a variation amounts to a modifying agreement, but is not documented as such, the agreement is unenforceable without a court order. It would be open to firms to exercise forbearance as a unilateral concession under the agreement, rather than as a variation of its terms, although this would not give the customer the same level of certainty, as a concession could be withdrawn.

Notices in relation to enforcement

63. The CCA restricts the ability of the creditor or owner to enforce the terms of a regulated agreement, or to terminate the agreement, in certain default and non-default situations. The general purpose is to safeguard the customer's position against unfairness or hardship, given the inequality of bargaining power.

64. Section 76 requires notice, in the prescribed form, at least seven days before enforcing a term of a regulated agreement in non-default cases. This covers contractual remedies set out in the agreement in relation to recovering possession of goods or land, or treating any right conferred on the customer as terminated, restricted or deferred. Section 76 does not apply to open-end agreements.

65. Section 87 requires notice to be given before the creditor or owner can take certain actions following breach of the agreement by the customer. These include terminating the agreement or demanding earlier payment of any sum or recovering possession of goods or land. The notice must be in the prescribed form and the customer must be allowed at least 14 days to respond. If the firm fails to comply with the provisions, it is precluded from taking the relevant actions.

66. Section 98 requires seven days' notice before terminating, other than for breach of the agreement, where the agreement has a fixed period. The notice is not effective unless it is in the form prescribed.[121]

67. In each case notice must also be served on any surety (section 111).

Death of debtor or hirer

68. Section 86 restricts the ability of a creditor or owner to exercise certain contractual rights that would otherwise be exercisable upon the death of the customer.

69. This provision prohibits the enforcement of the following contractual rights by reason of the death of the debtor or hirer: termination of the agreement; demanding earlier

121 Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983, SI 1983/1561.

payment of any sum; recovering possession of any goods or heritable property; treating any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred; or enforcing any security.

70. The extent to which the firm is restricted depends on whether the agreement is fully or partly secured or unsecured. If at the death the agreement is fully secured, no such steps may be taken. If the agreement is only partly secured, or unsecured, the firm can enforce its contractual rights only on an order of the court.

71. This is designed to safeguard the customer's family from distress. It does not apply to open-end agreements.

Other restrictions on remedies for default

72. Section 90 restricts a firm's right to recover possession of goods which form the subject of a hire-purchase or conditional sale agreement. Essentially, where the customer has paid one-third of the total price of the goods, the creditor is not entitled to recover possession of the goods except on order of the court.

73. Such goods are referred to as 'protected goods'; this protection was carried over from the Hire-Purchase Act 1965. Breach of this requirement means that the agreement terminates and the customer is released from all liability and can recover all sums paid under the agreement (section 91).

74. The purpose of the one-third rule is to provide safeguards to protect the customer from repossession where the customer has paid a substantial amount towards the cost of the goods. It reflects the fact that, under such agreements, the customer does not acquire title to the goods until all payments have been made, so there may be an imbalance between the parties.

75. In addition, section 92 prohibits a firm from entering premises to take possession of goods which are subject to a regulated hire-purchase or conditional sale agreement, or a consumer hire agreement, except by order of the court. This is irrespective of whether the goods are protected goods under section 90.

Provisions about interest

76. Section 86F precludes a creditor or owner from charging anything other than simple interest in respect of default sums. This provision was added as part of the changes implemented by the 2006 Act. Section 86E provides separately for the provision of default sum notices before interest can be charged.

77. Section 93 prevents a creditor from increasing interest on default. Default interest must not be charged at a rate which exceeds the rate of interest (or the rate of the total charge for credit) provided for in the agreement.

78. The County Courts (Interest on Judgment Debts) Order 1991[122] provides that interest shall not be payable under that Order where the relevant judgment is given in proceedings to recover money due under a CCA-regulated agreement. This led some firms to include terms and conditions in their agreements, allowing contractual interest to be charged both before and after a court judgment. Until 1 October 2008, there was no restriction under the CCA on such a provision.

122 SI 1991/1184, article 2(3)(a).

79. Section 130A was added by the 2006 Act in light of evidence of consumer harm arising from failure to notify customers that post-judgment interest was accruing.

80. If a creditor or owner wants to recover interest from the customer, after judgment has been entered, it must give the customer notice of its intention to charge interest together with information in the prescribed form. Post-judgment interest cannot be recovered until the first prescribed notice is given, and thereafter only if further notices are given at intervals of not more than six months.

Security

81. Section 113 prohibits a creditor or owner from evading the CCA by the use of security. For example, the firm would be precluded from obtaining, by reason of the provision of security, more than half of the total amount payable in the event of voluntary termination of a hire-purchase or conditional sale agreement.

82. Section 104 prevents a creditor from treating goods under a hire-purchase or conditional sale agreement as subject to the landlord's hypothec in Scotland. A hypothec is a form of security where possession of the secured asset stays with the person providing the security.

Unauthorised payments and credit-tokens

83. A credit-token is defined broadly in section 14 and includes a card, check, voucher, coupon, form, booklet or other document or thing given to a customer by a creditor who undertakes, upon its production, to supply cash, goods or services to the customer or to pay a third party to do so.

84. Examples of credit-tokens are two-party cards issued by a store for the purchase on credit of goods supplied by that store, or three-party and four-party cards issued by credit card firms. It would also include, for example, shopping vouchers.

85. Section 66 provides that a customer incurs no liability for use made of the credit-token by any person unless the customer has previously accepted the credit-token, or its use constituted the customer's acceptance of it. This protects the customer, for example, from fraudulent interception of mail containing a credit card.

86. A customer accepts a credit-token when it is signed, or a receipt for it is signed, or it is first used, either by the customer or by a person authorised by the customer to use it under the agreement.

87. Section 83 provides that a customer is protected from liability for loss arising from use of the credit facility by another person (other than one acting, or to be treated as acting, as the customer's agent). Credit facilities include not only running-account credit but also fixed-sum credit; this is broader than credit-token agreements.

88. The Crowther Report felt that it was important to protect the consumer against careless administration of the credit facility by the creditor who might, for example, fail to build in safeguards to adequately prevent the fraudulent use of a credit card.

89. Section 84 provides that a customer's liability for misuse of a credit-token is limited to a maximum of £50 (or the credit limit if lower) unless the credit-token was misused by a person who acquired possession of it with the customer's consent. The Crowther Report recommended this provision in order to limit liability in the event of loss or theft of the card and its subsequent unauthorised misuse.

90. The liability set out in section 84 may only be imposed if the credit-token agreement contains, in the prescribed manner, the name, address and telephone number of the person to be notified in the event that the credit-token is lost or stolen or is for any other reason liable to misuse.[123]

91. The Payment Services Regulations 2017 (PSRs)[124] which implement the Payment Services Directive[125] also include provisions governing liability for unauthorised payment transactions within their scope.

92. The PSRs apply to payment service providers including banks, building societies, credit card providers and money services businesses. The PSRs provisions on unauthorised payment transactions are currently disapplied in some cases for CCA-regulated agreements. There are, however, some differences in the concepts used under both regimes. In particular, the PSRs include provisions governing liability for unauthorised payment transactions due to the customer's fraud or gross negligence, whereas section 83 provides immunity from liability where another person did not act, or is not to be treated as acting, as the customer's agent.

93. Some respondents to the Call for Input stated that the CCA provisions are unduly complicated and inconsistent with the PSRs. They argued that this lack of alignment could give rise to confusion. For example, unlike the CCA, the PSRs require the card issuer immediately to refund unauthorised transactions. There may also be different interpretations of when consent was given for use of the card.

Pawnbroking

94. The CCA contains specific rights and protections relating to articles taken in pawn under regulated agreements. In particular:

- Section 114 requires a pawn-receipt to be given in respect of an article taken in pawn. In addition, it is an offence to take any article in pawn from a person who is known to be, or who appears to be and is, a minor.
- Section 116 provides that a pawn must be redeemable by the customer at any time within six months from the making of the agreement. The parties can agree to a longer redemption period, but it must not be shorter.
- Section 117 imposes a duty on the firm, upon surrender of the pawn-receipt and payment of the amount owing, to deliver the pawn to the bearer of the pawn-receipt, with certain limited exceptions.
- Section 118 sets out the procedure to be followed in the case where the pawn-receipt has been lost, mislaid, destroyed, stolen or is otherwise not in the customer's possession.
- Under section 119 it is an offence for a creditor to unreasonably refuse to allow a pawn to be redeemed. Section 122 makes provision in Scotland for a court order for

123 Consumer Credit (Credit-Token Agreements) Regulations 1983, SI 1983/1555.

124 SI 2017/752.

125 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

delivery of the pawn where a person is convicted of an offence under section 119(1) or for theft or fraud in relation to the pawned item.

- Under section 120, if, at the end of the redemption period[126], the pawn has not been redeemed, then the property in the pawn either passes automatically to the firm or otherwise becomes realisable by the firm by sale under section 121.

- Section 121 provides for the realisation of the pawn, by sale, after 14 days' notice has been given to the customer. Information must also be given to the customer of the result of the sale, and the proceeds, and any surplus must be returned to the customer.[127] The customer is entitled to challenge the price realised on sale, or the expenses of sale, and the burden of proof is then on the firm.

95. The Crowther Report considered it necessary to continue the protections that previously existed for consumers in the Pawnbrokers Act 1872. It also recommended that loans secured by a pledge should have similar protections as other unsecured credit agreements, particularly in relation to charges, transparency and documentation. Additional protections were needed in relation to taking articles in pawn and the realisation of unredeemed pawns.

96. Some responses to the Call for Input called for modernisation of the provisions to ensure that they remain fit for purpose and reflect modern forms of communication. It has also been suggested that it was an oversight not to exempt pawnbroking from the requirement to serve a default notice under section 87 in cases where a notice of intention of sale under section 121 has been served, as the effect is similar.

Exiting the agreement

Withdrawal and cancellation

97. The right of withdrawal is set out in section 66A and implements the CCD. It applies to most regulated credit agreements (including some falling outside the CCD) and gives the customer a 14-day right of withdrawal from the agreement once made, without giving any reason.

98. The 14-day period begins from the day after the latest of the following:

- the day the agreement is made

- in cases where the creditor is required to inform the debtor of the credit limit, the day on which the creditor first does so

- in cases where section 61A (duty to supply copy of executed agreement) applies, the day on which the debtor receives a copy of the agreement under that section or on which the debtor is informed as specified in section 61A(3), or

- in cases where section 63 applies, the day on which the debtor receives a copy of the agreement under that section

126 Or, where the debtor or hirer is entitled to apply for a time order under section 129(1), five days after the end of the redemption period.

127 Consumer Credit (Realisation of Pawn) Regulations 1983, SI 1983/1568.

99. Following withdrawal, the customer is under an obligation to repay the credit together with interest in respect of the period during which credit was drawn down. This must be done without delay and no later than 30 calendar days after notice of withdrawal was given. The effect of withdrawal is that the credit agreement and any ancillary service contract are treated as if they had never been entered into.

100. In the case of hire-purchase, conditional sale and credit sale agreements, as the credit provided is the deferment of the payment of the purchase price, the obligation to repay the credit means that the customer has to pay the price for the goods. Title to the goods then passes to the customer on the same terms as would have applied had the customer not withdrawn from the agreement.

101. There is a separate right of cancellation under sections 67-73 in respect of agreements outside the scope of section 66A, including hire agreements, but only where antecedent negotiations, preceding the credit agreement, included oral representations made by the negotiator in the presence of the customer. This will include doorstep sales, but may also include situations where the negotiations are conducted at trade premises, such as a supplier's showroom or the offices of a creditor, but the customer takes the credit agreement away and signs it at home.

102. This right applies for five days following receipt of the copy agreement or notice of cancellation, or (in some cases) 14 days from the making of the agreement.

103. The consequences of cancellation are different from withdrawal. For example, while under section 66A any credit provided must be repaid with interest within 30 days and a failure to do so entitles the creditor to recover the sums as a debt, under the cancellation provisions the agreement remains in force in so far as it relates to repayment of credit and interest. Following cancellation, the customer is under a duty to return the goods and to take reasonable care of them. If the customer fails to surrender the goods, this is a breach of statutory duty.

104. The policy rationale for the provisions is to ensure that customers have a period post-contract during which they can reflect and change their mind without any punitive consequences. Some stakeholders have called for alignment of the withdrawal and cancellation provisions, and have also pointed to overlap and confusion with other legislation including the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.[128]

Early repayment

105. Section 94 entitles a customer to settle a credit agreement ahead of time, either in full or partially, by giving notice to the creditor and making the necessary payment to discharge the remaining debt, less any rebate of charges.

106. Regulations under section 95 provide for calculation of the minimum rebate and the settlement date in the case of full or partial early settlement.[129]

107. Section 95A entitles the creditor to claim compensation in certain circumstances, provided that this is fair and objectively justified and does not exceed a specified percentage of the amount repaid (in line with the CCD). Compensation can be claimed only where the amount of the payment under section 94 exceeds £8,000 (or the total

128 SI 2013/3134.

129 Consumer Credit (Early Settlement) Regulations 2004, SI 2004/1483.

of such payments in any 12-month period exceeds £8,000).

108. Section 96 provides that, where the agreement is settled in full, the customer (and any relative) is discharged from any ongoing liability under a linked transaction.

109. Section 97 entitles a customer to request a settlement statement showing how much it will cost to settle.[130] If the creditor fails to provide this statement, within seven working days, the agreement is unenforceable while the breach continues. In the case of partial early repayment, the customer can request a statement under section 97A showing the effect of the payment, once made, on the amount owed.

110. Some respondents to the Call for Input called for alignment of the full and partial early settlement provisions. Other respondents argued that the regulations are overly complicated and should be simplified.

Termination of agreements

111. Customers also have a right to terminate a regulated agreement in certain circumstances. In addition, section 103 entitles the customer to request a termination statement from the creditor or owner, confirming that the agreement has ended and that any indebtedness has been discharged.

Open-ended credit agreements

112. Section 98A, which implements the CCD, entitles the customer, by notice and free of charge, to terminate an open-ended credit agreement (other than in the case of overdrafts and agreements secured on land). The agreement may provide for a period of notice which must not exceed one month. The creditor may require the notice of termination to be in writing; otherwise it may take any form.

113. The creditor is also entitled to terminate the agreement if this is provided for in the agreement. The creditor must give the customer at least two months' notice on paper or another durable medium.

114. Section 98A also entitles the creditor to terminate or suspend the customer's right to draw on credit. The creditor must serve a notice, with objectively justifiable reasons, on the customer before the termination or suspension takes effect or, if that is not practicable, immediately afterwards.

Right to terminate hire agreements

115. Section 101 entitles the hirer to terminate a consumer hire agreement upon notice, provided that this does not expire earlier than 18 months after the making of the agreement (unless a shorter period is provided in the agreement). This allows the owner to tie the hirer into a minimum 18-month period. The right to terminate does not apply to hire for business purposes.

Right to terminate hire-purchase and conditional sale agreements

116. Under section 99, a customer has the right to terminate a hire-purchase or conditional sale agreement at any time before the final payment falls due, provided that the customer has paid at least 50% of the total amount payable, or pays up to this amount. This is usually referred to as voluntary termination.

117. This right of voluntary termination may be particularly helpful where a customer

130 Consumer Credit (Settlement Information) Regulations 1983, SI 1983/1564.

has suffered a change in circumstances and wishes to limit their liability by handing back the goods. However, it is not limited to such circumstances. The right was recommended by the Crowther Report on the basis that, with hire-purchase (unlike a loan), the customer has no rights to the goods until the agreement is settled, while the creditor has a form of security over the goods.

118. The 50% rule was an attempt to strike a balance between goods which become worthless soon after being hired out and those that depreciate more slowly. The Crowther Report recognised that depreciation rates may vary, but felt that a single percentage figure would be simpler and easier to understand.

119. Consumer groups argue that these provisions are important because:

- Under hire-purchase contracts, the creditor retains all the rights of ownership of the goods, with the customer assuming the liability and the risk of repossession, which creates an imbalance between the parties.
- The provisions prevent creditors from tying customers into contracts for goods that may have ceased to have any economic value.
- They constitute an important option for customers who have become over-indebted and cannot afford to settle early.

120. Some industry respondents argue that voluntary termination rights are only occasionally used for the purpose for which they were intended, namely to address instances of financial difficulty. Instead, customers use these rights as a mechanism for reneging on one agreement in order to enter into another. This can give rise to significant costs for firms, which may be passed on to customers in the form of higher prices. It is argued that this amounts to a form of cross-subsidisation.

121. The provisions were subject to a consultation by the DTI in 2007. The aim was to establish whether there was a need for a change in the legislation, in light of concerns expressed in particular by the motor finance industry. The DTI concluded that responses to the consultation had failed to give persuasive arguments for change, and so the provisions remained unchanged.[131]

122. The DTI noted that it would not be possible to remove the voluntary termination provisions in isolation. Given their position at the heart of the law on hire-purchase, to do so would call the whole concept of hire-purchase into question.

Judicial protections

123. The Crowther Report noted that the provision of statutory rights for consumers coupled with restrictions on the rights of creditors would serve little purpose unless there was effective machinery for enforcement of those statutory provisions.[132]

124. The report recommended that consumers should, as a last resort, have recourse to the courts for enforcement of their rights. The threat of proceedings by a consumer, or

131 Summary of Responses to a Consultation on Voluntary Termination of Hire Purchase and Conditional Sale Agreements under the Consumer Credit Act 1974 (DTI, September 2004).

132 Crowther Report, paragraph 6.10.1.

as a defence to a claim made against the consumer, could lead to a settlement of the claim or abandonment of an unjustified claim made against the consumer.

125. Accordingly, the CCA gives the courts functions allowing the court to intervene in the contractual agreement between the customer and the firm. This includes the power to make time orders, reopen agreements under the unfair relationship test and make enforcement orders in relation to mortgage agreements. Some respondents to the Call for Input argued that the intervention of the courts is no longer necessary, given the FSMA regulatory regime and the role of the Financial Ombudsman Service.

Time orders

126. Section 129 enables the court to make a time order, in certain circumstances, allowing the customer more time to make payments under a regulated credit or hire agreement. An order can also remedy any breach by the customer. An order can be made only if it appears to the court just to do so.

127. An order can be made in relation to an application by the creditor or owner for an enforcement order under section 127, or in an action otherwise to enforce a regulated agreement or security or to recover possession of goods or land. In addition, the customer can apply for a time order following receipt of a default notice under section 87, or an enforcement or termination notice under sections 76 or 98.

128. The customer can also apply for a time order following receipt of an arrears notice under sections 86B or 86C, provided that the customer first gives notice of intention and makes a payment proposal to the creditor or owner, and waits 14 days.

129. A time order may, as the court considers just, provide for either or both of:

- the payment by the customer of any sum owed under the regulated agreement by such instalments, payable at such times, as the court, having regard to the means of the customer, considers reasonable
- the remedying by the customer of any breach of the regulated agreement (other than non-payment of money) within such period as the court may specify

130. If the court considers it just to do so, it can impose conditions or suspend the operation of any term of the order. For example, it could require the creditor to repay sums paid by the customer. The court can also vary the terms of a regulated agreement as a consequence of making a time order (section 136).

131. Consumer groups have called for the retention of this protection because they see it as a vital tool which is used by debt advisers when assisting a consumer with financial difficulties. It can be used to reduce payments, interest and charges, and to prevent further enforcement action by firms.

132. However, some consumer groups have expressed concern that the provisions may be failing to deliver the intended level and scope of consumer protection. In particular, the process of applying for time orders can be expensive, time-consuming and obscure, and not all consumers can benefit. In addition, the procedures are not well known. They also argue that the procedure in section 129A, following issue of an arrears notice, is overly complicated and unduly time-sensitive.

Unfair relationships

133. Following the recommendations of the Crowther Report, provisions controlling extortionate credit bargains were included in the CCA under sections 137-140. If, upon application by the consumer, the court found that the credit bargain was extortionate, it could reopen the credit agreement to do justice between the parties.

134. The operation and effectiveness of these provisions came under scrutiny due to concerns about their limitations in providing adequate consumer protection and their failure to address unfair practices in the credit market.

135. The 2006 Act replaced the extortionate credit bargain provisions with a new concept of unfair relationships in sections 140A–140D. The intention was to make it easier for consumers to challenge unfair agreements, and for the courts to consider all aspects of the relationship between the parties.

136. The court can re-open a credit agreement under section 140A if it determines that the relationship between the creditor and the debtor arising out of the credit agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following:

- any of the terms of the agreement or a related agreement
- the way in which the creditor has exercised or enforced any of its rights under the agreement or a related agreement
- any other thing done (or not done) by, or on behalf of, the creditor either before or after the making of the agreement or a related agreement

137. A related agreement includes a linked transaction in relation to the main credit agreement, or a credit agreement consolidated by the main agreement.

138. The provisions apply to all credit agreements, whether regulated or not, apart from regulated mortgage contracts and regulated home purchase plans.

139. Once the customer alleges there is an unfair relationship, the onus is on the creditor to establish that the relationship is not unfair. The court may have regard to all matters it thinks relevant and may treat acts or omissions of any associate or former associate of the creditor as if they were acts or omissions of the creditor.

140. The court has wide powers to make an order where it finds an unfair relationship. For example, it can require the creditor to repay sums to the customer, or reduce or discharge any amount owed by the customer, or set aside any duty imposed on the customer. The court can also alter the terms of the agreement, or a related agreement, and can require the creditor (and any associate or former associate) to do or not do anything the court sees fit in connection with the agreement.

141. The court is entitled to exercise its powers even if the relationship between the creditor and the debtor has come to an end. In addition, the court can look at any aspect of the acts and omissions of the creditor, either before or after the making of the agreement. The provides a very wide jurisdiction.

142. Consumer groups argue that the provisions have made it easier to challenge unfair agreements. This is because the court's task is not limited to assessing the fairness of the price or other terms by reference to the circumstances when the contract was

entered into. Instead, the court can also look at the creditor's conduct, before, during and after the making of the agreement.

143. It has been argued that, even though there have been fewer than 50 reported cases under the unfair relationships provisions, only some of which have been successful, advisers regard the provisions as a useful tool in negotiating with creditors, on the customer's behalf, such that most cases do not reach the courts. However, consumer groups have also argued that the courts have interpreted the provisions too narrowly and it would be helpful to have statutory guidance to help guide the courts.

144. The CCA provides little guidance on what amounts to unfairness. It simply states that the court 'shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor)'. This deliberate formulation in such broad terms was designed to give the courts a wide discretion to consider unfairness. It is argued that, although this is designed to promote flexibility, it creates uncertainty, which can be bad for all parties.

145. Industry respondents to the Call for Input argued that the provisions are no longer needed because the consumer protection aspects they relate to are adequately covered by the FCA Principles, in particular Principle 6 (treating customers fairly). They also see the courts' involvement in resolving disputes as inconsistent with the regulatory approach generally under FSMA.

Enforcement of land mortgages

146. Under section 126, where a land mortgage secures a regulated agreement, a regulated mortgage contract or a consumer credit agreement which would, but for the investment mortgage exemption, be a regulated agreement, the creditor cannot enforce the mortgage agreement without a court order. It does not, however, prevent enforcement with the consent of the mortgagor given at that time.

147. Although the CCA does not provide a sanction for breach of this provision, non-compliance by a creditor could attract our disciplinary sanctions. The debtor could also seek an injunction to restrain enforcement. In addition, the unfair relationships provisions may apply. Some respondents to the Call for Input view this provision as a powerful consumer protection measure which should be retained.

Annex 6
Information requirements: supplementary analysis

1. In this annex, we provide supplementary detail on the CCA provisions which require creditors and owners to provide customers with information in relation to regulated credit and hire agreements. We look at the content of and rationale for the requirements, and explore the issues we have identified.

2. Stakeholders have suggested that some information requirements are not working well for customers and/or firms. In some cases, a CCA provision may not be adequately protecting consumers, for example because it is not fulfilling its intended purpose. Other concerns are around the burden of compliance, which is sometimes perceived to be disproportionate to the consumer benefits.

3. We explore the issues by grouping the relevant information requirements into sub-themes. We would welcome views on these as part of responses to Q3.

Introduction

4. The Crowther Report noted the importance of legislative measures to tackle consumers' lack of knowledge and the resulting inequality of bargaining power:

> 'Many consumers have no understanding, or no adequate understanding, of the nature of the commitment into which they are entering or of the cost and other terms or of alternatives that are available to them. They are also ignorant of their legal rights. This lack of knowledge may be due to want of intelligence or education on the part of the consumer concerned or it may result from the fact that the information which he is conscious of needing in order to make an intelligent choice is not made available to him, or alternatively is not presented to him in an intelligible form.'[133]

5. Accordingly, many CCA provisions require firms to provide information to customers. While the specific purpose of the information requirements may differ, they have in common that they aim to protect consumers by reducing information asymmetry and enabling customers to make informed decisions.

CCD implementation

6. When the CCD was adopted in 2008, the information requirements it contains needed to be integrated into the CCA. In deciding how best to implement these requirements,

133 Crowther Report, paragraph 6.1.2.

the Government had to make a number of policy decisions. Because the scope of the CCD does not match the scope of the CCA, considerations included:

- whether to apply the CCD requirements to credit agreements falling outside the scope of the CCD but within the scope of the CCA
- whether to repeal, amend or maintain existing CCA information requirements that are not required by but are compatible with the CCD

7. As set out in Chapter 1, we are assuming that substantive changes to CCA provisions will not be possible in so far as they implement CCD requirements.

Extension of scope of CCD provisions

8. The Government took a case-by-case approach to deciding whether and to what extent to apply CCD provisions to agreements outside the scope of the CCD.

9. For example, section 77B (statement of account on request) applies to fixed-sum credit agreements other than those secured on land, for credit above £60,260, where the credit is for business purposes, and pawn agreements. By way of contrast, section 78A (notification of interest rate changes) applies to credit agreements above £60,260[134] or for business purposes, and pawn agreements. It does not apply to agreements secured on land or unarranged overdrafts.

10. It would only be possible to amend the scope of such provisions in respect of the agreements that do not fall within the scope of the CCD. One option might be to extend the scope to include further types of agreement; another might be to reduce the scope to include fewer (or no) types of non-CCD agreements.

Requirements going beyond CCD provisions

11. The CCD does not regulate every aspect of the subject areas it covers. The Government's general approach was to retain existing CCA provisions wherever this was permitted by the Directive, to minimise the impact on existing provisions.

12. For example, the CCD does not require agreements to be signed but Article 10(1) permits Member States to maintain or introduce national provisions in relation to the validity of the conclusion of credit agreements which are in conformity with EU law. The Government chose to retain the requirement in section 61 that a regulated credit agreement must be signed by the customer and by or on behalf of the firm.

13. In each case, there would be the option of repealing or amending some or all of the aspects going beyond CCD requirements.

Level of prescription: Rationale for and risks of prescribing form and content

14. One of the recurrent themes raised by industry representatives in response to the Call for Input was the level of prescription in the CCA and the relevant regulations. The concerns relate both to the extent to which the content of the information is prescribed (the 'what') and the form in which it must be provided to the customer (the 'how'). The detailed nature of the provisions is argued to be inflexible, impose

134 Where they are not residential renovation agreements.

unnecessary constraints on firms and to lead to poor outcomes for customers. Consumer organisations, on the other hand, emphasise the importance of the consumer protections which the information requirements provide.

15. In the following sections, we consider the current levels of prescription in relation to pre-contractual, contractual and post-contractual information. Before doing so, we explain more generally the rationale for prescribing the form and content of information, and consider some of the risks.

16. For the most part, the substantive information requirements are set out in regulations made under the CCA. They distinguish between required information, forms of wording and the form of the information.

Prescribing information

17. A requirement to provide certain information can be at a number of different levels of prescription, according to the amount of discretion that firms have.

18. For example, a firm might be required to provide the customer with information about the key terms of the agreement. This would leave it open to the firm to decide which terms are key. Alternatively, the key terms might be defined but it is left to the firm to decide how to describe them and what level of detail to include.

19. The purpose of prescribing the information to be provided to customers can differ depending on the product and the associated potential for harm. At a general level, prescribing the content of the information required can contribute to:

- providing certain essential information to protect the customer
- ensuring all customers receive a certain minimum level of information
- enabling customers to make informed choices

20. There are, however, also risks. These include:

- Changes in the market or in customer needs may render the prescribed information less relevant, or unhelpful, or even cause consumer harm (unless the prescribed information is reviewed and updated regularly).
- Providing the same information to all customers may mean that the needs of different types of customer are not met as well as they might otherwise be.
- To comply with the requirements, firms may provide customers with large amounts of information which may overwhelm, confuse or detract from the core messages; this can make effective decision-making more difficult for customers.
- Ensuring that the correct information is provided may be burdensome for firms.

21. A balance is needed between ensuring that customers are provided with the right information at the right time and that any burden on firms is not disproportionate.

Prescribing forms of wording

22. Where forms of wording are prescribed, firms have little or no discretion as to how the information is described. This tends to be used only when the information is relevant

to all customers receiving it (irrespective of the specific product) and is of particular importance, such as information about consumers' legal rights.

23. Prescribing forms of wording mitigates the risk that a firm fails – either inadvertently or deliberately – to communicate key information in a clear way, for example by using legal or technical jargon. It also ensures that all customers receive the same information and so enjoy a consistent level of protection as regards the most important issues. Because firms have little or no discretion, prescribing forms of wording is not in itself burdensome for firms as compliance is comparatively simple.

24. However, all this presupposes that the form of wording prescribed is effective. In order to ensure the wording is sufficiently clear, is perceived in the way envisaged, and does not have unintended consequences, consumer research and testing may be helpful. Even if wording is clear and effective, it may become less so over time.

25. Wording which is not clear or causes customers to react negatively could potentially lead to consumer harm, and also burdens on firms due to queries and complaints. Furthermore, prescribed forms of wording may not be consistent with the rest of the firm's communication, for example in relation to the style of language used, which may reduce its effectiveness.

Prescribing form

26. The key purpose of form requirements is to increase the likelihood that customers read, understand and, where relevant, act upon the information. It also reduces the risk that firms present the prescribed content – either knowingly or inadvertently – in such a way that the key messages or certain important pieces of information do not get through to the customer or are less likely to do so.

27. Examples of this include interspersing important pieces of information with less important ones or making less important messages more prominent, thereby failing to direct the customer to the most relevant parts. These risks can be mitigated by the inclusion of prominence requirements. They may relate to the size of the text used (or use of bold or underlining) and/or to its positioning within the document. Prominence may be defined in absolute terms, for example that certain information must appear on the first page of the document, or in relative terms, for example that it must be no less prominent than other information.

28. Form requirements can also serve to break down complex and/or detailed information into more manageable sections with the aim of making the document easier to navigate and so more likely that the customer engages with it. Customer engagement, in turn, increases the chance that customers make informed decisions.

29. As with other forms of prescription, form requirements must be effective in reaching their desired objectives. If the format prescribed is not engaging, or prominence requirements fail to successfully draw key pieces of information to customers' attention, the burden on firms may outweigh the consumer protection benefits.

Level of prescription: Pre-contractual and contractual information

30. In this section, we examine the form and content requirements for pre-contractual and contractual information. We also consider modifying agreements.

Pre-contractual information

31. Providing pre-contractual information aims to:

- help customers understand the key terms of the proposed agreement
- provide an opportunity for customers to consider and reflect on the information before making a final decision
- enable customers to compare the product with others ('shop around') in order to be able to make more informed decisions about whether to conclude an agreement and which is the most suitable product for them[135]

32. Section 55 provides that regulations may require specified information to be disclosed in the prescribed manner before a regulated agreement is made.

33. This power was first exercised through the 2004 Disclosure Regulations.[136] These applied to all regulated credit and hire agreements with the exception of distance contracts (which were instead covered by the Distance Marketing Regulations[137]) and agreements secured on land. The core requirement was to disclose information very similar in form and content to that of the credit agreement itself.

34. The CCD also contains pre-contractual information requirements. These were implemented through the 2010 Disclosure Regulations.[138] There are both similarities and differences between the requirements of the 2004 and 2010 Regulations.

35. The Government decided to apply the 2010 requirements to some (but not all) types of agreement outside the scope of the CCD. It acknowledged that it might be easier and less disruptive for firms to continue to apply the 2004 Regulations to certain types of agreement, and to be able to apply the same requirements across their entire loan book.[139]

36. Firms are therefore permitted to choose which requirements to apply to the types of agreement that remain subject to the 2004 Regulations. These are non-distance credit agreements that are either secured on land, for credit over £60,260, or entered into by a customer for business purposes. Regulated hire agreements remain subject to the 2004 Regulations in all cases.

37. In accordance with the CCD, there is a 'lighter' disclosure regime in the 2010 Regulations for arranged overdrafts.[140] Different requirements also apply to distance contracts and telephone contracts. Pawn agreements are covered where the customer is either a new customer of the firm or expressly requests the information.

38. Firms have argued that having different requirements applying to different types of credit agreements is unduly complex. However, these differing requirements generally provide for exceptions from the usual requirements. For example, where an agreement is a distance contract but not made on the telephone, the pre-contractual information

135 See also recital 19 CCD: 'In order to enable consumers to make their decisions in full knowledge of the facts, they should receive adequate information, which the consumer may take away and consider, prior to the conclusion of the credit agreement, on the conditions and cost of the credit and on their obligations.'
136 Consumer Credit (Disclosure of Information) Regulations 2004, SI 2004/1481.
137 Financial Services (Distance Marketing) Regulations 2004, SI 2004/2095.
138 Consumer Credit (Disclosure of Information) Regulations 2010, SI 2010/1013.
139 Consultation on Proposals for Implementing the Consumer Credit Directive (BERR, April 2009).
140 Arranged overdrafts are referred to in the 2010 Regulations as 'authorised non-business overdraft agreements'.

can be provided immediately after the agreement has been concluded.

Required information

39. The pre-contractual information required by the two sets of regulations is very similar. The 2010 Regulations contain some additional requirements but most of these need only be included where they are applicable. Examples include notarial fees, and charges for the use of a specific payment method.

Forms of wording

40. The 2004 Regulations require several forms of wording to be included in the pre-contractual information provided to customers. They are referred to as 'statements of protection and remedies' because they seek to inform customers about their legal rights. Slightly different forms of wording apply to different types of agreement.

41. The 2010 Regulations do not prescribe any forms of wording. However, in a number of cases the relevant information must be included in the SECCI (see below). This includes information about the consequences of missing payments and rights of withdrawal and early repayment.

42. This means customers receive information about these rights under both sets of regulations. The difference is that the 2004 Regulations prescribe the precise wording which must be used whereas the 2010 Regulations do not.

43. There are also some statements of protection and remedies prescribed under the 2004 Regulations which are not covered by the 2010 Regulations. These include a statement that the customer has protections under the CCA and the agreement is unenforceable without a court order if the firm does not comply with them.

44. Customers contracting under the 2010 Regulations also have these rights but there is no requirement on firms to advise of them. Firms can, however, choose to do so in a document separate from the SECCI.

Form

45. The 2010 Regulations require firms to provide the information in the precise presentational format set out in the Standard European Consumer Credit Information form (SECCI). It must be provided 'in good time' before the agreement is made.[141] The required information must be presented in the form and order set out in the SECCI, including with the prescribed headings and sub-headings, and must be clear and easily legible. The SECCI ensures all pre-contractual credit information is presented in a consistent way, and so enables customers to compare credit offers.

46. In the case of arranged overdrafts a shorter version, the European Consumer Credit Information form (ECCI), may – but does not have to – be used. If the ECCI is not used, the required information must be disclosed in writing with all items of information equally prominent.

47. The 2004 Regulations do not require the use of a specific format but do contain form requirements which aim to ensure that the information is provided in a manner which is clear and enables the customer to understand the content. For example:

141 Exceptions to this are made for certain telephone contracts, non-telephone distance contracts, excluded pawn agreements and overdraft agreements. Separate provisions apply to these types of agreements.

- The document must have the title 'Pre-contract Information' and contain the prescribed headings.
- The required information or forms of wording may not be interspersed with any other information.
- All information must be equally prominent (with the exception of headings).
- The information must be easily legible and the text distinguishable from any background colour.

48. The 2004 Regulations do not include any requirements about the order of the information or forms of wording, meaning firms have discretion in this regard.

Contractual information

49. The Crowther Report noted that:

'An essential aspect of protection in consumer credit is the provision of basic information to the consumer as to the terms of the transaction upon which he is embarking. This entails the regulation in some measure of the form and content of the contract document and the prompt supply of a copy of it to the debtor.'[142]

50. In line with this, section 60 requires regulations to be made on the form and content of regulated credit and hire agreements.

51. The key purposes of contractual information are:

- to help customers understand the terms of the agreement, especially their rights and obligations, before consenting to be bound by them
- to prevent the customer from experiencing 'surprises' at a later date, for example due to terms and conditions of which they were not aware
- to provide customers with a document to which they can refer during the lifetime of the agreement

52. The section 60 power was exercised by means of the 1983 Agreements Regulations[143] which set out the contractual information requirements for all credit and hire agreements. They were substantially amended in 2004.[144]

53. The CCD form and content requirements were implemented through the 2010 Agreements Regulations.[145] The scope of the 2010 Agreements Regulations corresponds to that of the 2010 Disclosure Regulations.

54. A creditor may choose to apply either the 2010 or the 1983 Regulations to non-distance credit agreements that are either secured on land, for credit over £60,260, or entered into by a customer for business purposes. The same regime must be chosen as for the provision of the pre-contractual information; a creditor cannot 'mix and

142 Crowther Report, paragraph 6.5.1.
143 Consumer Credit (Agreements) Regulations 1983, SI 1983/1553.
144 Consumer Credit (Agreements) (Amendment) Regulations 2004, SI 2004/1482.
145 Consumer Credit (Agreements) Regulations 2010, SI 2010/1014.

match' for an individual agreement.[146]

Required information

55. The information required by the two sets of Agreements Regulations is very similar. As with pre-contractual information, the 2010 Regulations require some extra items of information to be provided, including how payments will be allocated, the right to receive a statement of account upon request, and the right of complaint to the Financial Ombudsman Service.

56. Conversely, the 1983 Regulations require certain information which is not required by the 2010 Regulations, for instance examples showing how much would be payable under certain early repayment scenarios.

57. Because the 2010 Regulations implement the CCD, it would not be possible to add further information requirements in respect of the types of agreement within the scope of the CCD. Changes could, however, be made in relation to the types of agreement not in the scope of the CCD, or to the 1983 Regulations.

58. It should be noted that more information is not necessarily synonymous with better information; a longer or more detailed document may not be read or understood.

Forms of wording

59. The 1983 Regulations contain a number of forms of wording. They correspond to those required at the pre-contractual stage. Some of these statements of protection and remedies apply to particular types of agreement, such as those secured on land or hire-purchase. Other forms of wording concern matters which are required information under the 2010 Regulations, most notably a warning about the consequences of missing payments.

60. Any review would need to balance the advantages of prescribing clear, simple, standardised messages against the potential benefits of allowing firms more flexibility to tailor the messages to the risks associated with different types of product and/or to the circumstances of the individual customer. It may be relevant that customers concluding agreements subject to the 2010 Regulations are likely to span all segments and to encompass more potentially vulnerable customers than those concluding agreements under the 1983 Regulations.

61. The appropriateness of the language used would also need to be considered, where possible using consumer research to inform the conclusions. It is important that the language used is clear and concise, for example when informing customers about their rights, and that everyday language is used wherever possible.

Form

62. The 1983 Regulations prescribe three sub-headings under which the contractual information must be provided[147] and the order of these sub-headings. It is within the discretion of the firm to decide on the order of the information items within each sub-heading. They also require that there is no interspersion with other information or wording, for example including explanatory notes in the body of the agreement.

146 Consultation on Proposals for Implementing the Consumer Credit Directive (BERR, April 2009); Government Response to Consultation on Proposals for Implementing the Consumer Credit Directive (BIS, December 2009).

147 The three subheadings prescribed are 'key financial information', 'other financial information' and 'key information'.

63. These form requirements were introduced in 2004[148] with the objective of making agreements clearer, more consistent and more transparent.

64. By way of contrast, the 2010 Regulations do not prescribe any sub-headings or order, and there is no ban on interspersion. Only the heading of the document is prescribed. The contractual document must contain the required information and, where applicable to the type of agreement, the relevant statements of protection and remedies. The content must be presented in a clear and concise manner, be easily legible and in a colour readily distinguishable from the background.

65. There are very similar requirements on prominence in both sets of regulations. For example, the heading of each form of wording must be shown more prominently than any other lettering in that form of wording[149] and given no less prominence than any other information in the document (except the overall heading of the document, names of the parties to the agreement and trade names).

66. In principle, sub-headings may aid navigation, signpost customers to particularly important information, and help to break down the document into more manageable sections. Whether these aims are reached will depend on the effectiveness of the requirements.

67. Stakeholders argue that detailed form requirements make it more difficult for firms to provide information which is tailored to the needs of the customer, and may discourage the development of new, more creative ways of communicating contractual information that aim to increase customer engagement. Firms are not prevented, however, from using 'smarter communications' such as videos and interactive tools, as a supplement to more traditional documentation.

68. A more flexible approach would give firms discretion to tailor the document to the type of product and/or customer. On the other hand, the document may be more difficult to understand, for example because important messages are 'hidden away'.

Modification of agreements

69. Section 82(1) provides that where a firm wishes to make use of a clause in the credit or hire agreement to vary that agreement, the customer must be informed of the details of the variation before it can take effect.[150] Where the agreement is varied or supplemented, this gives rise to a modifying agreement under section 82(2) which is deemed to replace the original agreement. A modifying agreement requires the express consent of the debtor or hirer.

70. The form and content requirements for modifying agreements are set out in the Disclosure Regulations 2004 and 2010, and Agreements Regulations 1983 and 2010.

71. A modifying agreement must clearly identify the aspects of the original agreement which are being modified, and that the other aspects remain unchanged. In broad terms, the same information must be provided about the changes, and in the same form, as would be required under a new agreement.

72. The 1983 Regulations require the same forms of wording to be included in modifying

148 Consumer Credit (Agreements) (Amendment) Regulations 2004, SI 2004/1482.

149 This can be done by any appropriate means, including by using capital letters, underlining, larger or bold print.

150 See also Annex 5. Interest rate variations are covered by section 78A.

agreements as are required in new agreements with regard to the consequences of missing payments, consumer rights under the CCA, and the availability of further information on these rights from consumer organisations. These are not prescribed by the 2010 Regulations.

73. The 1983 Regulations require that both parties sign the modifying agreement. By way of contrast, modifying agreements within the scope of the 2010 Regulations need the signature of only the customer. Where the agreement is for an arranged overdraft, no signature is required.

74. Industry representatives have argued that, in practice, many modifying agreements are the result of discussions with the customer about setting up a repayment plan. In such circumstances, it may be important to be able to conclude the agreement quickly, given that the customer may be in a financially vulnerable situation. Customers may be unlikely to take notice of information or wording that repeat what was in the original agreement. The requirement for both parties to sign the modified agreement may slow down the process of making changes that help the customer.

75. There is also a risk that more onerous requirements in relation to the conclusion of modifying agreements may act as an incentive for firms to make changes on a more informal basis, for example when exercising unilateral forbearance in setting up repayment plans, without documenting them as modifying agreements. This leaves the customer without the legal protection provided by contract law or the CCA. As unilateral forbearance does not bind the firm, there is a risk for the customer that the firm may revert at any time to the terms of the contractual agreement.

Two regimes

76. The above sections on pre-contractual and contractual information have highlighted how the UK approach to CCD implementation has resulted in the creation of two information regimes. One implements the CCD, and extends that regime to most other credit agreements, while the other is the remainder of the earlier UK regime.

77. In this section, we consider two other aspects of contractual information which further highlight the differences between the two regimes.

Copy agreements

78. Sections 61A, 61B, 62 and 63 require the firm to provide the customer with a copy of the final credit or hire agreement. Which provision is applicable depends on a number of factors, including the type of agreement and whether the agreement will become executed upon its signature by both parties. If these provisions are not complied with, the agreement is not properly executed and cannot be enforced against the customer without a court order.

79. Section 62 requires firms to provide a copy of the unexecuted agreement, and section 63 a copy of the executed agreement. In contrast, the CCD requires that all parties to the agreement receive a copy of the final agreement.

80. As part of CCD implementation, the Government added a new section 61A, which applies to all credit agreements except those which are cancellable, for an arranged overdraft, for credit over £60,260, for business purposes or secured on land. It also inserted a new section 61B for arranged overdrafts. Sections 62 and 63 continue to

apply to other types of regulated agreement.[151]

81. In this way, sections 61A and 61B have been created as part of a second, CCD-compliant regime; the pre-CCD regime has been retained for a comparatively small number of other types of regulated agreement.

82. Stakeholders have argued that the differing scope and requirements give rise to undue complexity, and that there should be a single regime applying to all credit and hire agreements. The provisions aim to balance the need to ensure the customer receives a copy of the agreement with the need to avoid overburdening firms by requiring them to provide several copies of the same agreement.

Cancellation rights

83. Credit agreements for over £60,260 and hire agreements are not within the scope of section 66A (right of withdrawal). Where they are signed off trade premises following oral representations, they remain cancellable under section 67. This is a further way in which two regimes have been created.

84. Firms are required to inform customers of their right of withdrawal or right to cancel. Information about the right of withdrawal is required as part of the content requirements of the 2010 Agreements Regulations. The requirement to inform customers of the right to cancel is a separate requirement set out in section 64. The form and content of the notice is prescribed in the Cancellation Notices Regulations.[152]

85. This notice of cancellation rights (or 'cancellation notice') must be included in every copy agreement provided under sections 62 and 63 and, in some instances, must also be sent to the customer within seven days of the conclusion of the agreement. Where it is not presented personally but instead sent to the customer, a Cancellation Form must be provided for which a form of wording is prescribed. The aim is to make it as simple as possible for the customer to exercise the right to cancel.

86. The cancellation notice included in a copy of the agreement must be contained in a box; no other text other than the prescribed form of wording may appear in this box. This is to ensure that it is drawn to the customer's attention in a prominent manner.

87. Some stakeholders have argued that the detailed requirements around the right to cancel are outdated and no longer proportionate to the level of protection required. In 1983, a right to cancel or withdraw from any kind of contract was still a relatively new concept, and so it was necessary to bring the right to cancel to customers' attention in a prominent manner. Since then, rights of withdrawal, cancellation rights and 'cooling off periods' have become commonplace, which arguably makes it less important to take additional measures to highlight them to customers.

Complexity of two regimes

88. Industry stakeholders have argued that the form and content requirements for pre-contractual and contractual information are particularly complex, which makes compliance burdensome for firms. This is due in particular to:

- the existence of both a 'CCD regime' and a 'pre-CCD regime'

151 Section 61A will apply instead if the creditor chooses to apply the 2010 Regulations to a credit agreement for over £60,260, for business purposes or secured on land.

152 Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983, SI 1983/1557.

- complexity within each regime, for example differing requirements for different types of agreement
- some types of agreement do not fall squarely within one regime
- overlaps with other legislation, for example on distance or off-premises contracts

89. However, we note that firms may opt to apply the CCD regime to many agreements falling within the scope of the pre-CCD regime.[153] For this reason, the extent to which the existence of two regimes is burdensome may, at least in part, be related to the choices an individual firm makes in this regard. It is possible that, in practice, most firms choose to operate under the CCD regime to ensure a common process.

Level of prescription: Post-contractual information

90. In this section, we consider the level of prescription in relation to the form and content of statements of account and notices.

Statements of account

91. A number of CCA provisions require the creditor or owner to provide the customer with a statement of account, either periodically or at the customer's request.[154] The table below summarises the relevant requirements.[155]

CCA provision	Applicability	What	When
s77	Fixed-sum credit	statement of account	upon request
s78(1)	Running-account credit	statement of account	upon request
s79	Hire	statement of account	upon request
s97	fixed-sum and running-account credit	statement showing amount required to discharge the debt ('settlement statement')	upon request
s77A	fixed-sum credit	statement of account	at least annually
s78(4)	running-account credit	statement of account	at least annually (typically monthly)

92. The overarching purpose of statements of account is to ensure transparency for customers about the state of the account at a particular point in time. This helps the customer understand the state of their finances, how much interest and other charges they are paying and, as a result of the information, to make good decisions.

Periodic statements

93. In respect of running-account credit agreements, section 78(4) requires firms to send customers a periodic statement of account containing certain prescribed information. The form and content requirements are contained in the Running-Account Credit

153 The main exception to this is hire agreements, which must be concluded under the pre-CCD regime.

154 The requirements in section 77B (statements upon request for certain types of fixed-sum credit agreements) and section 97A (statements upon request where debt has been partially repaid) are not included in this analysis as they derive from the CCD and cannot be usefully reviewed while the UK remains subject to EU law.

155 Additional statement requirements exist in relation to sureties in sections 107 (fixed-sum credit agreements), 108 (running-account credit agreements) and 109 (hire agreements).

Regulations[156] and the 2007 Information Requirements Regulations.[157]

94. Periodic statements are intended to help customers understand their financial position by being made aware, at regular intervals, of how much they owe, how much interest and other charges they are paying, and the potential consequences of failing to keep up with repayments.

95. The Government concluded in 2003 that there was insufficient transparency for customers about the state of their credit accounts. It was concerned that customers did not always have regular oversight of their borrowing, which could lead to financial difficulties due to a lack of informed decision-making.[158] As a result, section 77A was added in 2006 which requires firms to provide periodic statements for fixed-sum credit agreements. The form and content requirements are set out in the 2007 Regulations.

Required information

96. For both fixed-sum and running-account agreements, the required information focuses on the period concerned, the balance at the start and end of the period, money in and out (dates and amounts) and interest (the amount payable and how it has been calculated). This is described in the DTI's Explanatory Memorandum to the 2007 Regulations as 'a summary of everything that has happened on the account during the period of the statement' in order that customers 'are kept aware of the state of their account on a regular basis, allowing them to make more informed decisions and be aware of any problems as they arise'.[159]

97. In the case of running-account credit, the 2007 Regulations added a requirement to provide information in the statement about the order or proportions in which payments are allocated towards the discharge of sums owing. This is intended to aid customers' understanding of how they are being charged interest when they do not pay off the full balance.[160]

98. Any review would need to consider the extent to which the required information contributes to customers' understanding of the activity on their accounts, and whether there may be ways of achieving the stated objectives which are less burdensome for firms, for example by imposing less detailed requirements.

Forms of wording

99. The forms of wording which must be included in fixed-sum and running-account statements are prescribed by the 2007 Regulations. They are primarily concerned with providing information and warnings about repayments and the consequences of late payment, and informing customers of their legal rights, most notably the right to take a complaint to the Financial Ombudsman Service.

100. Any review should consider whether amendments might enhance customers' understanding or make the language more accessible. For example, an option might be to consider the possibility of requiring warnings and statements of rights but without prescribing the precise wording.

156 Consumer Credit (Running-Account Credit information) Regulations 1983, SI 1983/1570.

157 Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007, SI 2007/1167.

158 Explanatory Memorandum to the Consumer Credit (Exempt Agreements) Order 2007, 2007 No 1168, and the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007, 2007 No 1167.

159 Ditto. [Explanatory Memorandum]

160 The UK Cards Association (now part of UK Finance) has published best practice guidelines on credit card statement summary boxes. The credit card industry has committed to include these summary boxes on all monthly statements to remind customers of the key features of their credit card and to make it easier for them to compare products.

Form

101. Statements for both fixed-sum and running-account agreements are required to be easily legible and of a colour readily distinguishable from the background. The information and forms of wording must be no less prominent than any other information or wording contained in the document.

102. There are also bans on interspersing specific items of information, for example in relation to wording about allocation of payments in statements under section 78(4). There are exceptions to prominence requirements to allow a firm to use its corporate identity, for example name and logo in the usual format, size and colour.

Statements upon request

103. Sections 77, 78 and 79 require a creditor/owner to provide a statement of account if requested to do so in writing by the debtor/hirer. Under the Prescribed Periods Regulations[161] the firm must provide the statement within 12 working days of receiving the request. The provisions enable customers to gain access to information about the state of their account, including any outstanding and future payments.

104. There are no prescribed forms of wording and no form requirements. A firm is not required to respond to a request made by a customer within one month of having complied with a previous request for a statement. This protects firms from repeated requests which may go beyond what is considered reasonable. The request must be made in writing and accompanied by a £1 payment.

105. It has been suggested that the requirement for a written request is outdated and unnecessary, especially given that a request for a settlement statement under section 97 need only be in writing if the agreement is secured on land. In addition, the £1 fee may not cover the costs to a firm of producing and sending the requested statement. On the other hand, it is arguable that a customer should be able to request and receive a statement free of charge.

106. Statements of account provided upon request must be signed by the creditor/owner or on their behalf. This is intended to act as confirmation of authenticity and to indicate the intention of the firm to be bound by the information contained in the statement (section 172 provides that such statements are binding on a firm).

107. On the other hand, it may be questioned whether the signature requirement continues to protect or reassure the customer in the way it may have done in the past. Many customers are used to receiving printed documents from firms that are not signed or even provided in paper format. Where a signature is included (usually photocopied or scanned) it may no longer be enough to satisfy the customer that the document is authentic, especially given the sophisticated methods of fraudsters.

Settlement statement upon request

108. Section 97 requires a creditor to provide a specific type of statement of account at the request of the debtor. This must indicate how much remains to be paid in order to discharge the remaining debt under the credit agreement. It is sometimes known as a settlement statement. The Settlement Information Regulations[162] require the statement to be provided within seven working days of the creditor receiving the request. The request need only be in writing if the agreement is secured on land.

161 Consumer Credit (Prescribed Periods for Giving Information) Regulations 1983, SI 1983/1569.

162 Consumer Credit (Settlement Information) Regulations 1983, SI 1983/1564.

109. The statement must include prescribed information setting out how the settlement amount has been arrived at, including any early settlement rebate, how it was calculated, the settlement date and any additional compensation. This information is intended to enable customers to take an informed decision about whether to settle early. There are no prescribed forms of wording or form requirements.

110. As with statements on request provided under sections 77, 78 and 79, the creditor does not have to respond to a request made within one month of having complied with a previous request. In contrast to sections 77, 78 and 79, however, the creditor is not required to sign a settlement statement.

111. In the case of running-account credit agreements, the debtor's request for an early settlement quote may be met by referring to a periodic statement provided under section 78(4) within one month of receiving the request. This avoids duplication.

Notices

112. The CCA requires firms to give notice to debtors and hirers in a number of situations which are not part of the standard course of the agreement and which are not usually foreseen at the time of concluding the agreement.

113. Notices fulfil the important function of advising the customer that an unexpected event has occurred which may require the customer to take action, or warning that the firm intends to take action and giving the customer opportunity to respond. This means that the consequences of a customer not engaging with, not understanding and/or not acting upon notices can be far-reaching. There is also greater potential for customers, in particular vulnerable ones, to suffer harm.

114. The different types of notice are summarised in the table below:

CCA provision	Type of notice	Summary of requirement	Breach by customer?
s76	Enforcement notices	Firm must give customer at least 7 days' notice before enforcing a term of the agreement, for example by demanding earlier payment or recovering possession of goods.	No
s98	Termination notices	Firm must give customer at least 7 days' notice before terminating agreement.	No
ss87/88	Default notices	Firm must serve notice on customer before becoming entitled by reason of the breach to take actions such as terminating the agreement or demanding earlier payment.	Yes
s86B	Arrears notices (fixed-sum credit)	Creditor must give notice to debtor when debtor's arrears have reached a specified level (usually 2 months).	Yes
s86C	Arrears notices (running-account credit)	Creditor must give notice to debtor when debtor has missed 2 consecutive minimum repayments.	Yes
s86E	Default sum notices	Firm must give notice to customer when a default sum has become payable under the agreement.	Yes

Enforcement notices, termination notices and default notices

115. Enforcement (section 76) and termination (section 98) are not the result of a breach by the customer but rather are triggered unilaterally by the firm. These provisions apply only to credit and hire agreements which have a specified period. The requirement to

provide customers with at least seven days' notice before the firm is entitled to enforce or terminate the agreement is an important consumer protection. In particular, it prevents a firm from 'surprising' the customer with an immediate request for earlier payment of the entire remaining balance of the debt.

116. Where the customer is in breach, the firm is required under sections 87 and 88 to provide at least 14 days' notice before it becomes entitled to take action by reason of the breach. The key purpose of default notices is to ensure that the customer is aware of the alleged breach and has the opportunity to remedy it and so to prevent the firm from taking further action.

117. The form and content of all three types of notices are detailed in the Enforcement, Default and Termination Notices Regulations.[163]

Required information

118. The information which firms are required to include in each type of notice includes the information that notice is being served under the relevant provision of the CCA as well as a clear and unambiguous statement indicating the action the firm intends to take, how, and when it intends to do so.

119. As default notices offer the customer an opportunity to remedy the breach, they must also include information about the action required by the customer or the sum that must be paid, together with a deadline. The FCA default information sheet must accompany the notice.[164]

120. Any review of the required information would need to consider how each prescribed information item contributes to protecting customers, and whether amendments might increase this protection and/or reduce the burden on firms. This might include, for example, whether firms should have more flexibility regarding the inclusion of certain items of information, to allow for notices which are shorter and more targeted at the circumstances of the individual customer. However, the potential benefits would need to be balanced against the risk of potentially depriving customers of important information.

121. It has been suggested that it might be sufficient to require a statement that the firm is legally required to provide the notice, rather than also specifying the CCA section under which the notice is being served, which can be perceived as rather technical. This was the approach taken to sections 86B, 86C and 86E.[165]

Forms of wording

122. Three forms of wording are prescribed for use in all three types of notice:

- The first seeks to encourage the customer to engage with the content of the notice by stating it is important and should be read carefully.
- The second suggests further sources of help and advice.
- The third advises the customer of a legal right of which they may not otherwise be aware, namely the right to apply to court for a time order.

163 Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983, SI 1983/1561.

164 The FCA default information sheet contains high-level advice as well as contact details of organisations that can provide further help – www.fca.org.uk/firms/information-sheets-consumer-credit

165 Consumer Credit Act 2006: Response to Consultation on draft statutory instruments: exemptions, post-contract information, licensing (BERR, March 2007).

123. These forms of wording aim to protect customers. However, it could be considered whether simple information requirements might also be sufficient to achieve this purpose rather than prescribing forms of wording. If forms of wording are to be retained, they could be reviewed with the aim of making them more readily comprehensible and encouraging greater customer engagement.

124. Some additional forms of wording are prescribed for default notices, where applicable. They aim to ensure that customers are aware of their rights, for example by encouraging them to read the FCA default information sheet included with the notice. Where action is needed to remedy the breach or to pay compensation, they inform the customer of the consequences of taking this action or failing to do so.

Form

125. The form requirements are the same for the three types of notice:

- easily legible and of a colour readily distinguishable from the background
- provided in writing and in paper format
- the information about the firm's proposed action must be clear and unambiguous
- the forms of wording prescribed must be given more prominence than the rest of the content

126. In addition, some of the forms of wording prescribed for default notices must come directly after the corresponding required information. Presenting content on a single topic together may enhance the readability of the notice.

127. We consider the paper format requirement below. The provision of clear, unambiguous and easily legible information is unlikely to be more onerous than CONC 3.3.1R(1) which requires information to be communicated to customers in a way which is clear, fair and not misleading.

Arrears notices and default sum notices

128. Notices of sums in arrears (also known as 'NOSIAs' or 'arrears notices') and notices of default sums (or 'default sum notices') are triggered by a breach of the agreement by the customer. The triggers for and timeframes within which a firm must provide a notice to a customer differ and, in the case of arrears notices, also depend on whether the agreement is for fixed-sum credit (or hire) or running-account credit.[166]

166 We consider the triggers separately below.

129. The table below summarises the requirements.

CCA section	Type of notice	Applicability	Summary of requirement	When to be provided
section 86B	Arrears notice	Fixed-sum credit, hire agreements	Firm must give a first arrears notice to customer when the arrears amount to at least the sum of the last two payments that were due.[166] Firm must give further arrears notices to customer at least every 6 months if the arrears continue.	Within 14 days of the conditions being met.
section 86C	Arrears notice	Running-account credit agreements	Creditor must give an arrears notice to debtor each time two consecutive payments have been missed.	By the end of the next statement period.
section 86E	Default sum notice	Fixed-sum and running-account credit, hire agreements	Firm must provide a default sum notice to customer when a default sum has become payable under the agreement.	Within 35 days of the default sum becoming payable.

130. These three provisions were inserted into the CCA by the 2006 Act and aim to ensure that customers are aware that they have breached the credit or hire agreement. The Government's rationale was that it is 'important borrowers are alerted when problems arise, [...] so that they can deal with the problem' before it escalates and potentially becomes unmanageable.[168] This is a strong consumer protection rationale which seeks to help prevent customers from becoming over-indebted or otherwise incurring financial distress, by acting early to resolve payment difficulties.

131. The 2007 Regulations[169] prescribe the form and content of these types of notices. Firms, industry trade bodies and representatives of the legal profession have suggested that there is an imbalance between the burden these information requirements impose on firms and the benefits to customers. While acknowledging the important consumer protection role played by the notices, these stakeholders do not believe the notices are fulfilling their purpose. They consider that the content requirements are too prescriptive and result in long notices which are too convoluted for customers to be able to discern the key messages.

Required information

132. Firms are required to include the same core information in all three of these types of notice. These include a statement that the notice is being served under the CCA and the reason for it, for example because the customer is behind with sums owed, and words to encourage the customer to discuss the account with the firm.

133. There are also requirements specific to each type of notice. These relate mainly to the particulars of the sums owing, for example the amount, nature and date of the outstanding payments. Under section 86B, there are differing requirements for the first notice and further notices.

167 Where the payments are made weekly or more frequently, it is the sum of the last four payments.

168 See footnote 158 above. [Explanatory Memorandum]

169 SI 2007/1167.

134. The Government's intention was to ensure a proportionate approach to arrears and default sum notices by minimising the burden on firms and preventing potentially long and repetitive communications to customers. For these reasons:

- If the total amount the customer has failed to pay over the last two payments is £2 or less, only a 'light' arrears notice under section 86C is required.
- Notices provided under sections 86C or 86E may be incorporated into another notice or statement under the CCA, and information need not be duplicated.
- Where agreed with the customer, notices under section 86B may relate to more than one agreement (aggregation).

Forms of wording

135. The forms of wording applicable to these notices depends on the type of notice and certain features of the agreement. They focus less on advising customers of their rights and more on providing additional information to aid the customer's understanding. Examples include:

- A statement that the missed payments mentioned in the notice may give rise to default sums and interest.
- A statement that the notice does not include information about missed payments or default sums which have been notified to the customer in earlier notices.

136. On the one hand, these may be helpful clarifications for customers. On the other, it has been suggested it may be sufficient to require firms to provide information about these topics, where relevant, but without prescribing forms of wording.

137. It is also argued that the language and tone may not always be in line with that used in firms' communications, and that the requirements may constrain firms in ways which may not be in the interests of the customer.

Form

138. The regulations require that arrears and default sum notices are easily legible, of a colour readily distinguishable from the background, and written in plain, intelligible language.

139. The information and forms of wording must be no less prominent than any other information or wording contained in the document (other than headings, the date of the notice and the names/logos of the parties). This protects customers against firms relegating certain pieces of information to the 'small print'.

140. Any review of these requirements would need to weigh this protection against the risk that longer notices may appear impenetrable if the content is mostly of similar appearance. This may discourage customers from engaging with the content. It might aid customers' understanding of the content if firms had the flexibility to give certain pieces of information greater prominence.

Updating and modernising

141. In this section, we consider four CCA provisions where stakeholders have argued that the current provisions may not be working well for either customers or firms, and should be considered for updating and modernising. The issues with these provisions are mainly linked to developments in communication methods and the different channels used by the parties to an agreement to communicate with one another.

Signing agreements

142. Under section 61, a credit or hire agreement must be signed by both the customer and the firm in order to be properly executed. We examine below the relevance and appropriateness of this requirement in both traditional and electronic contexts.

Requirement to sign agreement

143. Section 61(1)(a) provides that an agreement must be signed 'in the prescribed manner both by the debtor or hirer and by or on behalf of the creditor or owner'. The 'prescribed manner' is detailed in the 1983 and 2010 Agreements Regulations. Failure to comply with the signature requirements means the agreement has been improperly executed and so is enforceable by the firm only with a court order. Arranged overdraft agreements are excluded from the signature requirement.

144. When implementing the CCD, the Government chose to maintain the signature requirement on the grounds that it provides customers with certainty as to what they have agreed to.[170] The signature requirements are therefore applicable to all regulated credit and hire agreements:

- The document must include designated spaces for the debtor's/hirer's signature (referred to as a 'signature box') and the date of that signature.
- The document must also be signed and dated by the creditor/owner (or by a person on their behalf) but no designated spaces are required.

145. The 2010 Agreements Regulations differ from the 1983 Regulations in that they do not prescribe the form of the signature box or its location within the document.

146. The requirement that both parties provide a signature fulfils the function of providing customers and firms with legal certainty that an agreement has been concluded. This protection is particularly important for a customer who may not otherwise be sure when the agreement has been formalised and with what content.

147. It may be possible to create certainty by other means, for example with an exchange of emails in which both parties express their intention to enter into the agreement.

148. Requiring the customer to physically sign a document may be argued to focus their attention on the fact they are about to enter into a legally binding agreement with potential legal and financial consequences. This may increase the likelihood that the customer reads the document and/or asks any questions before signing it.

149. From a firm's perspective, not having a customer signature on the agreement may increase the risk of fraud which, in turn, may need to be mitigated by additional means of verifying the customer's identity.

170 Consultation on Proposals for Implementing the Consumer Credit Directive (BERR, April 2009).

150. On the other hand, it may be argued that requiring signatures from both parties means that it takes longer to conclude an agreement. This is especially the case where a traditional 'wet' signature is the sole means of signature accepted by the firm. A delay as a result of formalities such as signatures may mean that the customer will have to wait longer to gain access to the credit.

151. Contracts for other types of retail financial services, for example bank accounts, mortgages and general insurance, are not subject to a signature requirement, though firms may request the customer's signature.

152. It has been argued that a signature requirement is an inflexible and outdated concept which is no longer appropriate in the modern digital economy. According to this view, it may stifle innovation and the development of new types and forms of credit and hire.

153. A middle way might be to require only the debtor/hirer to sign the agreement. This would ensure that consumer protection is maintained though it would not provide legal certainty that the firm also intended to enter into the agreement. An alternative might be to apply the signature requirement to only some types of agreement or only to agreements for more than a certain sum and/or of a specified minimum duration. This could, however, have unintended consequences, such as firms changing their product offerings to avoid the signature requirement.

Use of electronic signatures

154. The 2004 Electronic Communications Order[171] amended the CCA and regulations to permit the use of electronic communications. However, it did not clarify what constitutes a valid electronic signature.

155. This was considered by the High Court in 2014 in the case of Bassano v Toft & Ors.[172] The court confirmed that agreements under the CCA can be validly concluded with an electronic signature, and that the signature may be executed by the name of the person being typed in an electronic communication, such as an email. It can also be constituted by clicking on a button which communicates agreement to be bound by the document, for example a button containing the words 'I accept'. The button must be in the space in the document designated for the customer's signature.

156. However, some industry stakeholders have suggested that there remain challenges around the use of electronic signatures, and would like more clarity and certainty. There is also a risk that customers do not understand that providing their electronic signature is equivalent to signing a paper document, especially when the signature consists of clicking on a button or ticking a box. This may result in customers concluding agreements without intending to do so.[173]

157. Electronic signatures may also make it more difficult for firms to be sure with whom they are contracting. It may be necessary to take extra measures to verify the customer's identity, which could place a greater burden on both the firm and the customer. However, it can be argued that the burden is no greater than that associated with concluding an agreement by any distance means. Furthermore, any additional burden or risks may be outweighed by the benefits to both parties of being able to conclude an agreement online, for example convenience.

171 Consumer Credit Act 1974 (Electronic Communications) Order 2004, SI 2004/3236.

172 [2014] EWHC 377 (QB).

173 The Law Commission is currently undertaking a project which seeks to address any uncertainty as to the formalities around the electronic execution of documents more generally – www.lawcom.gov.uk/project/electronic-execution-of-documents/

158. One option might be to define minimum requirements for an electronic signature in relation to credit and hire agreements, for example in relation to the process for signature. However, this would need to take account of relevant EU law, including the EU Regulation on electronic identification and trust services.[174]

Service of documents

159. Section 176 defines when a document may be deemed to have been properly served on or given to a subject. It is a provision relevant to all other information requirements in the CCA. The sender can deliver or send the document by an appropriate method, or address the document to the subject by name and leave it at their 'proper address'. This is defined as the address last known to the sender.

160. This requirement gives rise to a key concern for industry stakeholders in relation to several CCA provisions, in particular the requirements to send arrears notices under sections 86B and 86C and statements of account under section 77A. This is because even when the firm knows that the customer no longer resides at the last known address (often referred to as a 'gone-away') the document must nevertheless be sent for the firm to comply with the information requirements. This can be problematic for a number of reasons:

- Customer confusion and distress: The occupier of a property may become distressed when repeatedly receiving documents intended for a previous occupant, for example where relationship breakdown is the cause or requests have been made to the firm to cease sending the documents.
- Fraud and data protection risks: Because statements and notices contain detailed information about customers and their financial transactions and financial situation, there is a risk that they may be used by fraudsters to steal personal data or perform fraudulent transactions.
- Burden on firms: Credit providers not only send out the documents but also need to deal with queries and complaints, for example from the occupiers receiving them, and losses from fraudulent use of the information.
- Policy intent: Complying with the CCA information requirements where the customer is a 'gone-away' does not actually result in the customer receiving the information, so fails to provide them with the consumer protection intended.

161. Corresponding issues exist where the customer has entered into a statutory insolvency arrangement, such as an Individual Voluntary Arrangement (IVA) or Debt Relief Order (DRO). Statements and notices may be inconsistent with the specific arrangements due to having been prepared in line with the original agreement. This can cause distress and confusion as the customer is unlikely to be expecting to receive such correspondence during the period of the arrangement.

162. In principle, these issues also exist in relation to other retail financial services. However, the impact on customers and firms is different in these contexts:

- In a retail banking context, the customer has usually deposited money with the firm. This means that the customer has a financial incentive to ensure their contact

174 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

details are up-to-date. The need for the firm to re-establish contact is also less urgent than where the customer has borrowed money.

- Where general insurance contracts are concerned, issues with a customer whose address is no longer current and cannot be contacted by other means are primarily contractual issues. A contract can simply be cancelled by the provider.

- A key difference between mortgages and consumer credit is the CCA sanctions for non-compliance. Some firms may prefer to send out documents they know or suspect will not reach the intended recipient because if they fail to do so, the underlying agreement will be unenforceable and they will not be entitled to charge interest or default sums in respect of the period of non-compliance.

163. The issue of 'gone-aways' was considered by BIS/HMT in 2010[175] but this did not lead to legislative change. Options considered included removing the requirement to send statements and notices in certain circumstances, subject to appropriate safeguards, or allowing for an abbreviated document which does not contain sensitive personal or financial information, to mitigate fraud and data protection risks.

Electronic transmission of documents – section 176A

164. Section 176A was added by the 2004 Electronic Communications Order.[176] It provides that a document can be deemed to have been transmitted electronically where:

- the recipient agrees that the document may be delivered by transmitting it to a particular electronic address in a particular electronic form

- the document is transmitted to the agreed address in the agreed form, and

- it is possible to store the information for future reference, for an appropriate period, in a way which allows it to be reproduced without charge

165. A number of respondents to the Call for Input suggested that the requirements about the form of the document and obtaining the customer's consent may need updating. We consider these two aspects of the definition below.

Consent of customer

166. Section 176A(1)(a) requires that a customer agrees before documents may be sent to them electronically by the firm. In the FCA's view this requires express consent; it cannot be implied or inferred by the firm. This is particularly important for customers who do not have ready access to the internet or who may lack the skills and/or confidence to communicate electronically.

167. Industry stakeholders have commented that the consent requirement does not reflect the realities of modern communications and is burdensome. They argue:

- It has the effect of making paper communications the default option, which is old-fashioned and costly for firms.

- The process around gaining consent is burdensome for firms and time-consuming for both parties.

175 Consumer credit and personal insolvency review: summary of responses on consumer credit and formal response on personal insolvency (BIS/HMT, July 2011).

176 SI 2004/3236.

- It makes it more difficult for firms to meet customer needs and preferences.
- Some customers may not understand that the need to opt in to electronic communications is a legal requirement and so submit complaints to firms about the process; this places a further burden on firms.

168. However, section 176A appears consistent with the approach in the Payment Services Regulations 2017 (PSRs). These provide that a framework contract may include a condition that the customer may require the information to be provided 'in an agreed manner'.[177] We clarify this in our guidance on the PSRs:

169. 'It is our view that this means that the contract may provide for the customer to choose to receive information in an alternative manner, but that the customer cannot exercise this option simply by agreeing to the terms and conditions. A separate agreement to the alternative provision of the information will need to be actively made by the customer. Without this, the PSP will need to provide the information at least once a month on paper or another durable medium.'[178]

170. The mortgage regime takes a different approach to electronic communications. MCOB 2.7.2G(2) states that a firm should 'be able to demonstrate that the customer wishes to communicate using this medium'. This may require something less than the consent in section 176A and the PSRs.

Form of document

171. Section 176A(1)(c) provides that to be deemed to have been transmitted electronically:

172. 'the form in which the document is transmitted [must be] such that any information in the document which is addressed to the person to whom the document is transmitted is capable of being stored for future reference for an appropriate period in a way which allows the information to be reproduced without change'.

173. Where the form of electronic documents is referenced in the mortgage and insurance regimes, for example in MCOB 3B.1 and ICOBS 4.1A, the term 'durable medium' is used. This term is also used in regulation 2(1) of the PSRs:

> ''Durable medium' means any instrument which enables the payment service user to store information addressed personally to them in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored'.[179]

174. Some stakeholders have expressed concern that it is not clear whether and how the two definitions differ. They argue that both appear to have substantially the same content yet it is unclear why the term 'durable medium' was not used when section 176A was added in 2006.[180] Both EU case law and FCA guidance now exist in relation to 'durable medium' meaning that it may offer a greater degree of legal certainty.

Notices in paper form

177 Payment Services Regulations 2017 (SI 2017/752), regulation 53.

178 Payment Services and Electronic Money – Our Approach: The FCA's role under the Payment Services Regulations 2017 and the Electronic Money Regulations 2011 (July 2018 (version 2)) paragraph 8.103.

179 Ditto, paragraph 8.74.

180 The concept of 'durable medium' was introduced in by the EU in 1997 by the Distance Selling Directive 97/7/EC. For more on the origin of the term, see the FCA page on durable medium at: www.fca.org.uk/firms/durable-medium

175. The Electronic Communications Order allows firms to send statements and notices by electronic means but an exception was included for enforcement, default and termination notices. These 'shall be in writing and given to the debtor or hirer in paper form'.[181] This does not preclude the possibility of sending these notices electronically but this must be in addition to, not in place of, a paper version.

176. The rationale for this exception was that enforcement or termination can have a significant impact on the rights of the customer. The Government also considered that default is often the result of financial hardship which makes paper communication 'an essential safeguard'. In addition, it noted that customers in financial difficulties may no longer have access to the necessary equipment or network to enable them to communicate electronically.[182]

177. Some stakeholders have expressed the view that the paper form requirement is outdated given the widespread use of electronic communications and customer preferences in this regard. In the last decade, there has been a marked increase in the number of consumers using electronic channels such as online banking and mobile apps. This has been accompanied by a shift in customer preferences, with an increasing number choosing to receive communications electronically.

178. The use of smartphones and mobile apps may also mean that most people experiencing financial difficulties will continue to have access to email, internet and mobile apps. Some consumer segments may be more likely to be contactable electronically than by post, as an increasing number of consumers have unstable and unpredictable housing arrangements. For these customers, sending notices by post may not be a helpful safeguard.

179. However, customers may be more likely to take note of a notice arriving by post than an email or text message. In addition, some customers may check their email accounts only irregularly or may not realise that a particular communication is important given the volume of emails typically received by consumers.

180. Electronic communications are not a realistic option for some customers. This may be because they do not have or wish to have (regular) access to the internet or because they choose to conduct their financial affairs by more traditional or face-to-face means, perhaps due to a lack of confidence or concerns around data protection and fraud. For these customers, some of whom may be vulnerable, the requirement to provide certain notices in paper format may still be a helpful safeguard.

Other specific issues

181. In this section, we consider issues specific to certain CCA provisions which do not fall within the sub-themes explored in previous sections.

Copy agreements on request

182. Sections 77, 78 and 79 require the firm to give the customer a copy of the executed credit or hire agreement (and any document referred to in it) upon the customer submitting a written request and paying £1. The sanction for failing to comply is that

181 Consumer Credit (Enforcement, Default and Termination Notices) (Amendment) Regulations 2004, SI 2004/3237.

182 Explanatory Memorandum to the Consumer Credit (Enforcement, Default and Termination Notices) (Amendment) Regulations 2004, 2004 No 3237.

the firm is not entitled to enforce the agreement for the duration of the breach.

183. The form and content requirements for copy documents are set out in the 1983 Cancellation Notices and Copies of Documents Regulations.[183]

184. The copy agreement must be a 'true copy' of the original. The meaning of this was clarified in the judgment of the High Court in Carey v HSBC Bank plc in 2009.[184] Key aspects of the judgment are summarised in guidance in CONC 13.

185. The purpose of the requirement to provide a copy agreement is to enable customers to check their rights and obligations under the agreement at any point during the lifetime of the agreement. The firm must provide a copy of the original agreement. If the agreement has been varied, it must also provide either a copy of the current agreement or details of all the variations that have been made. The firm can reconstitute a copy of the executed agreement from sources other than the actual signed agreement; the signature and date of the agreement may be omitted.

186. Sections 77, 78 and 79 were drafted at a time when agreements were provided in paper format only. This meant the ability of a customer to refer to the terms of the agreement was dependent on having retained the paper agreement. In contrast, many agreements are now supplied electronically and can easily be saved for future reference. However, not all customers are able or inclined to use electronic forms of communication, and may be reliant on receiving documents in paper format. This is likely to include vulnerable customers.

187. In addition, a customer may not want a copy of the original agreement. In such cases, it may meet the customer's needs for the firm to send the current agreement.

Copy agreements on issue of new credit-tokens

188. Section 85 requires a creditor to give the debtor a copy of the executed credit agreement each time a new credit-token (except the first), for example a replacement credit card, is issued. Failure to comply with this requirement makes the agreement unenforceable while the breach continues.

189. The purpose of this requirement is to remind customers of the conditions of use of the credit-token. This gives the customer a fresh opportunity to familiarise themselves with any limitations on the ways in which it may be used and any conditions attached to its use, for example fees and charges.

190. Stakeholders have questioned the relevance of this requirement, given the trend to electronic communications referred to above. In addition, they have pointed out that customers can request a copy agreement at any time under sections 77-79. There may also be uncertainty as to the scope of 'credit-token' and whether this includes electronic tokens, such as mobile apps, which tend to be re-issued much more frequently than, for example, credit cards.

191. Options might include allowing firms to offer customers the possibility of opting out of receiving a copy agreement with each new credit-token; requiring firms to advise customers with each new credit-token of their right to request a copy of the agreement; or requiring firms to inform customers with each new credit-token where they can find the conditions of use of the credit-token, for example an internet link.

183 Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983, SI 1983/1557.
184 [2009] EWHC 3417 (QB).

Enforcement notices and termination notices: notice period

192. A firm is required to give the customer at least seven days' notice of its intention to take enforcement action under section 76 or to terminate the agreement under section 98. However, section 88 requires that a firm waits at least 14 days after service of a default notice before taking any action further to the alleged breach.

193. The period for default notices was extended from seven to 14 days by the 2006 Act. The rationale was that seven days was 'not enough time for a consumer to work out what is required and respond'.[185] Unlike enforcement and termination notices, default notices are issued as a result of a breach by the customer and contain a deadline for the customer to act. They may have more serious consequences. In contrast, enforcement and termination notices are essentially for the customer's information, and no response to the firm is required.

194. Nevertheless, there may be an argument for extending the 7-day period in respect of enforcement and termination notices. This would give longer for the customer to consider what the notice means for them, and what their options are, especially where sums will shortly become payable. For example, the customer may need to make alternative arrangements. On the other hand, extending the period would mean the firm would have to wait longer to exercise its legal right to enforce a term of or terminate the agreement.

Triggers for issuing arrears notices

195. Sections 86B and 86C require a firm to give an arrears notice to the customer when the arrears have reached a specified level. For fixed-sum credit agreements, this is when the arrears equate to two missed payments.[186] A further notice must be issued within six months if the customer remains in arrears.

196. For running-account credit, the trigger is missing two consecutive payments. A further notice is triggered after the next two missed payments. A customer who repeatedly misses every second payment under a running-account agreement will, however, not receive an arrears notice.

197. Stakeholders have suggested that the timing of the notices is often not reflective of the way in which firms deal with customers in arrears. For example, a firm may already have contacted a customer about the arrears by the time the trigger point is reached. Stakeholders have therefore questioned why a formal arrears notice is needed as well.

198. Making a customer aware of a missed payment at an earlier point in time may be beneficial to both parties, for example by encouraging an open conversation about the reason for the missed payment. However, where the earlier contact has not led to a customer making up missed payments, it is unclear to what extent the arrears notice will change this. It may even cause distress to the customer.

199. On the other hand, there may be instances in which a formal notice does contribute to a change in customer behaviour, for example due to the information about further consequences which may not have been provided by the firm in earlier contacts.

200. It may be worth considering amending the requirement so that an arrears notice is only triggered if no formal notice (complying with the relevant requirements and accompanied by the FCA arrears information sheet) has been provided within a

185 Explanatory Memorandum to the Consumer Credit (Enforcement, Default and Termination Notices) (Amendment) Regulations 2006, 2006 No 3094.

186 Four missed payments where repayments are scheduled weekly or more frequently.

specified period. There may also be merit in allowing firms to vary the content of the notice where it is clear from earlier contact that the customer is unable to pay. Any such changes would, however, need to be accompanied by appropriate safeguards to ensure customers are adequately protected.

Annex 7
Sanctions: supplementary analysis

1. This Annex relates to Chapter 7 on Sanctions (including unenforceability). It provides further detail on the nature and policy rationale of the relevant provisions, and highlights issues identified with the provisions.

The Crowther Report

2. The Crowther Report noted that the legislative regime at the time was deficient in a number of respects. These included:

- an excess of technical detail in the statutes
- no consistent policy in relation to sanctions for infringement

3. On the first of these, a considerable number of statutory provisions regulating credit transactions were devoted to the formalities of contract and registration. All too often, debtors could rely on a pure technicality to defeat a just claim.

4. The report concluded that, to do justice between the parties, statutory provisions regulating the formalities of contract should:

- be limited to what is necessary for the protection of the debtor and third parties
- be sufficiently flexible to accommodate reasonable commercial requirements and allow the development of new forms of contract
- be easy to understand and comply with, and
- provide for relief from the consequences of inadvertent breaches which have not misled other parties

5. In broad terms, the provisions of the Hire-Purchase Act 1965 fulfilled these requirements in a large measure, but the Moneylenders Acts and the Bills of Sale Acts did not. In particular, a lender who made even a technical slip in a moneylending transaction was disabled from recovering any part of the loan. Such technicalities did not serve the interests of justice. Legislation should draw a distinction between breaches that are serious and breaches that are trivial, and a lender who makes a technical slip should not be so harshly treated.

6. The court had no power to grant relief against the consequences of a minor contravention of the Moneylenders Acts that had not prejudiced the borrower.

7. The Crowther Report noted that consumer credit legislation has three primary tasks:

- redress of bargaining equality

- control of trading malpractices
- regulation of remedies for default

8. On the first of these, the report commented:

> 'This is attempted by requiring the disclosure of certain essential information, both in the contract itself and in prior advertising; by prohibiting false or misleading information; by giving the credit consumer certain in-built contractual rights and limitations of liability which cannot be excluded; and by restricting contractual provisions which are harsh or likely to cause undue hardship'.[187]

9. On the second, it commented:

> 'The law seeks to prevent trading abuses by prohibiting these and imposing sanctions if the prohibition is not observed. Sanctions may take various forms: restriction or deprivation of the civil remedies that would otherwise be open to the creditor; the imposition of criminal penalties; the granting of injunctions; and, through the operation of a licensing system, the application of pressure by threat of suspension or withdrawal of a licence'.[188]

10. On the third, it commented:

> 'The third, and very important, function of the law... is to regulate the rights which a creditor would ordinarily be able to enforce under general law. This may be done by restricting or prohibiting certain types of extra-judicial remedy – e.g. the enforcement of the right to repossess goods – and by giving the court discretion to order payment by instalments and to allow the debtor to remain in possession of the goods, despite his default, upon certain terms'.[189]

11. The law should maintain a fair balance between the creditor and the debtor. In its proposals on sanctions for breach of duty, the Crowther Report stated:

> 'The efficacy of any protective legislation depends on adequate sanctions for its infringement. Sanctions should be such as to penalise the wilful or reckless wrongdoer and deter him from repeating his offences and to give those committing infringements through gross negligence an incentive to be more careful in the future. On the other hand, the severity of the penalty should be tailored to the gravity of the breach. Legislation ought not to encourage the debtor to avoid repayment of sums he has borrowed by taking advantage of technical and unmeritorious points based on some minor and inadvertent breach by the lender'.[190]

187 Crowther Report, paragraph 6.1.15.
188 Ditto.
189 Ditto.
190 Paragraph 6.11.1.

12. The report concluded:

> 'In summary, sanctions should be tailored to the gravity of the offence; the court should be given a general power to excuse inadvertent breaches that have not misled or otherwise prejudiced the innocent party; and the general pattern of sanctions should be worked out on rational policy basis'.[191]

13. The 1974 Act implemented many of the recommendations of the Crowther Report, but with some changes and additions.

Unenforceability without a court order

14. Section 65 provides that a regulated agreement which is improperly-executed is enforceable against the debtor or hirer on an order of the court only.

15. Section 61(1) provides that a regulated agreement is not properly executed unless:

- a document in the prescribed form, containing all the prescribed terms and conforming to regulations under section 60, is signed in the prescribed manner by the debtor or hirer and by or on behalf of the creditor or owner
- the document embodies all the terms of the agreement (other than implied terms), and
- the document is, when presented or sent to the customer for signature, in such a state that all its terms are readily legible

16. In addition, an agreement is not properly executed if:

- it does not comply with sections 58(1) and 61(2) in the case of certain agreements secured on land
- pre-contractual information is not disclosed to the customer in accordance with regulations made under section 55
- a copy of the agreement is not supplied to the customer in accordance with sections 61A, 61B, 62 or 63, or
- notice of cancellation rights is not given where required by section 64

17. Similarly, an improperly-executed security instrument, in relation to a regulated agreement, is enforceable against the surety on an order of the court only (section 107). In addition, where the firm fails to give the surety a copy of a default notice (or notice of enforcement or termination) served on the debtor or hirer, section 111 provides that the security is enforceable (in respect of the breach or other relevant matter) on an order of the court only. There is a parallel provision at section 124 in relation to breach of section 123 on taking and negotiating instruments.

191 Paragraph 6.11.9.

18. Section 127(1) provides for the making of enforcement orders by the court. The court must dismiss an application by the creditor or owner if (but only if) it considers it just to do so, having regard to:

- prejudice caused to any person by the contravention
- the degree of culpability for it, and
- the court's powers under sections 127(2), 135 and 136

19. Section 127(2) provides that, in making an enforcement order under section 127, the court may, if it appears just to do so, reduce or discharge any sum payable by the debtor or hirer, or a surety, to compensate for any prejudice suffered.

20. Section 135 provides that, if it considers it just to do so, the court may make the operation of any term of the order conditional on the doing of specified acts by any party to the proceedings, or suspend the operation of any term of the order until this is done or until the court directs.

21. Section 136 provides that the court may include such provision as it considers just for amending any agreement or security in consequence of a term of the order.

Irredeemable unenforceability

22. Prior to 2007, section 127(3) provided that if an agreement was not signed by the debtor or hirer, or did not contain certain prescribed terms, it was irredeemably unenforceable. In such cases the court was precluded from making an order allowing enforcement of the agreement.

23. The prescribed terms are set out in the 1983 Agreements Regulations.[192] They include the amount of credit (or the credit limit), the rate of interest and the number and amount of repayments. These were regarded as being of particular importance for a debtor or hirer, and so failure to include them was likely to give rise to consumer detriment. Irredeemable unenforceability was intended to incentivise the firm to include the terms in the agreement, and to ensure they are stated accurately.

24. Similarly, signature of the agreement was considered to be of particular importance since otherwise there may be no evidence that the customer was aware of the terms of the agreement (including the prescribed terms) and had consented to enter into the agreement on those terms.

25. The concept of irredeemable unenforceability attracted criticism on the basis that it did not allow for the possibility that breaches might be minor or inadvertent, or might not in themselves be liable to cause material detriment to consumers.

26. For example, a prescribed term might not be missing, but might contain a slight error that, in itself, was unlikely to cause harm. The error might be in the customer's favour or might be 'de minimis', or could be as a result of uncertainties as to how the underlying information requirements apply in the particular case. In addition, a firm

192 Consumer Credit (Agreements) Regulations 1983, SI 1983/1553, Schedule 6.

may have made all reasonable efforts to secure a signed agreement (and may have evidence that the customer intended to be contractually bound) but the customer may have failed to return a copy. This might be problematic for remote transactions.

27. The application of section 127(3) was considered by the Court of Appeal in 2001. It noted that the effect was to remove the court's discretion to allow the lender any recovery even where an error in drawing up the agreement caused no prejudice to the borrower. It concluded that this was incompatible with the firm's rights under the European Convention on Human Rights (ECHR).

28. However, this was overturned on appeal by the House of Lords. Even though in individual cases there may be bad outcomes, the House of Lords concluded that the policy overall may well be a proportionate response. Lord Nicholls stated that 'something more drastic was needed in order to focus attention on the need for lenders to comply strictly with these particular obligations'.[193]

29. Section 127(3) was subsequently repealed by the Consumer Credit Act 2006. This also removed section 127(4) which provided that failure to give notice of cancellation rights had the same effect of preventing the court from making an enforcement order. The relevant provisions continue to apply, however, in relation to agreements made prior to the repeal of section 127(3) from 6 April 2007.

Unenforceability during breach

30. The CCA also provides that, where particular provisions are breached, the firm is precluded from enforcing the agreement until the breach is rectified.

31. This applies, for example, in relation to sections 77, 78(1) and 79, which entitle the debtor or hirer to request a copy of the agreement together with a statement of account. The statement, which must be signed by or on behalf of the creditor or owner, must include (in the case of fixed-sum credit agreements within section 77) the total sum paid to date, the total sum which has become payable but remains unpaid (and the dates and amounts in question) and the total sum which is to become payable in the future (including the amounts and dates).

32. It also applies in respect of the equivalent provisions in relation to security, at sections 107 to 109, where the surety requests a copy of the agreement (and the security instrument) and a statement of account. The debtor or hirer can also request a copy of the security instrument under section 110.

33. In addition, section 85 requires the creditor to give the debtor a further copy of the executed agreement upon the issue of a new credit-token (other than the first one), and section 97 requires the provision of a settlement statement upon request.

34. The provisions also originally included provision that, if the breach was not rectified within a specified period, the firm committed a criminal offence. This was removed by the Consumer Protection from Unfair Trading Regulations 2008, on the basis that a criminal offence was considered disproportionate in such cases.

193 www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030710/will-3.htm

35. The sanction of unenforceability during breach was extended in 2006 to breach of section 77A on annual statements for fixed-sum credit agreements; sections 86B to 86D on notices of sums in arrears; and section 86E on notices of default sums. These were seen as important provisions to help ensure consumer awareness about the ongoing state of their account and the extent of any arrears.

Meaning of unenforceability

36. The CCA does not define what is meant by enforcement or unenforceability, other than in certain respects. For example, section 65(2) states that the retaking of goods or land to which a regulated agreement relates in an enforcement of the agreement, and section 76 lists actions which constitute enforcement. The same approach to unenforceability is used in the CCA in section 55(2) and section 61B(3).

37. The actions listed in section 76 comprise demanding earlier payment of any sum; recovering possession of any goods or land; or treating any right conferred on the debtor or hirer by the agreement as terminated, restricted or deferred.

38. Section 87 lists the same actions, and in addition refers to termination of the agreement following breach by the debtor or hirer, and enforcement of security.

39. The FCA has issued guidance on our interpretation of the requirement in section 87 to serve a default notice before the creditor enforces a guarantee or indemnity following breach of a regulated agreement.[194] In this, we take the view that it is clear from the structure of the CCA, and relevant case law, that enforcement of security can include exercising some forms of 'self-help' remedy relating to the security, if the remedy is sufficiently coercive. As such, a guarantee is enforced, in the FCA's view, if, following breach of the agreement by the borrower, the lender demands payment by the guarantor, or takes payment from the guarantor by using a continuous payment authority or direct debit mandate that was previously provided and without at least appropriate prior notification to the guarantor.

40. The meaning of enforcement was considered by the courts in the McGuffick case in relation to section 77 CCA.[195] Flaux J held that passing details of a debt to a credit reference agency and related activities did not constitute enforcement under the CCA. He also held that steps taken with a view to enforcement, including demanding payment, issuing a default notice, threatening legal action and the actual bringing of proceedings, were not themselves enforcement. On the other hand, he confirmed that the actions listed in sections 76(1) and 87(1) did amount to enforcement, even though some of the actions 'less obviously' amounted to enforcement.[196]

41. It is unclear whether, and to what extent, firms rely on the McGuffick judgment in relation to the meaning of the word 'enforce' for breaches of other CCA provisions giving rise to unenforceability.

194 G17/1: Guarantor loans: Default notices (January 2017).

195 *McGuffick v The Royal Bank of Scotland plc* [2009] EWHC 2386 (Comm).

196 See also CONC 13.1.6G.

Disentitlement to interest and default sums

42. In addition to unenforceability, breach of sections 77A and 86B/C has the effect that the debtor or hirer has no liability to pay interest or default sums in respect of the period of breach. We refer to this as 'disentitlement'.

43. The policy rationale is set out in the relevant Committee Stage debate, in relation to the proposed sanctions for breach of section 77A:[197]

> 'The obligation to provide a statement is intended to be self-enforcing... A creditor either provides a statement in accordance with the section, or he does not. The Government's view is that there should be clear sanction for that failure to comply with the law. The clause as drafted provides that.
>
> There should also be one sanction. The Government do not believe that it can be argued that some debtors ought to be treated differently because of some difference in their situations or their agreements. Nor do the Government believe that the sanction should be diluted. Lenders will be required to provide statements. If they fail to do so, they should suffer a penalty. There is no scope for half-measures—the statement must be provided as required. It is the Government's view that the penalty should be one which strikes most directly at the creditor's failure to provide the statement—by removing the interest owing under the agreement—and provides real encouragement to compliance. Noble Lords will appreciate that creditors do not have to incur these sanctions; they simply need to comply with new Section 77A.'

44. The effect of sections 77A and 86D is to apply 'twin' sanctions, by linking unenforceability with a direct economic sanction of disentitlement.

45. The sanctions apply automatically, and the courts have no direct role. However, it was intended that the provision in regulation 41 (see below) should disapply the sanctions in cases where the breach was minor and technical.

46. The disentitlement sanction has generated the most controversy, as can be seen from the summary of Call for Input responses at Annex 3.

47. The 2007 Regulations, implementing the 2006 Act changes, introduced a provision at regulation 41 allowing firms to overlook insubstantial errors or omissions.[198]

48. Regulation 41 provides that, where a notice or statement contains an error or omission which does not affect the substance of the required information or forms of wording, it does not breach the regulations on that ground alone, and so does not give rise to the automatic sanctions.

49. This reflected the intention of the Government to achieve a balanced regime, such that obligations on lenders are self-enforcing but with a provision in relation to breaches which are minor and technical and could not cause harm.

197 www.publications.parliament.uk/pa/ld200506/ldhansrd/vo051108/text/51108-36.htm.

198 Regulation 41 (errors and omissions) of the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007, SI 2007/1167.

50. Regulation 41 applies in relation to annual statements under section 77A; running-account statements under section 78(4); arrears notices under sections 86B/C; default sum notices under section 86E; certain prescribed wording in notices under sections 76, 87 and 98; and post-judgment interest notices under section 130A.

51. However, it is unclear whether and to what extent firms rely on regulation 41 in practice, in the absence of reported case law as to the types of defects that may fall within the scope of regulation 41.

52. The application of the 'de minimis' principle was considered in the JP Morgan case.[199] Although this did not relate to the proper construction of regulation 41, the court confirmed that if a breach does not fall within regulation 41, the statutory statement or notice is entirely ineffective; it is as if no statement or notice had been given at all. The judge said: 'Elsewhere in the consumer credit legislation, errors in or late service of notices which can be regarded as de minimis can be ignored, but unless the de minimis rule saves the error, the notice is invalid'.

53. There is no equivalent of regulation 41 for breaches giving rise to unenforceability without a court order. Firms may, however, be able to rely in appropriate cases on the common law principle that a 'de minimis' error can be disregarded.

Criminal offences

54. The CCA includes a number of criminal offences.

55. In particular, section 49 makes it an offence to canvass debtor-creditor agreements off trade premises. There is a parallel offence in section 154 in relation to canvassing of certain ancillary credit services off trade premises, namely credit-brokerage, debt-adjusting, debt-counselling and credit information services.

56. Section 50 makes it an offence to issue circulars to minors. There is a parallel offence at section 114 where a person takes an article in pawn from a minor. There are also criminal offences at sections 80, 119 and 157-160, as described below.

57. As noted above, some other criminal offences were removed in 2008, on the basis that they were considered disproportionate.

Canvassing off trade premises

58. Section 49 reflects concerns identified in the Crowther Report about house-to-house leaflet distribution schemes inviting selected members of the public to act as agents of banks to call on borrowers, including that commission arrangements could act as a strong motivation for deception and sharp practices by agents.

59. The report recommended that it should be made illegal for any lender, whether a bank or otherwise, and whether directly or by agents, to advertise loan facilities by personal canvassing except in response to a written request from a prospective borrower. However, this should not prevent the personal canvassing or offering of goods or services on credit or hire-purchase terms.

60. Section 49 prohibits the canvassing of debtor-creditor agreements (i.e. cash loans and other credit not linked to the purchase of goods or services) off trade premises. It also prohibits the soliciting of entry into such an agreement during a visit carried out in

199 *JP Morgan v Northern Rock* [2014] CTLC 33.

response to a request on a previous occasion where the request was not in writing or was not signed by or on behalf of the person making it.

61. There is no equivalent ban on canvassing debtor-creditor-supplier agreements (linked to the purchase of goods or services) or consumer hire agreements.

62. This policy intention is reflected in the Notes on Clauses to the Bill:

> '... the nature of the canvassing that it is desired to control are deliberate personal approaches to the consumer on the doorstep or elsewhere where the consumer is not expecting to do business and where he is likely to find it most difficult ending the conversation should he want to'.

63. In practice, section 49 is mainly relevant to the home-collected credit sector. We have consulted on proposed guidance setting out our interpretation of section 49, in light of concerns regarding practices in that sector.[200]

64. Issues have been raised in respect of other aspects of sections 48-49, and the ban on canvassing ancillary credit services in sections 153-154. For example, it may be unclear what is meant by 'a previous occasion' and whether this implies a minimum gap between the request and the visit. There may also be situations where it is unclear whether premises are trade premises for these purposes.

65. The provisions apply broadly to any individual (the canvasser). This would include employees and agents of an authorised firm, and also non-authorised persons. If a non-authorised person visits to promote loans, while this may not in itself be a regulated activity they are likely also to be engaged in regulated lending or credit broking, and so may be acting in breach of the general prohibition.

66. We are not aware of any instance where the offences have been prosecuted.

Circulars to minors

67. Section 50 makes it an offence to send a minor (a person under 18), for financial gain, any document inviting the recipient to borrow money, or to obtain goods on credit or hire, or to obtain services on credit, or to apply for information or advice on these matters. As with section 49, it applies broadly to any individual.

68. There is little discussion of this provision in the Crowther Report which effectively recommended re-enacting, with minor amendment, restrictions in the Betting and Loans (Infants) Act 1892 and extending them to all forms of credit and hire.

69. We are not aware of evidence of the deliberate targeting of minors. It would appear unlikely that an authorised firm would deliberately seek to enter into a credit agreement with a minor, as it takes the risk that the contract will be voided by the borrower. Where breaches occur, it seems likely that these would be inadvertent (for example, due to incorrect data or a systems error).

70. The provision is limited to documents, which is defined in section 189 CCA as including information recorded in any form. This would include emails, and possibly SMS texts, but not telephone calls.

200 www.fca.org.uk/publication/consultation/cp18-12.pdf

71. We are not aware of any instance where the offence has been prosecuted.

Credit reference agencies

72. The Crowther Report considered the importance of credit information and the implications arising from the expansion of credit bureaux. It recommended that these should be subject to regulation, including licensing, with statutory requirements as to the safeguarding of stored information and suitable security measures to prevent unauthorised access and interference. The regulation should include suitable sanctions for breach of duty.[201]

73. This led to the introduction of a statutory process enabling consumers to access and dispute credit information held by credit reference agencies (CRAs). The scheme is set out in sections 158-160 and includes an alternative process for business customers. Criminal offences apply where a CRA fails to disclose filed information upon request, or to correct wrong information.

74. The CCA provisions relating to individuals were subsumed into the Data Protection Act 1998 (DPA).[202] The relevant DPA provisions do not give rise to criminal offences, but compensation may be payable for failure to comply with certain requirements if an individual suffers damage as a result.

75. Other legislation sets out principles for the sharing of credit information in respect of small and medium-sized enterprises (SMEs).[203] This legislation also applies CCA provisions to designated CRAs who may not be acting within the regulatory perimeter.

76. If a creditor or owner fails to provide details of a CRA consulted when making a decision to reject a credit application, or fails to provide such details upon request, this is an offence under section 157. This also applies to a negotiator acting on the firm's behalf, who may be a non-authorised person.

Other criminal offences

77. Where an agreement requires the debtor or hirer to keep goods in their possession or control, they must, within seven working days following a written request from the creditor or owner, tell the firm where the goods are (section 80). Failure to comply is a criminal offence.

78. Section 114(2) provides that a person who takes an article in pawn from an individual who is known to be (or appears to be and is) a minor commits an offence.

79. Section 119 providers that a person who refuses without reasonable cause to allow a pawned item to be redeemed commits an offence.

Other sanctions

80. In addition to unenforceability and disentitlement, and criminal offences, there are a number of other sanctions in the CCA which we set out below.

201 Crowther Report, paragraph 9.1.16.
202 Sections 7 to 9 of the Data Protection Act 1998.
203 Small and Medium Sized Business (Credit Information) Regulations 2015, SI 2015/1945.

81. The sanction of breach of statutory duty arises in relation to a limited number of CCA provisions. These include section 92 (recovery of possession of goods or land) and section 103 (termination statements upon request).

82. In addition, section 72 requires the debtor or hirer to retain possession of goods, and take reasonable care of them, and to return the goods upon cancellation. Breach of this is actionable as a breach of statutory duty.

83. The sanction was also added as part of CCD implementation in relation to section 55C (provision of a draft credit agreement upon request) and section 77B (statement of account upon request in relation to a fixed-sum fixed-duration agreement).

84. Breach of statutory duty provides a private law right of action in tort, subject to the usual test of establishing causation and loss. This is substantially similar to the private law right of action under section 138D FSMA.

85. Section 91 deals with breach of section 90 which precludes the creditor (other than upon an order of the court) from recovering possession of goods under a hire-purchase or conditional sale agreement if the debtor has paid one-third or more of the total amount payable. These are referred to as 'protected goods'.

86. Where section 90 is breached, section 91 provides that the agreement terminates and the debtor is released from all liability under the agreement. In addition, the debtor is entitled to recover from the creditor all sums paid under the agreement.

87. The unfair relationships provisions are considered in Annex 5.

88. Firms are required to notify the FCA of significant CCA breaches. Specifically, SUP 15.3 requires firms to notify the FCA immediately on becoming aware, or having information reasonably suggesting, that a significant breach has or may have occurred or may occur in the foreseeable future. Whether a breach is significant will be determined having regard to 'potential financial losses to customers or to the firm, frequency of the breach, implications for the firm's systems and controls and if there were delays in identifying or rectifying the breach'.[204]

89. It is unclear to what extent firms comply with this obligation, and whether CCA breaches may arise which may be significant but are not notified. Failure to do so may also constitute a breach of Principle 11 which requires a firm to deal with its regulators in an open and cooperative way and to disclose to the FCA appropriately anything relating to the firm of which the FCA would reasonably expect notice.

204 SUP 15.3.12G

Annex 8
List of abbreviations

APR	Annual percentage rate of charge
BCOBS	Banking: Conduct of Business sourcebook
BERR	Department for Business, Enterprise and Regulatory Reform
BIS	Department for Business, Innovation and Skills
CCA	Consumer Credit Act 1974
CCD	Consumer Credit Directive 2008/48/EC
CONC	Consumer Credit sourcebook
CP	Consultation paper
CRA	Credit reference agency
DISP	Dispute Resolution: Complaints sourcebook
DPA	Data Protection Act 1998
DSRs	Distance Selling Regulations 2004
DTI	Department of Trade and Industry
ECCI	European Consumer Credit Information
EU	European Union
FCA	Financial Conduct Authority
FSA	Financial Services Authority
FSMA	Financial Services and Markets Act 2000
HMT	Her Majesty's Treasury
ICOBS	Insurance: Conduct of Business sourcebook
MCOBS	Mortgages and Home Finance: Conduct of Business sourcebook
NOSIA	Notice of Sums in Arrears

OFT	Office of Fair Trading
P2P	Peer-to-peer
PRIN	Principles for Businesses sourcebook
PS	Policy statement
PSRs	Payment Services Regulations 2017
RAO	Financial Services (Regulated Activities) Order 2001
SECCI	Standard European Consumer Credit Information form
SI	Statutory instrument
SM&CR	Senior Managers & Certification Regime
SUP	Supervision sourcebook
TSS	Trading standards services
UK	United Kingdom
2006 Act	Consumer Credit Act 2006

We have developed this work in the context of the existing UK and EU regulatory framework. The Government has made clear that it will continue to implement and apply EU law until the UK has left the EU. We will keep the proposals under review to assess whether any amendments may be required in the event of changes in the UK regulatory framework in the future.

All our publications are available to download from www.fca.org.uk. If you would like to receive this paper in an alternative format, please call 020 7066 9644 or email: publications_graphics@fca.org.uk or write to: Editorial and Digital team, Financial Conduct Authority, 12 Endeavour Square, London E20 1JN

Pub ref: 005620

12 Endeavour Square London E20 1JN
Telephone: +44 (0)20 7066 1000
Website: www.fca.org.uk