

## **FCA Practitioner Panel response to FCA's *Call for Input: Review of retained provisions of the Consumer Credit Act (February 2016)***

### **Summary**

Given the number and complexity of the remaining provisions, their long established interpretation and application, and their interactions with one another and with the FCA rules and guidance (the rules and guidance), the FCA is right to carefully consider how to go about its requirement to undertake a review. The guidance and interpretations of the provisions of the Consumer Credit Act (CCA) are often as important as the provisions themselves in achieving the desired outcome, so the task goes well beyond replicating the remaining provisions in the form of rules.

There seem to be three key elements to consider. Firstly the FCA should focus its attention and resources where they are needed most, rather than seek to review all provisions. Secondly it should involve the right mix of legal expertise and practical understanding to help guide its review. Finally it should use this opportunity to improve the completeness of coverage of the customer journey in its rules and guidance.

Firstly, focusing attention and resources on those provisions that cause the most disproportionate burdens for firms and/ or consumers, while providing the least significant protection for consumers, as well as those most in need of modernisation to fit with current and future market realities would maximise the benefit from the review.

Secondly, involving experts in the interpretation and application of the prioritised provisions will help to ensure that any changes retain effectiveness in achieving their intended outcome, while minimising the risk of unintended consequences. Involving practitioners (lenders and consumer advisors) who have many years of experience in actually putting the CCA provisions into practice in real customer situations will help to ensure any new rules and guidance can be effective as quickly as possible.

Thirdly, completing the coverage of the consumer journey in CONC will improve consistency of customer outcomes and experiences and allow the FCA greater flexibility to adapt to the changing nature of markets.

The FCA should aim to report in 2019, but also take any opportunity along the way to ask HMT to act on particular areas where possible, as the review progresses.

### **Responses to individual questions posed in the call for input**

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

Yes.

The current rules and guidance in CONC cover most steps in the consumer credit journey, with the exception of some of the ongoing and day to day operational issues with the credit agreement. CONC covers initial communication and promotion, pre and post-contractual requirements, including responsible lending and arrears, default and

recovery. The retained provisions in the CCA cover statements, notices of arrears, early and partial early settlement for example, whereas the rules and guidance do not. This results in a more up to date and flexible approach to some parts of the consumer journey through CONC, combined with a more dated, less flexible and more prescriptive approach through the CCA provisions. A focus on the CCA provisions in this area would not only bring greater coherence and completeness to the rules, but also address many of the provisions in the CCA that give rise to unnecessary burdens on firms, without delivering better outcomes or protections for consumers.

As there are substantial interactions between the provisions, it would make sense to focus on a coherent group (or groups) of CCA provisions that can be treated as a whole in the transfer to the rules and guidance, allowing the review to create efficient and effective new sections of CONC. For example, the area of the CCA provisions relating to statements, information on request, and notices of arrears and defaults would provide a coherent section (77 – 80, and 86B – 89). Another example might be the area of early and partial early settlements, and rights to terminate (94-103).

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

In line with the aims of the review, two areas of focus should be where disproportionate burdens are placed on firms without helping to ensure appropriate protections are in place for consumers, and where modifications or updates are required to ensure relevance in today's market.

For example, the provisions relating to statements (77A) and notices of sums in arrears (86B-86D), when combined with the regulations, give rise to very prescriptive requirements with highly disproportionate and inflexible obligations to rectify any divergence, without the result providing commensurate benefits to consumers. Small and inadvertent deviations from the prescribed wording and timings can quickly give rise to periods of non-compliance and the need not only to reimburse all interest and charges over many years, but also to re-engineer correct versions of the paperwork relating to previous periods. The inflexibility in both the requirements and the implications for firms do not result in well-understood, well-used or well-valued protections for consumers, either in the first instance (the statements and notices themselves) or in the second (the revised and re-engineered paperwork). Despite this, firms can incur costs and liabilities well in excess of the value of their businesses through relatively minor omissions, particularly if they go unidentified over time. This would seem to be an area of the CCA provisions that could be translated into far more flexible and effective rules and guidance that would give consumers genuine, relevant and understandable benefits and protections, while ensuring sensible and effective sanctions are in place to deal with any failure by firms to ensure good outcomes for consumers. Within CONC, sanctions could be tailored to deal with inadvertent or temporary issues where consumers would not face any real detriment as opposed to flagrant, deliberate or negligent firm behaviours where consumers were genuinely put at a disadvantage and ought to receive redress without needing to resort to court proceedings.

The key issues in relation to ensuring relevance in today's credit markets centre on the requirement for paper, as well as where credit product forms have evolved from those originally envisaged through innovation and responding to consumer needs. Consumers now prefer forms of contact, contract, customer service and record keeping such as email, mobile and online to which they have ready access, are comfortable using and which allow firms efficiently and effectively to serve their needs. Legislation designed

for fixed monthly repayment frequencies and longer terms of contracts often create problems for weekly, short term or flexible forms of credit that some consumers prefer for some situations, or that fit best with their immediate needs and budgeting habits. For example, some of the requirements for arrears notices and partial early settlement procedures tend to cause consumer confusion when applied strictly to weekly or very short term credit that allows for flexibility to adjust the timing and amount of repayments without cost to the consumer, under the terms of the credit agreement. The required communication with customers can appear to them to be inconsistent with the product they have chosen, and inappropriate given their expectations of customer service and reasonable forbearance and understanding. Where the requirement for a paper format persists, this can create delays and mismatches in timing that can cause consumers further confusion and frustration.

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

Yes.

Where provisions are well-understood by consumers and firms, operate effectively and provide valued consumer protections or better outcomes for consumers there seems little reason to include or prioritise them given the scale of the overall undertaking.

For example, sections 75 and 75A should be excluded, at this stage at least, as most stakeholders would agree that they have long operated effectively and relatively efficiently, delivering the highly-valued and well-understood consumer protections as intended. There seems to be little to be gained in spending the time and effort at this stage in seeking to repeal these provisions and trying to replicate them in the rules and guidance, and potentially much to be lost.

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

Yes.

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

Yes.

It would be helpful if the FCA also addressed the boundary between consumers and small and medium sized enterprises (SMEs) so that credit providers could be clear on the application of the rules and guidance in each case. The main issues arise at the smaller end of SMEs, in particular sole proprietors and the self-employed, who may wish to use credit for many purposes including those that could be classed as consumer or commercial or both.

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

Yes.

The FCA should aim to report by 2019 as required but make earlier recommendations to HMT where action can be taken in the meantime. This has the benefit of allowing the

time to consider fully any complexities but also enabling the more straightforward changes, and any changes agreed in the meantime, to be enacted sooner rather than later. Taking coherent groups of provisions (see response to Q1 above) mitigates the risk of acting in stages. The need for new legislation and parliamentary time may be better managed by a series of more contained and smaller changes over time rather than one large request in 2019.

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

Yes.

77, 77A, 86B, 86C, 86D, 94, 95, 97A, 99, 100 and associated regulations made under the CCA. See answers to questions above.

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

Yes.

Conducting the review in-house is efficient and appropriate, helping to build understanding of the rules and guidance that the FCA will need to oversee subsequently.

Engaging the correct legal expertise will be critical, particularly those with the best understanding of the current guidance and application of the existing CCA. For example, Richard Mawrey QC and Malcolm Waters QC would both be seen as leading experts in the field.

An expert stakeholder consultative group will also be critical to ensuring the right focus and balance between the benefits of reduced burdens and improved protections are achieved. The group should include practitioners such as lenders from different sectors representing different credit forms and customer types (revolving and fixed term credit, product related and cash based credit, prime, near prime and sub-prime/ non-standard customers, vulnerable and non-vulnerable customers), as well as consumer organisations with direct experience of applying the CCA and helping consumers do so. For example, the Money Advice Trust would be a good choice as it addresses all types of consumer and small business/ self-employed credit issues across the whole UK. Industry body groups may also be well placed to contribute, despite the pending consolidation of a number of more specialised bodies into a single larger group. For example UKCards, the FLA, the CCA, and the CFA may all have particular skills and experience to bring to bear in particular sectors of the credit market.

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