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

Presented to Parliament pursuant to paragraph 20(8) of Part 5 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014, SI 2014/366

March 2019

Financial Conduct Authority

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Contents

How to navigate this document

returns you to the contents list

takes you to helpful abbreviations

takes you to the previous page

takes you to the next page

prints document

email and share document

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 Her Majesty's 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)
- 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 We published an interim report in August 2018, setting out our initial views and inviting comments.[2] Following publication we also held 5 roundtable discussions involving a range of stakeholders including industry and consumer bodies. We received 30 written responses from stakeholders including firms, trade bodies, consumer groups and other interested parties (see Annex 2).

1.4 This final report sets out our views on the statutory question. It takes into account the views of stakeholders from the roundtable discussions and responses to the interim report and to the earlier Call for Input.[3]

1.5 Decisions about the future of CCA provisions will fall to the Government. This final report does not include formal recommendations to the Treasury, but provides analysis and evidence to enable decisions to be made.

Who this applies to

1.6 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

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).

2 DP18/7: Review of retained provisions of the Consumer Credit Act: Interim report (August 2018) – www.fca.org.uk/publications/discussion-papers/dp18-7-consumer-credit-act-review-interim-report

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

- consumer organisations
- the legal profession

1.7 Who may only need to read this summary

- other firms engaged in credit-related activities
- firms providing or administering regulated mortgages (paragraph 1.14 below)

1.8 Who else might be interested in this document

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

The wider context

1.9 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 were required to undertake a review of the remaining provisions.

1.10 We published a Call for Input in February 2016 to invite views from stakeholders on our proposed priorities, timescales and conduct of the review. In accordance with the statutory requirement (Annex 1), we published an interim report in August 2018 setting out our initial views and inviting views and evidence from stakeholders.

1.11 Our objective 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. We also looked to identify areas where there may be scope to simplify or modernise aspects of the regime or remove unnecessary or disproportionate burdens, reflecting our broader approach of principles-based, outcomes focused regulation.

1.12 Some CCA provisions and associated regulations implement aspects of the Consumer Credit Directive (CCD). On 16 July 2018, the Government published the Consumer Credit (Amendment) (EU Exit) Regulations 2018 under the European Union (Withdrawal) Act 2018. The Regulations amend the CCA and related legislation to make sure the legislation functions effectively when the UK leaves the European Union (EU). On 25 February 2019, a further statutory instrument was laid before Parliament which, when made, will give firms a 6-month transitional period to comply with relevant changes.

1.13 Throughout the review we have assumed that substantive changes to provisions implementing the CCD will not be possible at this 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 mortgages) and section 129 (time orders). In addition, some CCA provisions continue to apply to second charge mortgages entered into before 21 March 2016, even though the loans are now regulated mortgage contracts.

Overview of this report

1.15 This document has 7 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 the approach we have taken to the review, and to answering the statutory question. We explain the principles we have used and how we have approached the review through 3 inter-related themes:
  - rights and protections
  - information requirements
  - sanctions (including unenforceability)
- In Chapter 4, we set out some overarching issues that we have identified during our analysis, including the particular features of the consumer credit market that are relevant when considering what requirements are necessary to deliver an appropriate degree of consumer protection.
- In Chapters 5, 6 and 7 we set out our views on the statutory question against each of the 3 themes. In each case we supplement this with an annex setting out more details in relation to the relevant provisions.

Summary of our views

1.16 We summarise below our assessment for each of the 3 themes. In forming our views, we have taken into account the views of stakeholders on the interim report and discussions at stakeholder roundtables.

Rights and protections (Chapter 5)

1.17 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.

1.18 Our view remains that the protections offered by these provisions continue to be important, and should be retained in some form.

1.19 A small number of 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. This would have the advantage of bringing it together with existing FCA rules and guidance on credit broker fees. In these cases, we see merit in repealing the relevant provisions with a view to replacing them by FCA rules.

1.20 However, for most provisions in this theme, our view remains 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 same level of protection under the FCA's current rule-making powers. As such, we see merit in keeping the provisions in the CCA or other legislation.

1.21 We recognise, however, that there are issues with some of the provisions, including some raised by stakeholders. In our view, these merit more detailed consideration to ensure that the provisions continue to provide an appropriate level of consumer protection without imposing disproportionate burdens on firms.

Information requirements (Chapter 6)

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

1.23 Our view remains that a framework for the provision of information by firms to customers continues to provide important consumer protection. We also consider that the nature of the consumer credit market merits taking a different approach to regulation in comparison with other markets, for example in relation to striking the right balance between prescriptive or more principles-based requirements.

1.24 For most of the substantive information disclosure obligations in the CCA and its regulations, we think these could, in principle, be replaced by FCA rules. In some cases, it may be possible to adopt a more principles-based, outcomes focused approach reflecting the FCA's broader approach to regulation, subject to ensuring that consumers remain appropriately protected.

1.25 However, the loss of the associated sanctions, including unenforceability, would, we think, adversely affect the appropriate degree of consumer protection. An option would be to replace the information disclosure obligations with FCA rules, with the related provisions that provide for the civil consequence of non-compliance with these obligations being retained in the CCA or other legislation.

1.26 There would need to be consequential changes to those provisions to apply them to breaches of FCA rules. We recognise that this may require primary legislation if the amendments could not be achieved through the use of the Treasury's order-making power under the Financial Services Act 2012.

1.27 Our overall view, therefore, remains that we see merit in repealing the relevant information requirements, with a view to their replacement by FCA rules, but only if this does not result in the loss of corresponding sanctions.

1.28 We have identified issues with the current information requirement provisions. In our view, these merit further consideration, whether the provisions are retained in legislation or replaced, in whole or part, by FCA rules. Were these provisions to be replaced by FCA rules, this would be an opportunity to review in detail the relevant requirements including whether appropriate outcomes are best achieved by prescriptive or more principles-based requirements (or a combination of both).

Sanctions (Chapter 7)

1.29 Our view remains that the 'self-policing' nature of the sanctions of unenforceability and disentitlement to interest and default sums contributes significantly to ensuring key customer information needs are met.

1.30 Unenforceability (without a court order or until the breach is remedied) incentivises firms to comply with form and content requirements and to provide information to customers at the appropriate time. The sanction of disentitlement provides an additional deterrent against non-compliance in cases where there is a particular risk of harm to more vulnerable consumers.

1.31 In the context of consumer credit markets, we think a combination of the CCA sanctions, the FCA's regulatory powers and the private right of action under FSMA is appropriate. We consider that the provisions giving rise to unenforceability and disentitlement could not be repealed without adversely affecting the appropriate degree of consumer protection. As such, our view is that there is merit in retaining the sanctions in the CCA or other legislation, subject to reviewing the scope of their application.

1.32 We recognise that the underlying CCA obligations can be complex and may be open to more than one interpretation. As such, we can see some force in the argument that the application of the current sanctions can raise difficulties, and may be disproportionate in some cases. This applies particularly to disentitlement to interest and default sums. Our view is that, in principle, the scope of application of the sanctions should be focused on breaches which are likely to cause material harm to consumers, particularly the more vulnerable or those in financial difficulties.

1.33 We also see merit in clarifying the meaning of unenforceability so that firms are certain about the steps they can take where an agreement is unenforceable, and there is greater clarity for consumers as to the level of protection they have.

1.34 It would not be possible to replicate or replace these sanctions under the current FCA's general rule-making power.[4] However, as an alternative to keeping sanctions in legislation, 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 for example, section 137C (cost of credit and duration of credit agreements), section 137D (product intervention powers) and section 137FBB (early exit pension charges).

1.35 We could not, under our current rule-making powers, reproduce criminal offences in FCA rules. However, our view is that, in general, the criminal offences in the CCA are no longer 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. In addition, where a person is acting in breach of the general prohibition under FSMA, this is itself a criminal offence.

1.36 However, we recognise that the arguments may be more finely balanced for the offences of canvassing off trade premises and circulars to minors. These apply to individuals (not firms) regardless of whether the person is engaged in regulated activity by way of business. We see merit in considering the issues further in these areas. If the criminal offence is removed, in whole or in part, we think that it will be important to make clear that this in no way reflects a view on the importance of the provisions and of compliance with them.

4 There are several provisions in Part 9A FSMA that amplify the FCA's general rule-making power in specific 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 a transaction void or unenforceable (see sections 137C, 137D and 137FBB). However, as we are considering rules for the regulation of consumer credit generally, we have focused on the general rule-making power in section 137A of FSMA.

Next steps

1.37 We are now presenting this report pursuant to the requirements set out in paragraph 20(8) of Part 5 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014, SI 2014/366.

1.38 Decisions about the future of CCA provisions will fall to the Government, in light of our views and other relevant matters.

2 Background and context

2.1 In this chapter, we set out the background to the review and summarise the development of the CCA regime.

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.[5] The FCA's predecessor, the Financial Services Authority (FSA), consulted at the same time on high level proposals for an FCA regime (FSA CP13/7).

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.

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

2.5 However, the Government decided to continue to provide in the CCA important consumer rights and protections where they could not be replicated easily under FSMA because of the different statutory frameworks.[6]

2.6 The legislation[7] 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.

2.7 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.[8]

2.8 In particular, the review must consider:

- which provisions of the CCA could be replaced by FCA rules or guidance
- 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

5 A new approach to financial regulation: Transferring consumer credit regulation to the Financial Conduct Authority (HMT/BIS, March 2013).
6 A new approach to financial regulation: Transferring consumer credit regulation to the Financial Conduct Authority: Summary of responses (HMT/BIS, June 2013).
7 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).
8 See footnote 1 above.

general terms, which are expected to result from the imposition of that burden or restriction

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

The Consumer Credit Act

Background to the 1974 Act

2.10 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.

2.11 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).[9]

2.12 The Committee concluded that the existing law was inadequate and should be replaced by a new legal framework. This should cover all credit transactions (other than loans secured on land), with an emphasis on consumer protection. The legislation should have 3 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.

2.13 The Committee proposed specific protections for advertising, canvassing, disclosure, contract terms, post-contract requirements and legal proceedings. It also proposed a Credit Commissioner[10] 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.

2.14 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
- using credit registers to prevent debtors from over-committing themselves and to help creditors grant credit prudently

2.15 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'.

9 Consumer Credit: Report of the Committee – Vol 1: Report (Cmnd 4596), March 1971.
10 Subsequently the Director General of Fair Trading.

Reviews of the CCA

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

2.17 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.[11]

2.18 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.

2.19 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'.[12] 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

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

2.21 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 making agreements irredeemably unenforceable[13]
- replacing the extortionate credit bargain provisions by 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
- extending the remit of the Financial Ombudsman Service to cover consumer credit complaints

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

Consumer Credit Directives

2.22 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. Another Directive in 1990 mandated the method for calculating the annual percentage rate of charge (APR).

2.23 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 it was also important to amend existing provisions to take account of new forms of credit. It proposed a new Directive, to address these issues.

2.24 The new Consumer Credit Directive 2008/48/EC was adopted in April 2008 (referred to in this report as 'CCD').[14] 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.

2.25 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 CCD wording if they think this is necessary to give practical effect to the provisions.

2.26 The CCD was implemented in the UK primarily by the Consumer Credit (EU Directive) Regulations 2010. These amended the CCA in several areas. More changes were made to implement Directive 2011/90/EU on APR assumptions.[15]

2.27 The Commission reported on the implementation of the CCD in May 2014.[16] It has since launched an evaluation of the CCD, and published a roadmap for consultation in June 2018.[17] A formal consultation was launched in January 2019 to gather views from stakeholders on the functioning of the CCD and whether changes should be considered.[18] The deadline for responses to that consultation is 8 April 2019.

2.28 The purpose of the evaluation is to assess whether the Directive is still fit for purpose given market developments since 2008. The Commission aims to gauge the relevance, effectiveness, efficiency, coherence and EU added value of the CCD. A summary document is expected later this year.

14 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.

15 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.

16 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).

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

18 https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-3472049/public-consultation_en

Transfer of credit regulation

2.29 Responsibility for consumer credit regulation was transferred from the OFT to the FCA from 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)[19] which replaced the licensable activities and exemptions under the CCA.

2.30 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.

2.31 A credit agreement includes a loan or other form of financial accommodation, for instance credit to finance the purchase of goods or services. Hire-purchase (hire with an option to purchase) is treated as a form of credit.[20] Consumer hire is covered where the hire period is capable of exceeding 3 months.

2.32 A regulated agreement can be with an individual or relevant recipient of credit. This includes a sole trader or a small partnership (2 or 3 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.

2.33 Lending to consumers is generally regulated regardless of amount, but business lending and hire are regulated only up to £25,000.

2.34 There are several exemptions, including for instalment credit where goods or services are financed by credit which is repayable by up to 12 instalments within 12 months without interest or charges.

2.35 In their responses, some stakeholders questioned whether business lending should be subject to similar provisions as lending to consumers, or whether requirements should be tailored to the different customer needs and circumstances. Issues were also raised about the regulatory perimeter, although it was recognised that this is outside the scope of the current review and would be for Government to consider.

2.36 Some stakeholders argued for a fundamental review of the regulation of consumer hire, including whether this should be aligned to consumer credit regulation or should differ, reflecting the different products and risks to consumers. They noted that there are similarities between hire, hire-purchase (or conditional sale) and credit sale, and regulation should not create distortions or encourage arbitrage.

19 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.

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

3 Our approach to the review

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

Principles of our approach

3.2 The starting point for our review was 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
- 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
- differences between the CCA and FSMA regimes
- 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 views, we have taken account of equality and diversity issues that might arise as a result of possible changes to the regulatory regime.

Thematic approach

3.7 Our initial analysis led us to set 3 main themes for the review: rights and protections, information requirements and sanctions. Within each theme, we identified sub-themes which cover groups of similar provisions or, in some instances, a single provision.

3.8 This thematic approach covered all key CCA provisions, including those raised by stakeholders in response to our Call for Input. Provisions that did not fall within a specific theme mainly involved statutory definitions or enforcement powers, or were consequential upon other CCA provisions.

3.9 We gave particular attention to provisions that:

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

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

3.11 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.[21]

3.12 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. 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.

3.13 It should be noted that trading standards services (TSS) have a role as co-enforcers, with the FCA, of CCA provisions.[22]

Rights and protections

3.14 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. The theme is broken down into several categories and sub-themes. Our analysis and views are in Chapter 5, with a supporting annex at Annex 5.

Information requirements

3.15 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. This theme is sub-divided both on the basis of cross-cutting issues and to reflect the customer journey during an agreement's lifetime. Our analysis and views are in Chapter 6, with a supporting annex at Annex 6.

Sanctions

3.16 This 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. The theme is sub-divided based on the different types of sanction, including unenforceability. We analyse this theme and give our views in Chapter 7, with a supporting annex at Annex 7.

21 Subject to any modifications or exemptions the Government might make.
22 Section 161 CCA provides that local weights and measures authorities in Great Britain, and the Department for the Economy in Northern Ireland, have a duty to enforce the CCA and its regulations.

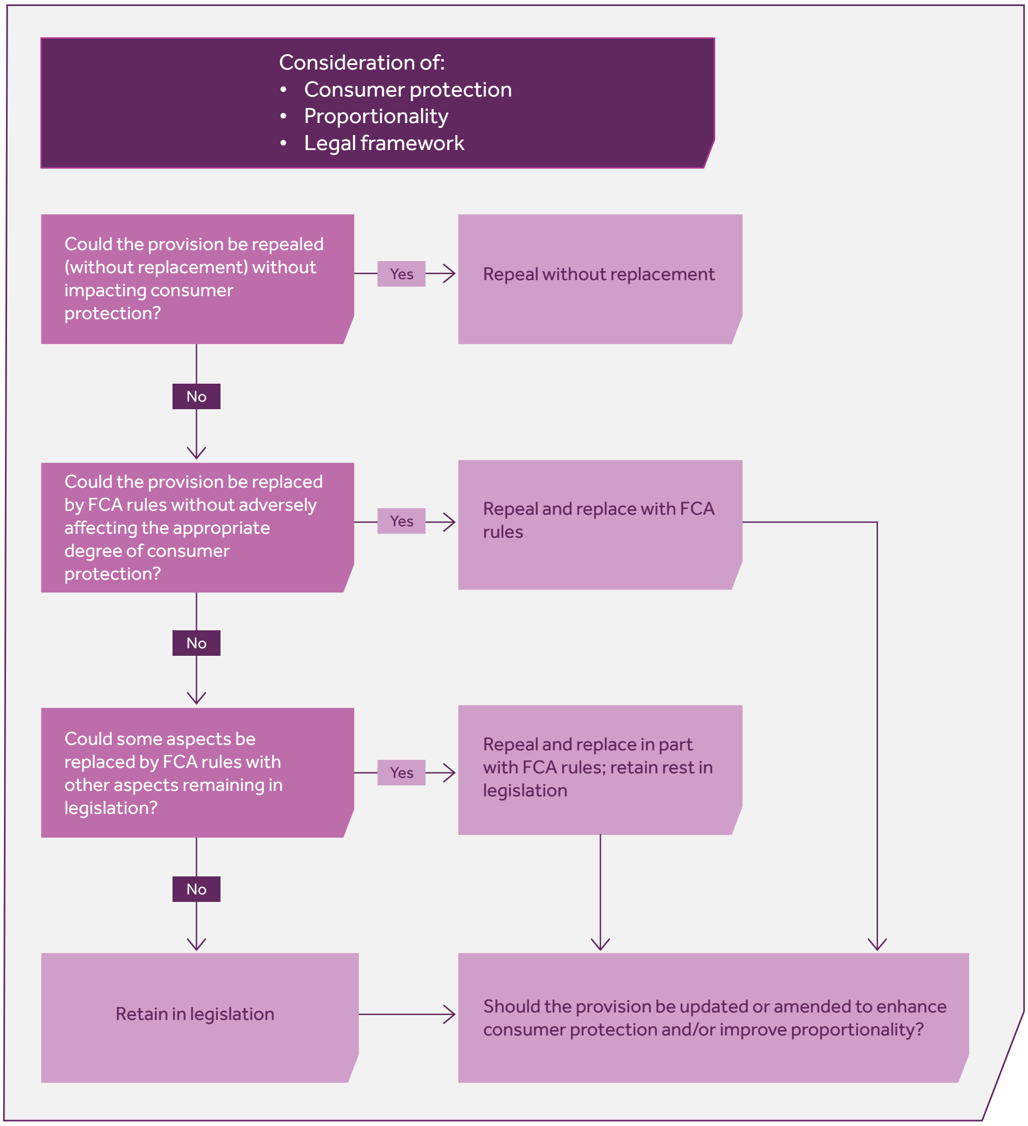
Approach to the statutory question

3.17 For the provisions and groups of provisions within each of the 3 themes, we 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?

3.18 There was 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.

3.19 This is illustrated in the diagram below.



Interim report

3.20 We published our interim report in August 2018. A summary of the feedback we received, and our responses, can be found at Annex 2.

3.21 Following publication of the interim report we held 4 stakeholder roundtable discussions in London and 1 in Edinburgh. Nearly 80 stakeholder organisations were represented across the 5 events. The views raised at these roundtables are also reflected in the summary of feedback at Annex 2.

3.22 In addition, we undertook some primary research with firms and consumers, to further inform our analysis. We set out details in Annex 3.

4 Overarching issues

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

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

Changes in consumer credit markets

4.2 In the interim report, we emphasised the significant changes in consumer credit markets since the Crowther Committee reported. We also set out some of the key developments and how these have affected interactions between customers and firms. Stakeholders generally agreed with our views, as set out below.

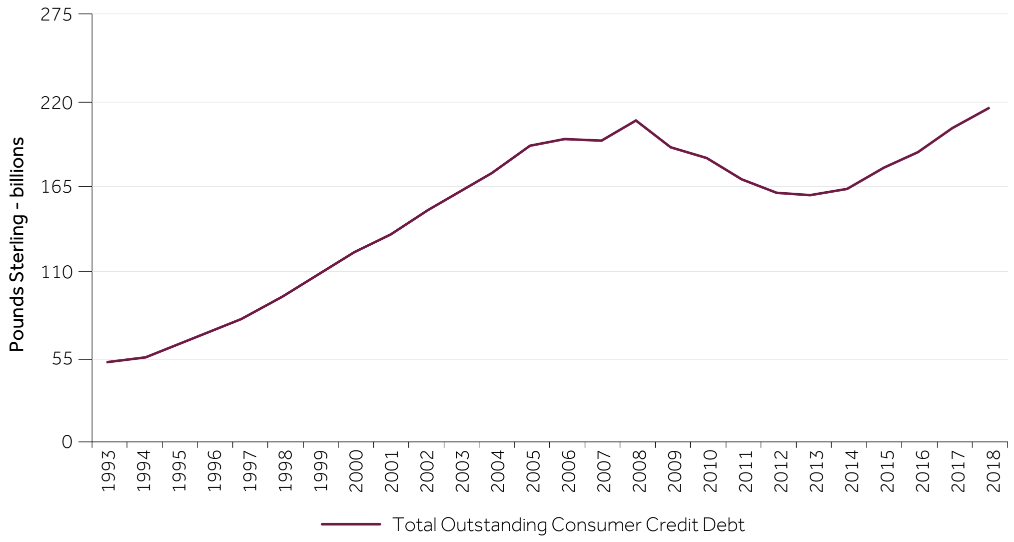
Changes in demand

4.3 In 1969, outstanding debt on hire-purchase and other instalment credit was reported to be just over £1 billion.[23] The most recent Bank of England data show that total outstanding consumer credit debt at January 2019 was £216.3 billion, representing 13.2% of all outstanding debt, including mortgages, held by individuals.[24]

4.4 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 levels. However, adjusting for inflation, the amount outstanding is 18.4% below the level in January 2008.[25]

23 Crowther Report, paragraph 3.1.13.
24 Bank of England Statistical Release: Money and Credit: January 2019 (published 1 March 2019) – https://www.bankofengland.co.uk/statistics/money-and-credit/2019/january-2019
25 Source: Bank of England data and Office of National Statistics (ONS) data.

Figure 1 Bank of England Statistics: Money and Credit[26]



4.5 Not only has the value of debt increased, so has the proportion of the population using consumer credit. The Crowther Report noted that 23% of the population had borrowed this way in 1969.[27] In comparison, our Financial Lives Survey estimated that in 2017, 75% of UK adults held, or had held in the previous 12 months, some form of consumer credit product.[28]

4.6 Recent growth in consumer credit has been largely attributed to motor finance, 0% credit cards and unsecured personal loans.[29] However, the past decade has also seen significant increases in the use of high-cost credit products.

4.7 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

4.8 In the early 1970s, the main products in the consumer credit market included hire-purchase, television rental (hire), mail order catalogues and check trading.[30]

4.9 Credit cards were first introduced in the UK in 1966, and the credit card market has since grown from 2 cards to over 180 products.[31] Total outstanding debt on credit cards has grown from £32 million in 1971[32] to £72.3 billion in January 2019.[33] Credit cards offer flexibility of drawdown and repayment but this comes with some specific risks, which we have addressed in our rules (PS18/4).

26 www.bankofengland.co.uk/news?NewsTypes=571948d14c6943f7b5b7748ad80bef29&Taxonomies=65c741d9573d48c09359a3c48020fe76&InfiniteScrolling=False&Direction=Latest
27 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.
28 Understanding the financial lives of UK adults: Findings from the FCA's Financial Lives Survey (October 2017) – www.fca.org.uk/publications/research/understanding-financial-lives-uk-adults
29 Record of Financial Policy Committee meeting held on 20 September 2017 – www.bankofengland.co.uk/record/2017/financial-policy-committee-september-2017
30 Crowther Report, Table 3.7 (page 132).
31 Moneyfacts, May 2018.
32 Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century: White Paper (DTI, December 2003).
33 See footnote 26 above.

4.10 There has been extensive growth in the number and range of high-cost credit products, including high-cost short-term credit (payday loans). These products enable non-prime[34] consumers to regulate cash flow and purchase essential goods. We have introduced new rules and guidance and are consulting on other proposed changes for high-cost credit products (CP18/43) including a cap on the cost of credit for rent-to-own (PS19/6).

4.11 We have also published rules and proposals (CP18/42) for overdrafts.

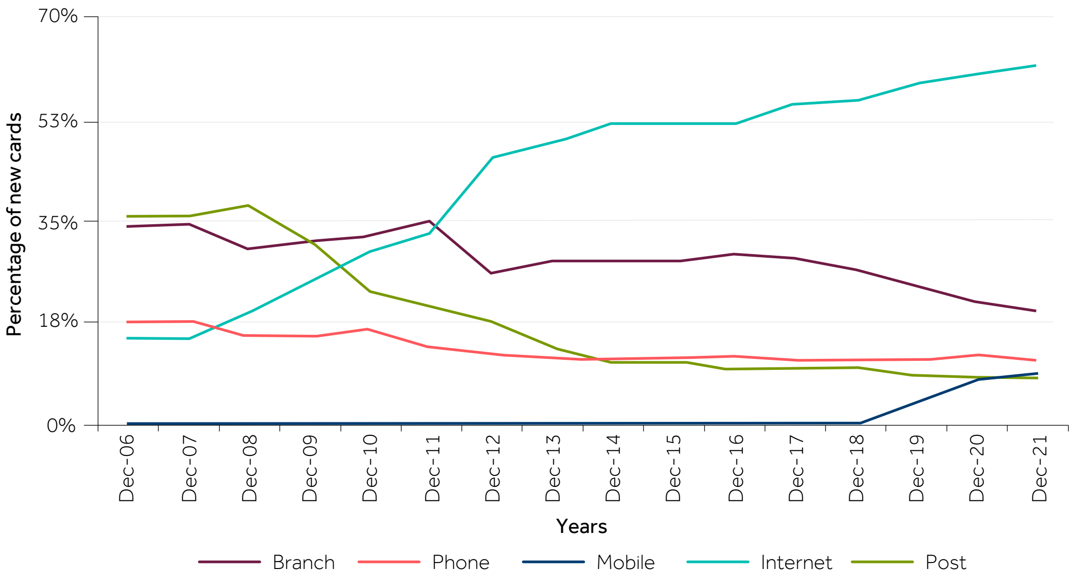
4.12 New types of products and business models, and the growth of mainstream credit products, can present new or additional risks of harm to consumers, particularly the more vulnerable and those with limited credit options. We have taken these into account in our review.

Changes in interaction between customers and firms

4.13 There have been significant changes in the ways 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 credit and communicating with customers. In response to this, the CCA was amended in 2004 to allow the electronic conclusion of agreements.

4.14 Since then, there have been more 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, for instance 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)[35]



4.15 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

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

35 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.

proportion of consumers using only digital methods has increased significantly and is now almost the same as those using only offline methods.[36]

4.16 In their responses to the interim report, stakeholders focused on the impact of rapid developments in technology driving changes in consumer behaviour and the ways firms and consumers interact. These developments are an important consideration when looking at the information requirement provisions in the CCA.

4.17 Another area of focus in responses was the impact of new products, such as personal contract plans (PCPs) in motor finance. The growth of high-cost credit products was seen as particularly significant.

4.18 Some stakeholders felt that increasing levels of lending inevitably increase the potential for harm to consumers, particularly those who might be in vulnerable circumstances or financial difficulties. They argued that this reinforces the need for appropriate protections. Other stakeholders mentioned an increase in vulnerable consumers, and felt that some of the current provisions do not always give the protection they need so there is a particular need for reform.

The CCA and FSMA regimes

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

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

4.21 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.[37] 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.[38]

4.22 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.[39] We exercised the power to make an agreement unenforceable when making the rules providing for the price cap for high-cost short-term credit (PS14/16). In general,

36 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.

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

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

39 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.

however, the sanction of making an agreement unenforceable is limited to a breach of the general prohibition[40] or entering into a credit agreement without the correct FSMA permission[41] or breach of the financial promotion restrictions.[42]

4.23 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 in relation to the ban on canvassing off trade premises.

4.24 In their responses to the interim report, stakeholders generally agreed that there are important differences between the CCA and FSMA regimes. However, they differed in their views on what that should mean for the review.

4.25 Some stakeholders felt that outcomes-based regulation under FSMA would help firms deliver the right outcomes for consumers, in contrast to the more prescriptive approach in the CCA, which they felt was outdated and in need of reform.

4.26 However, most stakeholders felt that keeping statutory rights and protections was important as they apply to a consumer's individual agreement. They felt that having a balance between statutory-based rights and FCA regulation was an effective way of protecting consumers.

Impact of FCA regulation

4.27 The interim report discussed the impact of FCA regulation since consumer credit regulation was transferred from the OFT to the FCA in April 2014.

4.28 In reviewing the retained provisions, we have considered whether, and to what extent, FCA regulation may negate the need for CCA protections. We have used the general approach to regulation set out in our Mission (April 2017) as elaborated on in our consultation on creditworthiness assessment (CP17/27).

4.29 We have also set out our general Approach to Consumers (July 2018), including how best we can protect consumers from harm across our regulatory responsibilities. To provide clarity on our expectations of firms and ensure good outcomes for consumers, particularly vulnerable consumers, we will consult on guidance for firms on the identification and treatment of vulnerable consumers.

4.30 Our authorisations gateway acts as a preventative tool to avoid harm, as set out in our Approach to Authorisation (December 2017). 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 were either refused authorisation or decided to withdraw their application before we made a decision.

4.31 We supervise against our high-level principles and specific requirements in the FCA Handbook, as set out in our Approach to Supervision (March 2018). Firms are required

40 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.

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

42 Section 21 FSMA.

to report specified information to us at regular intervals and to notify us of certain events, for instance 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.

4.32 We have a range of powers to take enforcement action against firms for non-compliance with our rules, and with CCA provisions, as set out in our Approach to Enforcement (March 2018). This can include levying financial penalties (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, and have set out near-final rules (PS1814) to extend the Senior Managers & Certification Regime to all consumer credit firms.

4.33 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 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.

4.34 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.

4.35 Given the need for regulation to keep up 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 kept CCA provisions where they could not be easily replicated under FSMA. As a result, the current regime incorporates statutory consumer rights and protections, supported by automatic sanctions, alongside the FSMA suite of regulatory powers.

4.36 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, as an incentive for compliance and to protect consumers.

4.37 Stakeholders agreed that FCA regulation has had a significant impact, but drew different conclusions about what that should mean for the review. Some stakeholders felt that this meant CCA provisions were no longer necessary. However, other stakeholders felt that, despite the breadth of the FCA's toolkit, this did not necessarily offer a more effective means of protecting consumers.

4.38 Our view is that, despite the significant impact we have had and our continuing oversight of the sector, this does not mean that there is no longer a need for the CCA protections. We do not think that the protection provided by FCA regulation overlaps unduly with that provided by the CCA, or negates the need for CCA rights and protections. They can co-exist and complement each other.

Regulation of consumer credit vs mortgages

4.39 In the interim report, we considered the differences in the way that consumer credit is regulated when compared to other retail sectors we regulate. We considered this with specific reference to mortgages, as it is also a retail lending product, and in response to issues raised in response to the Call for Input.

4.40 We noted that, in principle, it is desirable to have a degree of consistency between the regulation of different sectors. However, there might 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.

4.41 Consumers tend to take out mortgages only occasionally, and the sales process typically allows more time for reflection on the customer's part than is the case for most consumer credit products. Mortgage borrowers tend to have better credit scores on average and, on the whole, are less financially vulnerable.

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

4.43 There are also specific risks in relation to credit cards and similar products. Customers can draw down and repay on a revolving basis which carries risks of persistent debt.

4.44 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, are less likely to be financially resilient and more likely to be over-indebted.

Figure 3 Financial Lives Survey, FCA 2017[43]

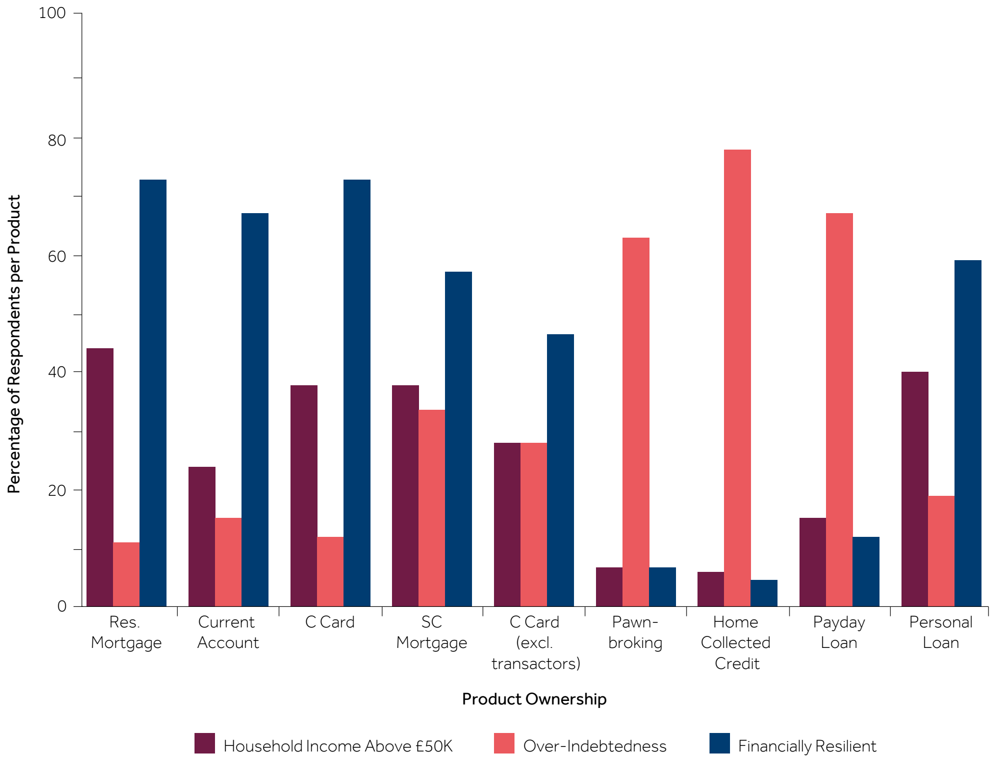
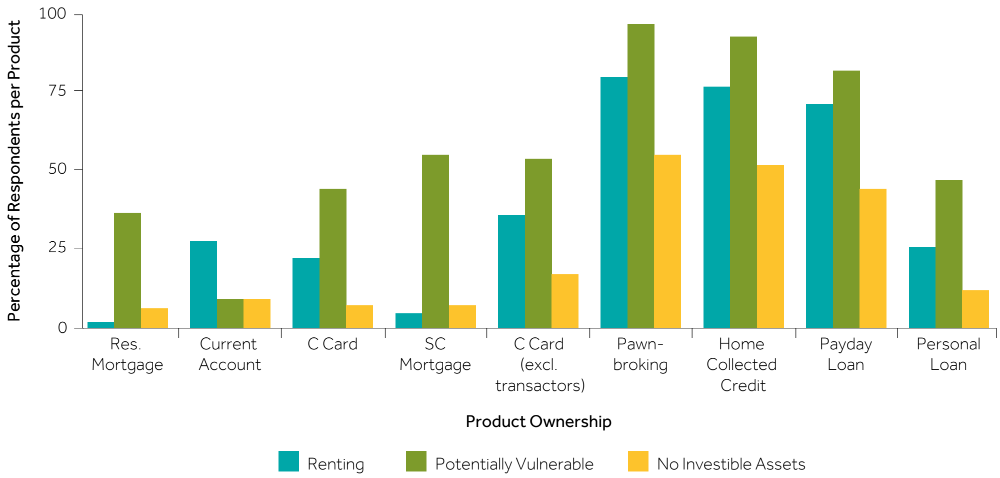


Figure 4 Financial Lives Survey, FCA 2017



4.45 On the supply side, there are just over 38,000 authorised firms in consumer credit, including just over 7,200 firms with permissions for lending, hire or both.[44]

4.46 In contrast, we estimate that there are 167 active lenders in the mortgage market (including lifetime mortgage providers).[45] The 6 largest lenders account for some three-quarters of outstanding balances.

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

44 Figures at 3 February 2019. The figure of 7,200 includes just over 2,800 firms with limited permission.

45 Derived from analysis of Product Sales Data in 2018 where lenders report one or more sales (at group level).

4.47 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 (article 29 of the Mortgage Credit Directive Order 2015).

4.48 We have taken account of the differences between consumer credit and other retail sectors, including mortgages, in our analysis of themes and provisions. Where we think an approach may be justified for consumer credit which is substantively different from other areas, this is on the basis of the specific issues and having regard to relevant similarities and differences between the markets.

4.49 Only a few stakeholders responded to this point. While they agreed that there are differences between credit and mortgages, some disagreed with the conclusion that these differences lead to consumer credit being higher risk, or necessitating a different regulatory approach. However, they did not provide much supporting evidence, for example how the markets are currently regulated (and the fact that most mortgage lenders are dual-regulated by the FCA and the Prudential Regulation Authority and subject to close supervisory scrutiny).

4.50 We do not agree that, because the mortgage regime does not have automatic sanctions for non-compliance with information requirements, it follows that these sanctions are disproportionate in consumer credit (see Chapter 7).

5 Rights and protections

Introduction

5.1 This chapter concerns provisions of the CCA that directly give rights and/or protections to consumers in relation to credit and hire agreements. Many of the provisions are closely connected to duties and obligations of creditors or owners.

5.2 Some CCA provisions entitle the customer to take action (for example, the right to withdraw from a credit agreement under section 66A), while others apply automatically without the need for action by the customer (for example, section 82(1) precludes a unilateral variation of an agreement by a firm from taking effect unless notice is given to the debtor or hirer in the prescribed manner).

5.3 We set out our views on whether the repeal (in whole or in part) of these provisions would adversely affect the appropriate degree of protection for consumers. We also set out some key issues with respect to these provisions, including those raised by stakeholders. More details are in Annex 5.

5.4 We have divided the provisions into sub-themes that broadly follow the customer journey, as set out in Table 1 below. In some cases, there is overlap with other themes of the review, as discussed in Chapters 6 and 7.

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

The interim report

5.5 In the interim report, we set out our initial views:

- the protections offered by these provisions continue to be important and should remain in some form
- in most cases, our current FSMA rule-making powers would not enable us to make rules that replicate the meaning and effect of these provisions
- most provisions in this theme should be retained in the CCA or other legislation because their repeal and replacement by FCA rules would adversely affect the appropriate degree of consumer protection
- however, there are issues with how some of these provisions are operating, and their impact, which we believe merit further consideration

Stakeholder feedback

5.6 In reaching our views on the provisions in this theme, we have taken account of the views of stakeholders, both from the roundtable discussions and in written responses to the interim report (Annex 2). We have also taken into account the findings of the consumer and firm surveys we carried out (Annex 3).

5.7 Many respondents generally agreed with the broad policy intention underpinning the rights and protections but not necessarily the way they are currently implemented in the CCA. For example:

- Some respondents felt the policy intent underpinning many of the provisions could be carried forward through FCA rules. This would provide an opportunity to simplify the provisions, and improve the way they operate, and remove any disproportionate burdens on firms.
- Other respondents agreed that rights and protections should remain in legislation but not necessarily in their current form. They argued that the opportunity should be taken to update or clarify aspects to address interpretational issues (for example, in relation to connected lender liability).

5.8 Some respondents argued that some of the provisions are no longer relevant and so should be repealed without replacement. One argument was that the provisions on antecedent negotiations are not necessary because of the FCA's regulatory toolkit and other consumer protection legislation. It was also argued that the multiple agreement provisions are no longer necessary, following abolition of the £25,000 financial limit, and that the time order provisions are rarely used.

Our overall views

5.9 We remain of the view that the CCA provisions covered by this chapter continue to deliver important rights and protections for consumers but, in most cases, could not be replaced by FCA rules under our current rule-making powers without adversely affecting the appropriate degree of consumer protection.

5.10 We have considered whether the provisions impose disproportionate burdens or restrictions on firms when compared to the benefits resulting to consumers. We do not think that they do, although we acknowledge that some provisions would benefit from being updated or clarified to address issues that have been identified or to enhance protections or improve proportionality.

5.11 However, there are a few provisions that we consider could, in principle, be repealed in whole or in part and replaced by FCA rules or other legislation. This is discussed below.

Majority of provisions

5.12 In most cases, the effect of CCA provisions on the rights and remedies of consumers could not be replicated using the current rule-making power delegated to the FCA.

5.13 The CCA, as an Act of Parliament, (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
- provides for judicial control and powers in relation to agreements and for the onus of proof in certain court proceedings

5.14 Examples are included in Annex 5, with more details on why we think that repeal would adversely affect the appropriate degree of consumer protection.

5.15 Some stakeholders argued that civil remedies available to consumers through other consumer protection legislation, although different to the rights and protections under the CCA, are comparable and sufficient to provide an appropriate level of consumer protection. We have taken account of these civil remedies which include:

- seeking redress through 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

5.16 However, we remain of the view that these additional rights and protections, either individually or together, would not be sufficient to maintain an appropriate degree of consumer protection if the relevant CCA provisions were repealed.

5.17 Although the Financial Ombudsman Service has wide powers to award compensation for financial loss, or other loss or damages, it cannot provide the same level of redress that the courts can under the CCA, neither could it rule that an agreement is unenforceable. Unlike CCA protections which apply automatically or which could be used as a defence in court proceedings, the protection provided by the Financial Ombudsman Service relies on the consumer being willing and able to make a complaint.

5.18 The Consumer Rights Act does not apply to business customers. This means that business borrowing covered by the CCA is excluded from its scope. It also does not apply to fairness of terms on the main subject matter of the contract or the appropriateness of the price if these terms are transparent and prominent and/or do not come within the 'grey list'.[46] While the basis of assessment required by the Act is quite wide, taking into account the nature of the contract and surrounding circumstances, the protection only assesses whether individual terms imposed were unfair. This is in contrast, for example, to the unfair relationships test under the CCA which allows a court to look beyond individual terms at the way the creditor has exercised or enforced any of its rights under the agreement or any related agreement or any other thing done (or not done) by, or on behalf of, the creditor.

5.19 Under the Consumer Protection from Unfair Trading Regulations, consumers can make a claim in the civil courts against traders who commit a misleading action or aggressive practice. The assessment of a complaint is based on how an 'average consumer' would have been affected by the commercial practice rather than how it might have affected the individual consumer. Although the 'average consumer' standard can be varied where practices are targeted at a specific group, or where practices materially distort the economic behaviour of a clearly identifiable group of certain types of vulnerable consumers, the test limits the scope for subjectivity. To have a civil remedy the consumer must be able to prove that the misleading action or aggressive practice led them to make a payment or enter into a contract. There is no right of redress for payments or contracts made before October 2014.

5.20 The measure of damages for loss in a claim brought under section 138D FSMA is unlikely to be the same as the extensive jurisdiction of the court under section 127 of the CCA. This includes the power to reduce the customer's 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. The consumer must prove that breach of a relevant rule resulted in loss for the consumer.

5.21 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.

5.22 We agree with stakeholders that some CCA provisions may not be delivering the intended benefits, or may disproportionately impact firms. While we consider that these provisions should be retained in legislation, we see merit in exploring the scope for changes in relation to issues that have been identified, to ensure a proportionate regime that provides an appropriate degree of consumer protection.

46 Schedule 2 to the Consumer Rights Act lists examples of terms which may be regarded as unfair. This list is known as the grey list.

5.23 In Table 2 below we list the key provisions that, in our view, could not be repealed and replaced without adversely affecting the appropriate degree of consumer protection (we set out more details in Annex 5).

Table 2: List of key provisions that could not be repealed

Sub-theme	Key CCA provisions
Prospective agreements	ss57-59, s61
Antecedent negotiations	s56
Multiple agreements	s18
Non-contracting out	s173
Connected lender liability	s75, s75A
Variation of agreements	s82
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
Pawnbroking	s114, ss117-122
Withdrawal and cancellation	s66A, ss67-74
Early repayment	ss94-98A
Termination	ss99-100, s102
Time orders	ss129-133, s136
Unfair relationships	s140A-C
Enforcement of land mortgages	s126

5.24 We set out some examples below.

Example 1 – antecedent negotiations

5.25 Section 56 deems certain negotiations with a customer that are conducted by a credit broker or supplier (the negotiator) before a regulated agreement is entered into to have been conducted in the capacity of agent of the creditor or owner as well as in its actual capacity. We consider this deemed agency principle important protection for consumers as much of what is said by the negotiator may influence the customer's decision to enter into the agreement. This provision therefore ensures the accountability of the creditor or owner for representations made by such persons and prevents the firm from contracting out of responsibility. It also prevents contracting out by making any term void to that extent.

5.26 A few stakeholders argued for the repeal of this protection on the basis that the Consumer Protection from Unfair Trading Regulations protect consumers from unfair, misleading or aggressive commercial practices and provide adequate safeguards and recourse for consumers even where a party to a transaction is not an authorised person. However, we do not consider this to be an adequate substitute, for the reasons mentioned above. In addition, 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.

5.27 Under our current rule-making powers, 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. This means, for example, that statements by the broker or supplier may constitute contract terms of the credit agreement and, if there is a misrepresentation by the broker or supplier, the debtor might be entitled to rescind the credit agreement. In addition, the creditor might be liable for damages. A supplier acting as negotiator may not necessarily be an authorised person and our rules cannot apply to non-authorised persons.

5.28 However, we recognise that there may be circumstances where the consumer might be deprived of this protection. For example, case law has decided that, where goods are sold by a supplier to an intermediary credit broker who then sells the goods to the creditor, the consumer is not protected by section 56(2) on the basis that the supplier is not the credit-broker within section 56(1)(b). However, it is unclear whether the legislation intended to make a distinction depending on whether a dealer sells goods directly to the creditor or via an intermediary. The Law Commission recommended in 2012 that this protection would benefit from clarification to make clear that 'the supplier acts as agent of the creditor even if the sale from the supplier to creditor takes place through an intermediary'.[47]

Example 2 – connected lender liability

5.29 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.

5.30 Our consumer survey (Annex 3) found that most consumers were aware of protections afforded when paying for goods or services using a credit card and for many this encouraged them to use their card for such purchases.

5.31 We could not use our general rule-making power under FSMA to make a rule that replicates the meaning and effect of this provision and, even if we could, there is substantial judicial learning on the interpretation and scope of section 75 that would be lost.

5.32 However, we recognise that technology and payment methods in the credit market have developed considerably since section 75 came into force, and issues not specifically within focus when the provision was framed have emerged. This has led to issues concerning the scope and application of the provision and uncertainty for both firms and consumers.

5.33 For example, the use by suppliers of third party payment processing firms has raised questions about whether this breaks the necessary link between the debtor, creditor and supplier, and so may make section 75 inapplicable. Whether a debtor-creditor-supplier relationship exists or not will depend on the specific arrangements and the effect of the commercial structures, and these vary. Ultimately, only a court can provide a conclusive view on whether a debtor-creditor-supplier relationship exists in an individual case.

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47 Consumer Redress for Misleading and Aggressive Practices (March 2012), Cm 8323 – https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236079/8323.pdf

5.34 Other issues that have been identified with section 75 include:

- Some respondents to the interim report complained that consumers unfairly use section 75 as a form of insurance, to claim the full amount of a large purchase from the creditor despite having paid only a small deposit towards the goods using their credit card. They argued that this could also encourage frivolous purchasing decisions. Some respondents called for a limitation of the creditor's liability under section 75 to the amount paid on the card.
- Some respondents argued that the customer's ability to make a claim for consequential losses arising from the supplier's breach of contract or misrepresentation is a disproportionate burden on creditors.
- There may be uncertainty about the scope of section 75 where payment is to an intermediary which is not itself providing the relevant goods or 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 made by additional cardholders authorised by the principal cardholder to use the credit card account (for example, a family member). As the principal cardholder is the borrower under the credit agreement, it is the principal cardholder that would need to make any claim under section 75. However, the Financial Ombudsman Service has upheld a claim made by an additional cardholder where that person purchased goods using their card for the benefit also of the principal cardholder.[48]
- Issues about the application of the cash value limits under section 75 can arise in relation to multiple purchases where a group of items are bought together. The application of section 75 may depend on whether the items could have been purchased separately and how the sale was promoted.
- The cash value limits were last increased in 1984 and 1985.
- While some consumer groups have suggested that the scope of section 75 should be extended to debit cards and charge cards, and other payment mechanisms, industry respondents argue that there is little rationale for doing so. This is outside the scope of our review.

5.35 Although our view is that section 75 should be retained, to maintain an appropriate degree of consumer protection, we consider that there would be merit in considering further the issues that have been identified with the provision.

Example 3 – withdrawal and cancellation

5.36 The provisions on cancellation and withdrawal provide a cooling-off period during which a customer can get out of a regulated agreement after it has been entered into. These rights are mutually exclusive as the right of cancellation in section 67 does not apply where the right of withdrawal in section 66A applies (see Annex 5). We consider these to be important consumer rights that are necessary to maintain an appropriate degree of consumer protection.

5.37 The right of withdrawal does not have the effect of cancelling a linked agreement for the supply of goods. This means that where a customer withdraws from the credit agreement, they are still bound to pay for the goods in some other way, unless there is a separate right of cancellation.

5.38 Some stakeholders argued that this undermines withdrawal rights, particularly where goods are acquired under a hire-purchase agreement where there is a single contract for the hire of the goods with an option to purchase.

48 www.ombudsman-decisions.org.uk/viewPDF.aspx?FileID=117089

5.39 We could not fully replicate the withdrawal or cancellation provisions with FCA rules because, for example, we could not make rules that apply to non-authorised persons or that govern the passing of title in goods. We also could not make rules that impose obligations on customers as the cancellation provisions do.

5.40 Stakeholders generally agreed with our initial views that repealing these provisions would adversely affect consumer protection. However, some argued that having separate regimes for withdrawal and cancellation causes confusion for consumers and firms. For example, there are differences in the cooling-off periods[49] and the method of exercising the rights.[50] There are also differences in the consequences of exercising the rights, including the implications for ancillary service contracts or linked transactions.

5.41 We agree that there is a case for aligning the regimes (subject to EU law while it applies) to simplify firms' obligations and give greater legal certainty to firms and consumers. It would also provide an opportunity to review the scope and application of the provisions.

Example 4 – judicial protections

Time orders

5.42 We consider that the power of the court to make a time order under sections 129-133 and consequential provision under section 136 is a strong consumer protection with no analogy in the FSMA framework. The provisions apply to all regulated credit and hire agreements, and also regulated mortgage contracts.

5.43 This protection enables the court, if it is just to do so, to redraw the terms of an agreement to reasonably reflect the customer's ability to repay the debt within a reasonable period. The court's discretion is based on balancing the interests of the firm and the customer.

5.44 While repeal without replacement would not necessarily oust the court's powers to intervene in credit agreements, we consider that it would significantly limit the court's ability to intervene in favour of a debtor in financial difficulties.

5.45 Some stakeholders have argued that the provisions are rarely utilised by consumers and have been effectively superseded by FCA rules which impose extensive requirements on lenders to assist customers in financial difficulties.

5.46 However, although the number of court cases that result in a time order is unlikely to be high, we do not consider that this minimises the impact of this protection. The existence of the provisions may encourage firms to negotiate with a customer and to accept an arrangement that may be analogous to a time order. It may also dissuade firms from taking unfair action.

5.47 Some stakeholders have suggested that the time order provisions may not be fulfilling their policy intent because of the expense, time and complexity involved in making a court application. We agree that there may be merit in reviewing the relevant procedures to ensure that they fulfil the policy intention.

49 A consumer can withdraw from a credit agreement within 14 days of the relevant day (usually when the agreement is made) and a consumer can cancel an agreement within 5 days of receiving a copy of the signed agreement or notice of cancellation rights (if required), or in other cases within 14 days of signing the agreement.

50 A consumer can withdraw from a credit agreement either orally or in writing, whereas a consumer can cancel an agreement only in writing.

Unfair relationships

5.48 The court's extensive powers to reopen credit agreements 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 many years.

5.49 Some stakeholders argued that allowing the courts to intervene in contractual agreements in this way leads to confusion and uncertainty. In their view, court intervention should no longer be necessary, given the FSMA regime and the role of the FCA and the Financial Ombudsman Service. They have suggested that Principle 6 (treating customers fairly) should be sufficient.

5.50 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.

5.51 The court's jurisdiction is very wide, enabling it to exercise its powers even where the relationship between the parties may have ended. It can also look at acts and omissions that occurred before or after making the agreement, including by an associate or former associate (who may not be an authorised person).

5.52 The definition of 'credit agreement' for these purposes is wider than regulated credit agreement. The effect of this is that where, for example, 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. The creditor may also not be an authorised person.

5.53 A few stakeholders argued that the lack of a definition of 'unfair' has created uncertainty for firms and has led to inconsistent judgments. However, we note that it was a deliberate policy decision on the part of Government to give the courts a wide discretion to consider unfairness on a case-by-case basis.

Minority of provisions

5.54 Some provisions covered by this theme could, in principle, be repealed (in part or in whole) and replaced by FCA rules or other legislation without adversely affecting the appropriate degree of consumer protection. Table 3 lists these provisions. This would also provide an opportunity to consider issues identified with the current provisions.

Table 3: List of key provisions that could be repealed (in part or in whole)

Sub-theme	Key CCA provisions	Partial or full repeal
Refund of credit brokerage fees	s155	Full
Prospective agreements	s55C	Full
Variation of agreements	s78A	Full
Pawnbroking	ss115-116	Full
Termination	s101, s103	Full
Unauthorised payments and credit tokens	s66, ss83-84	Partial

5.55 However, there may be benefit in keeping the provisions on prospective agreements (section 55C), variation of agreements (section 78A) and pawnbroking (sections

115-116) in the CCA or other legislation, to avoid undue fragmentation of the regulatory regime, given their close connection with other relevant CCA provisions that could not be replaced by FCA rules (see Annex 5).

5.56 Section 155 deals with refunds of credit brokerage fees. In our view, this could, in principle, be replaced with an FCA rule that obliges firms to provide a refund in the same or similar circumstances. This would have the advantage of bringing it together with existing CONC rules and guidance on credit broker fees.

5.57 It would also provide an opportunity to consider the issues that stakeholders have identified with the current provision. These include:

- 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 relevant agreement will be entered into.
- There is no entitlement to a refund until 6 months have elapsed. This may not be appropriate in the digital age, as most introductions take place online and consumers expect an early offer of an agreement.
- Some consumer groups have called for a ban on upfront credit broking fees, or on charging fees until an introduction has been made or a credit agreement has been 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 might be less transparent to the consumer and create conflicts of interest.
- Some stakeholders have suggested that there is a lack of clarity as to whether a refund applies where the consumer entered into a relevant agreement but later exercised their right to withdraw from or cancel the agreement.

5.58 If section 155 were repealed, with a view to replacement by FCA rules, we would consider these and other issues carefully, in light of our statutory objectives and on the basis of cost benefit analysis.

5.59 Sections 101 and 103 deal with termination of agreements. In our view, these could, in principle, be repealed in whole and replaced by FCA rules, without adversely affecting the appropriate degree of consumer protection.[51] The current sanction in section 103(6) that a failure to provide a notice is actionable as a breach of statutory duty is similar to section 138D FSMA. However, we also consider that they would benefit from a wider review, to ensure they provide appropriate consumer protection while not imposing undue burdens on firms.

5.60 For example, the statutory right to terminate a consumer hire agreement under section 101 does not apply until 18 months following entry into the agreement. There may be merit in reviewing this in light of changes in the market, including the increased use of consumer rental, and the position for hire-purchase.

51 Although section 172(2) (statements binding on creditor or owner) would no longer apply to termination statements.

5.61 Section 66 deals with credit tokens. 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, like a credit card or PIN, to a customer, any risk involved in the sending of the card or PIN will remain with the provider.[52] 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 and regulation 73(2).

5.62 Sections 83-84 deal with unauthorised payments. 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.

5.63 In some respects, 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.

5.64 In other respects, however, it can be argued that Part 7 of the PSRs contains stronger protections. There is a specified period for giving a refund (as soon as practicable, and in any event no later than the end of the business day following the day on which the provider becomes aware of the unauthorised transaction).

5.65 Overall, we consider that sections 66 and 83-84 could be partially repealed and replaced by the PSRs to create a more unified regime. However, we consider that section 66 should continue to apply where a credit-token is not a payment instrument regulated under Part 7 of the PSRs, and similarly sections 83 and 84 should continue to apply to CCA-regulated credit agreements that do not involve the provision of payment services within Part 7 of the PSRs.

52 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

6 Information requirements

Introduction

6.1 This chapter concerns the CCA provisions which require creditors and owners to provide customers with information in relation to regulated credit and hire agreements, both pre and post-contract.

6.2 In our interim report, we looked at the content of and rationale for the requirements, and explored issues identified with the current provisions which included drawing on feedback from stakeholders to our earlier Call for Input. We also considered the extent to which we could, in principle, exercise our general rule-making power to replace CCA provisions with FCA rules.

6.3 We now set out our final views, having regard to the feedback received to the interim report and the stakeholder roundtables.

Overview of information requirements

6.4 CCA provisions require firms to provide information to customers at different points. The detailed rules around the form and content of the required information are generally set out in regulations under the CCA. 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

6.5 Some of the requirements were originally made in 1983 (and later amended), while others were introduced in the 2006 Act (for post-contractual information) or as part of the implementation of the CCD in 2010. We set out supplementary detail on the various CCA provisions in Annex 6.

6.6 In addition, since the FCA took over the regulation of consumer credit in April 2014 we have made rules that impose further information requirements on firms. These are contained in the Consumer Credit Sourcebook (CONC), for example, on communicating with customers in persistent credit card debt.

6.7 Information requirements aim to protect consumers by reducing the information asymmetry between firms and customers. They are designed to enable and empower customers to make informed decisions, both before entering into an agreement and subsequently during the currency of the agreement, including by highlighting costs and key risks.

6.8 For example, post-contractual information serves a variety of different customer needs:

- Customers can request certain information, such as a copy of the agreement or a statement showing how much is owed. In some cases, the CCA or the relevant regulations prescribe the level of detail of information to be provided.
- Customers must be provided with information at defined periods or when certain trigger points or events occur, for example for periodic statements, notices of default sums (where arrears charges are incurred) or where a certain number of payments are missed requiring a notice of sums in arrears to be sent. Much of the content of this information is prescribed by regulations made under the 2006 Act and the timing of the issuing of the information is quite strict.
- A notice containing prescribed information must be provided before a firm can take certain steps under the agreement, for example before enforcing the agreement or varying the interest rate or terminating the agreement.

The interim report

6.9 Our initial view was that most of the information requirements could be replaced by FCA rules without adversely affecting the appropriate degree of consumer protection (although the associated sanctions could not be replaced).

6.10 We identified several potential advantages in doing this:

- Less complexity since the current provisions in the CCA, associated regulations and CONC are fragmented. Bringing them together, so far as possible, in a single location in the FCA Handbook would provide greater clarity and might be especially helpful for smaller firms. It may also benefit consumers and consumer organisations.
- Opportunity to review in detail the substance of the information requirements and, where appropriate, make amendments or add new requirements to address issues that have been identified or remove aspects that are no longer necessary. This would help ensure that they provide an appropriate level of consumer protection without imposing a disproportionate burden on firms.
- Simpler to amend in the future, subject to consultation and cost benefit analysis and stakeholder engagement. Having the requirements in the FCA Handbook would allow for quicker and more agile responses where amendments or additions are needed – for example, as firms' products and communications channels evolve, new conduct issues are identified or new consumer protection measures are needed to address emerging risks and harm.

6.11 We stated that, against this background, our initial view was that, in principle, it would be desirable in most cases to replace the obligations to provide information with FCA rules. We recognised that keeping the associated sanctions in the CCA would involve a degree of fragmentation of the regulatory regime but we considered that, taken as a whole, this was outweighed by the advantages of bringing information requirements together in the FCA Handbook.

6.12 We also made an initial assessment that, on the whole, the required information does not seem excessive and most elements contribute to ensuring the customer is adequately informed. The form requirements were in our view generally minimal and common-sense, although we recognised that in some areas it might be desirable to simplify or improve aspects, or tailor them more closely to the type of product and customer needs (subject to compliance with the CCD).

Stakeholder feedback

6.13 The general feedback from respondents to the interim report supported our preference for moving CCA information requirements into FCA rules.

6.14 Respondents on the whole saw this as an opportunity to review the form and content of the required information so that it is better focused and to help improve customer understanding and engagement.

6.15 Many respondents, and in particular industry, felt that the level of prescription was excessive, and made it difficult to communicate effectively with customers, for example in relation to new products or features. They argued that much of the prescribed wording was too legalistic or archaic and should be updated. However, some consumer organisations stated that they would have concerns over reduced levels of prescription as this could make it harder to enforce compliance and some firms could not be relied upon to highlight key risks and other relevant information if given too much flexibility or autonomy.

Our overall views

6.16 Our view remains that making rules replacing CCA information requirements provides an opportunity to review whether the requirements are targeted at the needs of customers and provide the right balance between delivering an appropriate degree of consumer protection and not imposing disproportionate burdens on firms. In some cases, it may be possible to adopt a more principles-based, outcomes focused approach reflecting the FCA's broader approach to regulation.

6.17 Although we consider that, in general, most provisions in this theme do not impose disproportionate burdens and restrictions when compared to the benefits to consumers, amendments may make information more relevant and readily comprehensible for customers in different situations. For example in some cases, there may be merit in allowing firms additional flexibility or updating requirements around the method of provision of information to reflect new methods of digital communication and customer preferences, subject to retaining core protections.

6.18 We acknowledge the technical and prescriptive nature of the CCA and its historic basis. However, we consider that, overall, the information requirements deliver important and relevant information and are not unduly prescriptive, although we agree that some aspects could be improved or be tailored more closely to the type of product and customer needs. Where there is a requirement for information to be reproduced using prescribed wording, this is intended to highlight important messages on a consistent basis but should not be so inflexible so as to risk it being applied in inappropriate circumstances.

6.19 We recognise that some requirements may better suit an outcomes-based approach, giving firms flexibility on delivery so they can provide relevant information to customers in different situations, in accordance with Principle 6 (treating customers fairly) and Principle 7 (communication with clients). Others might necessitate a degree of prescription, particularly where there are risks to more vulnerable consumers if firms do not deliver the right outcomes.

6.20 We remain of the view that moving the requirements to the Handbook should not be a 'lift and shift' exercise (aside from where necessary to ensure compliance with EU law where applicable). Instead, this would be an opportunity to review in detail the relevant requirements and consider what information consumers need and when and how it should be transmitted to them , including whether this is best achieved by prescriptive or more principles-based requirements (or a combination of both).

6.21 This should be assessed throughout the lifecycle of the different products and customer journeys, to ensure that customer needs are met. While there are advantages in uniform requirements applying across the board, there may be merit in tailoring these to different products or new digital methods of communication, or alternatively allowing firms a degree of discretion.

6.22 Consumer research and testing, and extensive stakeholder engagement, would be important in ensuring that the mode of delivery, timeliness and the form and content of the information requirements were appropriate, with the aim of encouraging customer engagement and contributing to informed decision making.

Replacing CCA provisions with FCA rules

6.23 We set out below, and in Table 4 below, our views on the extent to which we could, in principle, exercise our general rule-making power to replace the current CCA provisions on information requirements with FCA rules without adversely affecting the appropriate degree of consumer protection.

Provisions replaceable in whole

6.24 We have identified some CCA provisions which we consider could, in principle, be reproduced in whole by FCA rules:

- section 55C requires firms to give potential customers a copy of the proposed credit agreement upon request
- section 77B requires a creditor to provide a customer, on request, with a statement of account showing details of payments made for 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

6.25 Although sections 176 and 176A do not contain information requirements, we include these provisions here because they are relevant to all information that must be provided to customers under the CCA. In principle, sections 176 and 176A could be replaced in whole by FCA rules, depending on the extent to which the information requirements are repealed and replaced by FCA rules.

6.26 On section 55C, in principle this could be replaced in whole by FCA rules without adversely affecting the appropriate degree of consumer protection. However, there may be benefits in keeping this provision in legislation to avoid undue fragmentation of the regulatory regime, given its close connection with other relevant CCA provisions that could not be fully replaced by FCA rules (for example sections 77, 78 and 79 – duty to give information). The same applies to section 77B.

Provisions replaceable in part

6.27 Most of the CCA provisions that require firms to provide information to customers also set out the associated sanctions for breach of those obligations. These include unenforceability of the agreement (without a court order or during the period of non-compliance) and, in certain limited cases, disentitlement to interest and default sums.

6.28 As discussed in Chapter 7, we think that the loss of these sanctions would adversely affect the appropriate degree of consumer protection. As such, our view remains that the information requirements should be considered for repeal and replacement by FCA rules, but only if the existing sanctions could apply to a breach of those FCA rules, subject to modification and amendment as appropriate.

6.29 The CCA could provide that sanctions apply to breaches of specified FCA rules, or FSMA could be amended to give the FCA the power to apply these sanctions to breaches of relevant FCA rules.

Provisions not replaceable with substantially the same effect

6.30 We set out in Chapter 5 our view that the information requirements in sections 76, 78A, 82(1), 87 and 98 could not be replaced by FCA rules without adversely affecting the appropriate degree of consumer protection. However, in principle, the more detailed information requirements in secondary regulation could be replaced by FCA rules.

Summary of provisions

6.31 Our views on the various CCA provisions are set out in the Table below.

Table 4: 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 period of 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
Provisions replaceable in part: the notice requirements could be retained but detailed information requirements could be replaced by FCA rules	**n/a**	76	Enforcement notice (non-default cases)
		87	Default notice
		98	Termination notice

Specific issues

6.32 We have identified issues with the current information requirements which we think should be considered whether the provisions remain in legislation or are replaced by FCA rules. These include issues raised by stakeholders in response to our interim report (see summary of feedback at Annex 2).

6.33 We set out below specific examples of issues raised, and our views. This should be read alongside the more detailed supplementary analysis in Annex 6.

6.34 When reviewing information requirements, relevant factors could include:

- Whether the information requirement should be set at a high level and should be outcomes-focused or prescriptive, or a combination of these.
- Whether there is a need to unify requirements which have become disparate over time, for example because of CCD implementation.
- Identifying areas where consumers may potentially be overloaded with information, or alternatively may not be receiving sufficient information.
- Identifying areas where the form and content of the required information may not be clear, which may impede consumer engagement and decision making.
- Review of areas where the application of the requirements (including the associated triggers) may not be clear to firms or may raise practical difficulties.
- Identifying areas that might be acting as a barrier to technological development and innovation without delivering commensurate consumer protections.

Pre-contractual and contractual information

6.35 The form and content of agreements are subject to two different sets of secondary legislation, namely the Consumer Credit (Agreements) Regulations 1983 (as amended in 2004) and the Consumer Credit (Agreements) Regulations 2010. The former applies to regulated hire agreements, and also to credit agreements where the loan is secured on land or involves credit exceeding £60,260 or is entered into wholly or predominantly for business purposes. Other credit agreements are subject to the 2010 regulations, which reflect CCD requirements.

6.36 Where a credit agreement is subject to the 1983 regulations, the creditor can opt to apply the 2010 regulations instead, where pre-contract credit information is provided in compliance with the 2010 Disclosure of Information Regulations rather than the equivalent 2004 regulations. This is not possible for consumer hire which remains subject to the 1983 regulations in all cases.

6.37 The 1983 regulations have a high level of prescription including the ordering of information and restrictions on interspersion with other information (for example, explanatory text which might otherwise be helpful to the customer). The 2010 regulations do not require this degree of prescription and allow for more flexibility.

6.38 Where a firm offers products that fall within the ambit of both the 1983 and 2010 regulations, they may have to comply with different regimes for pre-contract and contractual information. We recognise that this can be an additional burden on firms, and may not have corresponding benefits for consumers.

6.39 There may be merit, therefore, in aligning the requirements (subject to CCD compliance) and providing firms with additional flexibility along the lines of the 2010 regulations. The potential impact on customer rights would, however, need to be considered. These include cancellation and withdrawal rights, which, while broadly similar, do have important differences.

Variation of agreements

6.40 Where the parties agree to vary the terms of an agreement this usually gives rise to a modifying agreement under section 82(2) CCA. This is deemed, for the purposes of the CCA, to revoke the original agreement with its terms being subsumed into a (notional) new agreement. This must comply with the relevant pre-contract and contractual information requirements.

6.41 Industry groups argued that the current requirements make the process complex to document and cumbersome to apply. This is said to be particularly the case where variations are sought that operate as a form of forbearance or where there is a change or addition to goods provided under the agreement. However, in our firm survey (Annex 3), several firms stated that they use modifying agreements for forbearance purposes.

6.42 Our view is that there would be merit in reviewing section 82, both in relation to modifying agreements and unilateral variations under section 82(1). For example, there may be scope to simplify the process for varying an agreement, which could include whether and in what circumstances a modified agreement should be signed by both parties and when copies should be provided.

6.43 In any event, we consider that substantive provisions in section 82(2) should remain in legislation but that the associated information requirements could be replaced by FCA rules without a loss of appropriate protection.

Multiple agreements

6.44 Some agreements incorporate distinct purposes or features. Section 18 CCA addresses circumstances where an agreement falls within more than one disparate statutory category set out in the CCA. The form and content requirements under the CCA may have to apply to each part or category, depending upon how the agreement is treated for the purposes of section 18.

6.45 Some industry respondents raised concerns that the rules for documenting a multiple agreement can be unduly complex, and hard to comply with, and this can lead to documentation which is unclear or difficult for consumers to follow. For example, the requirement to include a statement about certain rights and protections might only apply to part of the agreement. It was also suggested that the law in this area remains uncertain despite court judgments. The risk can be exacerbated as non-compliance can lead to the agreement being improperly-executed and unenforceable without an order of the court.

6.46 We set out in Chapter 5 our view that we could not replace section 18 in whole with an FCA rule, and its repeal would adversely affect the appropriate degree of consumer protection. However, we agree that section 18 should be reviewed to clarify its scope and effect, but with the detailed information requirements in secondary legislation being considered for replacement by FCA rules.

6.47 There could be scope to simplify the information requirements, having regard to the informational needs of consumers, to ensure that information is presented in a coherent and comprehensible way. For example, by increasing flexibility to avoid duplication of information for each part or category of agreement, or alternatively permitting consolidation of information where appropriate.

Post-contract information

6.48 Customers may receive information during the currency of an agreement either upon request, or at periodic intervals or certain trigger events or prior to the creditor or owner taking specified actions under the agreement.

6.49 Some stakeholders highlighted that the post-contract information requirements are fragmented, with a degree of overlap, and called for consolidation and a simplified regime. We agree that there may be benefits in a review which also takes into account relevant requirements in CONC, and involving all aspects of the customer journey. The aim would be to ensure that customers are sufficiently engaged and can make informed decisions about any actions they should take.

6.50 If changes are made to CCA requirements, we would consider corresponding changes to FCA rules, for example on peer-to-peer lending.

6.51 We accept that the level of information currently provided can be quite detailed and technical, for example for fixed-sum statements, arrears notices and default notices. However, it is important that the customer is given an overall and up-to-date picture of their account, particularly where they may be vulnerable or in arrears. Our consumer survey (Annex 3) shows that consumers do in general engage with the arrears notices or letters they receive from firms.

6.52 Several stakeholders raised issues concerning the form and content of default notices, feeling that the wording does not meet the needs of customers in financial difficulty. A mental health charity noted that communications should meet the needs of potentially vulnerable consumers and lengthy, complex or threatening communications can make it more difficult for consumers to engage.

6.53 Changes in the level of prescription and tone of language used might be desirable and lead to better customer outcomes. In some cases, there may be merit in allowing firms to provide information tailored to the customer's situation, although it would be important to strike an appropriate balance and ensure key protections are preserved.

6.54 We also recognise concerns raised about the requirement to send prescribed information to 'gone aways' (where the customer has moved home without informing the firm of their current address) or where customers are subject to an Individual Voluntary Arrangement (IVA) or are deceased. In our firm survey (Annex 3) firms reported that in 532,796 agreements, there was a 'gone away' where the customer was no longer at their address and there was no forwarding address. We agree there would be merit in reviewing these aspects.

Technological developments

6.55 The medium over which consumers access financial products has evolved rapidly in recent years with technological advancements. Applying for credit online and the provision of documents and information over the internet through online portals and digital repositories are becoming more commonplace.

6.56 We recognise that consumers want increased access to financial technology and firms are increasingly facilitating this with innovative delivery methods and making credit available through smartphones and mobile apps. Stakeholders have commented that the CCA has not kept up with the pace of change and there are impediments or uncertainties around its application in certain instances. For example, uncertainties have been raised about the extent to which an app in a mobile device could be regarded as a credit-token under section 14(1) CCA and the consequences where the software is updated.

6.57 The CCA requirements are, in general, technologically neutral. The CCA amendments in 2004 allow for the electronic conclusion of agreements and transmission of documents. There seems little reason why the lending process could not be completed entirely though electronic means. However, this may not be the preferred option of all consumers and some may prefer more traditional means of communication. We would expect firms to design delivery channels that have regard to their target market, the complexity of the product and its features and the likely level of customer understanding or vulnerability.

6.58 Our firm survey (Annex 3) showed that about two thirds of customer statements in the survey were sent by post with a third sent electronically for fixed-sum credit. In the case of running-account credit (primarily credit cards) there was a roughly equal division between post and electronic medium.

6.59 Section 176A CCA provides for the electronic transmission of documents, subject to certain conditions including that the customer has agreed to the form of communication. Some stakeholders (particularly from industry) argued that this provision is inflexible and that regard should be given to the uses and experience of the firm's customer base to determine their preferred choice of communication.

6.60 However, we think it remains appropriate to require explicit consent to receiving communication via electronic means, rather than consent being 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. Our consumer survey showed that just over a third of consumers preferred to receive information from firms in paper form.

6.61 The one significant area where the CCA is prescriptive in respect of the medium of communication relates to enforcement, default and termination notices. These must be sent using paper form, given the potentially serious consequences of such notices and to ensure that important information is brought to the customer's attention.

6.62 Some respondents (mainly from industry) argued that the requirement for these notices (particularly default notices) to be sent in paper form should be removed on the basis that post may not be opened or may not reach the recipient whereas emails are likely to be seen and read. However, on balance we are inclined to the view that the requirement should be retained as a customer may be more likely to take notice of a document which arrives by post, although we acknowledge the contrary arguments. There is, of course, nothing to prevent firms from also sending notices electronically, where the customer has given consent.

6.63 If sections 176 and 176A were to be repealed, with a view to their replacement by FCA rules, we would consider the issues further. For example, whether there should be more flexibility, or clarification of elements such as whether providing information via in-app or to digital document repositories should be sufficient. This would be likely to require consumer research and testing.

7 Sanctions (including unenforceability)

Introduction

7.1 This chapter concerns the provisions of the CCA which contain sanctions in the event that firms fail to comply with information or other requirements.

7.2 In our interim report, we explained that some provisions give rise to the automatic sanction of unenforceability without a court order where, for example, an agreement is improperly executed because it fails to comply with form and content requirements. We also explained that some provisions applying to post-contract information give rise to the automatic sanction of unenforceability during the period of the breach. In some instances, there is also a disentitlement sanction where the customer has no liability to pay interest or default sums in respect of the period of non-compliance.

7.3 These 'automatic' sanctions are 'self-policing' and apply without the customer or the FCA needing to take specific action.

7.4 In addition, there are a number of criminal offences under the CCA which in general arise in respect of conduct issues rather than information provision. There is also a specific sanction for breach of statutory duty for a limited number of CCA provisions.

7.5 We consider below the intended effect of the sanctions, their practical impact and how far they could be replicated within the FSMA regime. We give more detail in Annex 7. We provide our views on the statutory question of whether, if these sanctions were repealed, this would adversely affect the appropriate degree of protection for consumers. We also discuss issues with the current sanctions and some possible alternative approaches.

Background

7.6 The Crowther Report noted that the consumer credit regulatory regime prior to 1974 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 willful 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. The former was 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 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.[53] 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.

Unenforceability without court order

7.10 There are several provisions under the CCA that give rise to the automatic sanction of unenforceability unless a court order (an 'enforcement order') is obtained by the firm. The court has discretion under section 127(1) to allow enforcement of the agreement if it considers it just to do so, having regard to any prejudice caused and the degree of culpability for the breach.[54]

7.11 In granting an enforcement order, the court may also alter terms of the agreement so as to compensate the customer for prejudice suffered as a result of the contravention, such as reducing the sum payable.

7.12 This sanction 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 or notice of cancellation rights (sections 61A-64).

7.13 There have been very few court decisions reported where a firm has applied to the court for an enforcement order. In our firm survey (Annex 3) we found that, of the 1.3 million agreements in the sample where firms had identified agreements as improperly executed, only 446 (0.03%) led to an application for an enforcement order; this was granted in 268 cases, and in another 2 cases subject to conditions.

Unenforceability during breach

7.14 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.

7.15 This sanction applies in relation to the requirement to issue 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). These requirements were introduced under the 2006 Act and apply alongside disentitlement sanctions.

7.16 Unenforceability during breach also arises in relation to sections 77-79 (duty to give information upon request) and certain other information requirements.

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

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

Disentitlement to interest and default sums

7.17 In addition to unenforceability, breach of section 77A (annual statements) or sections 86B-86C (arrears notices) means that the customer has no liability to pay interest or default sums in respect of the period of non-compliance.[55]

Criminal offences

7.18 Breach of the provisions on canvassing off trade premises (sections 49 and 154) and circulars to minors (section 50) is a criminal offence.

7.19 There are also criminal offences at section 114 (pawn-receipts) and section 119 (refusal to deliver pawn), and at sections 157-160 for information held by credit reference agencies or relating to the use of such information.

7.20 In addition, although not a sanction on a firm, section 80 creates an offence by a hirer/debtor upon failure to give information about goods.

Breach of statutory duty

7.21 A limited number of CCA provisions give rise to a 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).

7.22 We consider that a breach of statutory duty under the CCA is substantially similar to the private law right of action provided by section 138D FSMA (see Annex 7). We do not consider it further in this chapter.

Transferability of provisions

7.23 It would not be possible to replicate the sanctions of unenforceability or disentitlement under our current FSMA rule-making powers.

7.24 However, it may in principle be possible to keep these sanctions within the CCA or other legislation, while replacing the substantive information disclosure obligations that give rise to the sanctions by FCA rules. We recognise that this may require primary legislation if amendments could not be achieved through use of the Treasury's order-making power under the Financial Services Act 2012.

7.25 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. Although section 138E of FSMA provides that a breach of an FCA rule cannot make a transaction void or unenforceable,

55 A 'default sum' means a sum (other than interest) payable by the debtor or hirer under a regulated agreement in connection with a breach of the agreement (section 187A). This could include, for example, arrears charges.

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).

7.26 Any extension of our rule-making powers could be limited to breach of certain types of rules.

7.27 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 sets out our views on whether their repeal would adversely affect the appropriate degree of consumer protection. We also look at the potential options and approaches to reform.

Stakeholder feedback

7.28 More so than other parts of the review, the sanctions drew strongly opposing views from industry and consumer groups. Most respondents focused on the sanctions introduced in 2006 on post-contract information, and particularly the disentitlement sanction.

7.29 Industry respondents argued that unenforceability and disentitlement can be disproportionate and unfair where an error is minor and causes no, or no material, harm. They disagreed that there is a need for the regime to be self-policing as standards have improved since the transfer from the OFT and the FCA has a wide supervisory and enforcement toolkit. They argued that the possibility of FCA action is a sufficient deterrent against non-compliance, and that self-policing does not necessarily work as firms who do not comply will not remediate in any event.

7.30 Some industry respondents also argued that the sanctions are inconsistent with the approach taken in other FCA-regulated sectors, and questioned why it was felt that the appropriate degree of protection for consumers should be higher in the consumer credit market.

7.31 Consumer respondents held strong views that the sanctions, including disentitlement, operate as an important self-policing tool and a crucial form of consumer protection. They felt that the FCA's powers to take enforcement action against firms for non-compliance cannot replace the importance of statutory rights in relation to a consumer's individual agreement. Their view was that disentitlement and unenforceability play a vital role in incentivising firms to comply with the requirements and to make sure they provide the designated information to customers at the correct time.

7.32 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.

Self-policing sanctions

7.33 The feedback from respondents was closely aligned to their previous views in response to the Call for Input. We remain of the view that the provisions giving rise to unenforceability and disentitlement could not be repealed without adversely affecting the appropriate degree of consumer protection.

7.34 In our view, the self-policing nature of these automatic sanctions contributes significantly to ensuring appropriate firm conduct and protecting consumers. We do not think it would be sufficient to rely on FCA supervisory, disciplinary and restitutionary powers alone. These FSMA powers are important – we have used them to intervene and tackle detriment in a number of areas of the consumer credit market including high-cost credit. However, we cannot intervene in all cases where there may be regulatory breaches, or provide recourse to all affected customers, as we must prioritise our resources.

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

7.36 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 or those engaged in credit or hire as an ancillary activity. This impacts on our ability, in practice, to proactively supervise firms and identify and act against non-compliance.

7.37 As noted in Chapter 4, there are currently around 7,200 firms with permissions for either lending or consumer hire. In total, there are over 38,000 firms with consumer credit permissions, including credit brokers.

7.38 Therefore, there is a limit to the extent to which FCA supervision can provide the same dissuasive effect as self-policing sanctions in the CCA. The extent to which it does may also vary by sector or firm, with some firms devoting greater resources to ensuring compliance or embedding this more in their processes.

7.39 Also relevant is 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 at risk of 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 may have a cause for complaint, or might be unsure as to their rights. Even where they realise there is a problem, they might be reluctant to complain or to seek redress. As a consequence, firms may put less effort into ensuring compliance.

Unenforceability of agreement

7.40 We remain of the view that unenforceability provides a potent consumer protection measure in incentivising firms to comply with form and content requirements, and to provide requisite information to customers at the appropriate time.

7.41 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 accumulating debt which may be difficult to repay.

7.42 There are differences in the way that unenforceability applies. 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 the agreement remains unenforceable, without the need to go to court. In some cases, 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.

7.43 There are complex interactions with how unenforceability can arise under FSMA, where firms enter into agreements without an appropriate permission, or following an introduction by an unauthorised credit broker. 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.[56] This function is unique to consumer credit, and was carried over from the OFT regime; it does not apply to consumer hire. However, our power to validate agreements under FSMA cannot remedy any separate CCA unenforceability.

7.44 Some industry respondents argued that customers could rely on the remedy under section 138D FSMA which provides for a private law action for a breach of an FCA rule. Consumer representatives however argued that a claim under section 138D is no substitute for automatic unenforceability, as the right to take court action for damages is not a right that a vulnerable consumer is likely to be in a position to use.

7.45 Our view remains that breach of statutory duty would not achieve a comparable standard of protection for consumers in the consumer credit market. 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. The customer would need to demonstrate that the firm's breach had caused loss.
- The court can exercise wider powers under the CCA when an application for an enforcement order is made, compared to the relief it can provide for breach of statutory duty. For example, the court can reduce the customer's liability, make a time order rescheduling payments or otherwise alter the terms of the agreement. In proceedings to enforce the agreement, the customer may also apply to re-open the agreement under the unfair relationships provisions.

56 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.

- 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, and this could impact on the outcome of disputes.

7.46 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.

Meaning of enforcement

7.47 The strength of unenforceability as an incentive for firms to comply with regulatory requirements depends on the practical consequences for the firm if an agreement is unenforceable.

7.48 The CCA does not generally define what constitutes 'enforcement' or what actions a firm may not undertake during a period when an agreement is unenforceable.[57] One trade body suggested clarifying the meaning of unenforceability rather than leaving firms to have to rely on case law. We can see benefit in this, so firms are certain about the steps they are allowed to take where an agreement is unenforceable, and there is greater clarity for customers as to the level of protection they have.

7.49 In our interim report, we mentioned the McGuffick case[58] where the court held that passing details of a debt to a credit reference agency did not constitute enforcement under the CCA and 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. We suggested that there may be merit in clarifying in legislation the meaning of enforcement to put this beyond doubt.

7.50 Several respondents to the interim report felt that enforceability should not be redefined as this had been settled by case law. However, it is important to note that the McGuffick decision related to section 77(4) CCA and the judge made it clear that the court was deciding only the issues specifically raised by the facts of that case and not any hypothetical factual situations not before the court.

7.51 As the court recognised in McGuffick, enforcement can mean different things in the context of different CCA provisions. We have published guidance on the meaning of enforcement of security such as a guarantee or indemnity, where we say (taking account of relevant CCA provisions, the McGuffick decision and other relevant case law) that we do not think that 'enforcement of security' 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.[59]

57 Although section 65(2) CCA states that a retaking of goods or land to which a regulated agreement relates is an enforcement of the agreement.

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

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

Reformulation of the enforceability sanction

7.52 In addition to clarifying the meaning of enforcement, we consider there may be merit in reformulating the unenforceability sanction or its scope, to ensure that its impact has the intended effect. Below we suggest some possible criteria that might be relevant in reformulating unenforceability as a sanction:

- Its application should be focused on information requirements where a failure by the firm has the potential for material harm to customers.
- Its application should be proportionate, and it should in general not apply to minor errors where there can be little or no detriment.
- Its effect on the firm should incentivise it to meet its regulatory responsibilities and take a proactive approach to compliance.
- Firms and customers should have certainty about the effect of unenforceability and the scope of this in terms of steps that a firm can or cannot take during the period of non-compliance or pending the obtaining of a court order.

7.53 A possible approach might be to prevent a firm from taking action of a coercive nature against the customer to compel or secure performance of an obligation during a period of unenforceability. This might, for example, include demanding payment (as opposed to passively accepting payments) or using other self-help remedies such as taking payment under a continuous payment authority (CPA). This might encourage the firm to bring the non-compliance to an end and meet its regulatory responsibilities.

7.54 If a firm threatened legal action, or brought a legal action, this would be as a pre-cursor to entering judgment (which would be clearly enforcement of the agreement). Threatening action which the firm knows it cannot legally take or follow through on could be regarded as misleading, unless the limitations of such actions were made clear to the customer.

7.55 In addition, consideration could be given to whether the unenforceability sanction should apply in a more limited way in certain cases. The sanction currently arises in different contexts under the CCA, relating to a variety of failings by firms. Arguably its meaning and effect should differ depending on the context, in order to meet the overall objective of securing compliance but in a way that is proportionate relative to the type of issue.

7.56 For example, consideration could be given to introducing more tailor-made options such as making certain identified obligations unenforceable (or unenforceable to a certain extent or in certain circumstances) following breach, rather than the entire agreement being unenforceable. This could ensure that the sanction is more clearly focused and is proportionate to the potential harm.

7.57 On the other hand, we recognise that applying unenforceability in different ways, in different circumstances, could be confusing to firms and customers, and there may be merit in having a more consistent approach.

7.58 Some stakeholders pointed out that, where there are parallel requirements in CONC on peer-to-peer platforms to issue arrears notices or default sum notices, there is not the same sanction of unenforceability (or disentitlement). However, this did not reflect a policy view about the appropriateness of CCA sanctions in these cases. Instead, it reflected the scope of the FSMA rule-making powers that we were exercising at the time.

Disentitlement to interest and default sums

7.59 The sanction of disentitlement raises additional issues, including 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; and how likely it is to create inconsistent outcomes.

7.60 It is widely recognised that 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). Firms are also required under Principle 11 and SUP 15 to report significant breaches of the CCA or CONC.

7.61 However, it is relevant that disentitlement was introduced in 2006 alongside significant 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 think that those changes on their own were sufficient, and so additional sanctions were needed. The Minister said at Committee stage of the Consumer Credit Bill: 'The Government have carefully considered appropriate sanctions where there has been a failure to provide notices, and the best way to make creditors or owners give arrears notices is to penalise them for non-compliance in a way that hurts them most'.[60]

7.62 It seems clear from this that the disentitlement sanction was intended to have a punitive effect and not merely be compensatory.

7.63 In response to our interim report, many industry respondents argued that disentitlement should be removed as a sanction. However, if it were to be retained then they argued that its effect should be limited to a breach of requirements that has caused, or is likely to have caused, material customer harm. Stakeholders recognised the challenges in defining materiality and suggested that guidance might assist.

7.64 It is important to note that disentitlement is limited to breach of the CCA requirements on arrears notices and annual statements, as these are regarded as particularly important information points.

7.65 In the case of arrears notices, the customer will have missed a specified number or amount of payments and may be in financial difficulties. They need sufficient opportunity to remedy the position or seek debt advice, and so the 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.

7.66 We recognise that firms might be communicating anyway with customers who have missed payments, but not all may do so or not in an appropriate and timely manner. We also recognise that there is a case for review of the requirements on the content of notices of sums in arrears, and the relevant triggers, but this should not detract from the need to require firms to provide relevant information when customers fall behind with payments.

60 https://publications.parliament.uk/pa/cm200405/cmstand/e/st050125/am/50125s10.htm

7.67 In the case of fixed-sum statements, section 77A was introduced because of concerns that customers were not in general receiving information from firms about the state of their accounts so they could check relevant information and see how much was owing.[61] This was particularly important for longer-duration agreements. We remain of the view that providing customers with relevant account information on a regular basis is imperative to meeting their informational needs and for customers to be aware if the debt is accumulating so they can take steps to plan ahead or seek advice.

Proportionality

7.68 We recognise that there is some force in the argument, advanced by many industry stakeholders, that the sanctions can apply where a breach is relatively technical and minor and could result in financial burdens that can be disproportionate to the intended benefits of the sanction as an effective deterrent against non-compliance.

7.69 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, particularly if the breach has applied across a large portfolio over an extended period. Some firms have told us that they have provided considerable sums in remediation in instances where a breach was technical and the customers sustained no comparable harm or prejudice requiring recompense.

7.70 Our firm survey (Annex 3) found that, of the 300,767 agreements in our sample where the firms identified breach of section 77A or section 86B/C, we were told that customers were reimbursed in 92.8% of cases.

7.71 Breaches of the legislative requirements should of course not occur. However, firms have said that sometimes these arise because the substantive requirements about the form and content of statements and notices are not very clear or the trigger events are unclear.

7.72 We accept that some CCA provisions may be open to different interpretations in certain circumstances, perhaps with the emergence of new types of product, and this can lead to inadvertent non-compliance. However, we expect firms to have adequate systems and controls in place to monitor and make sure they are complying with the requirements, so as to eliminate or reduce significantly the occurrence of breaches.

7.73 Where breaches do occur then we agree that the principle of proportionality suggests that an 'all or nothing' sanction may not always be appropriate. We agree in principle that a sanction should not apply where a breach was minor and technical and was not capable of causing material customer harm.

7.74 A wide range of stakeholders provided feedback in respect of regulation 41 of the relevant CCA regulations.[62] 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, it does not breach the regulations on that ground alone and so does not give rise to the automatic sanctions.

61 The DTI White Paper (December 2003) noted that a key aim of consumer credit reform was to enable customers to become better informed and this would help tackle the escalation of debt which could lead to over-indebtedness.

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

7.75 We recognise that regulation 41 was introduced with the aim of mitigating the consequences of minor technical errors. 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 its scope. Case law has, however, confirmed that if a breach does not fall within regulation 41, the statement or notice is entirely ineffective; it is as if no statement or notice had been given at all.[63]

7.76 We recognise that firms may be reluctant to rely on regulation 41 where there is doubt as to its application. In any event, it only applies to information and not the triggers, for example if a firm provides a notice slightly later than required.

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

7.78 However, there may still be instances where breaches of information obligations arise as a result of reasonable uncertainty over how they apply in a specific situation. This may be the case even if the substantive obligations are amended or replaced to clarify their application. It may also be the case even if regulation 41 is amended (or replaced by equivalent FCA rules) to clarify the sorts of defects in statements and notices which are considered minor and unlikely to impact substantively on a customer.

7.79 In particular, a breach may be substantive but unlikely to cause consumer harm. We think there may be merit in the sanctions being disapplied in such cases, or applied in a limited way. We set out some possible approaches below. We accept that otherwise customers may receive a substantial windfall even if the breach has not affected them in any adverse way.

7.80 Conversely, we would not wish to dilute the application and effect of the unenforceability and disentitlement sanctions in a way that would undermine their value as a commercial incentive to ensure the transparency of important information.

Rectifying breaches

7.81 Firms have also told us that they may be uncertain how to remedy any breach, in terms of issuing compliant statements or notices, and what information should be included in these. This may be particularly the case where there has been a considerable time lapse from when the error arose. They felt that the legislation provides no certainty on how compliance could be achieved in these cases.

7.82 Firms may adopt different practices in terms of how they bring a period of non-compliance to an end and what information they provide at that point.

7.83 For example, if a statement was not provided under section 77A, and so the firm was not entitled to interest and default sums in respect of the period of non-compliance,

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

it may be unclear whether amounts shown in a remedial statement should be the amounts that were due and payable under the terms of the agreement, or whether account should be taken of the impact of disentitlement and any refunds. It might also be unclear whether individual statements should be provided, covering the period in question, or if consolidated information may be permissible.

7.84 Stakeholders also felt that providing the customer with historic statements or notices might be unhelpful and could confuse customers. For example, there may not be great benefit in sending an historic arrears notice to a customer who is up to date, or including what might be an out-of-date version of the FCA information sheet.

7.85 We agree that firms should have certainty as to how to remedy any non-compliance which leads to unenforceability or disentitlement, and that information provided to customers should not confuse them and should be helpful to their needs. This should be taken into account in any substantive review of the requirements.

Possible options

7.86 Our view remains that the 'self-policing' nature of the automatic sanction of unenforceability (without a court order or during breach) should be retained, on the grounds that it is likely to have a significant effect in ensuring appropriate firm conduct in the consumer credit market and protecting consumers.

7.87 On balance, we also consider that disentitlement should be retained as a sanction, provided that its scope of application is narrowed sufficiently so that it is focused on the types of breach which are most likely to cause harm to customers.

7.88 We have suggested moving the substantive information disclosure obligations into FCA rules, where appropriate, but keeping the sanctions in the CCA (unless the FCA's rule-making powers under FSMA are extended to the same effect).

7.89 In considering changes to the current sanctions, relevant factors might include:

- Focus on harm: In principle, the sanctions should apply only to breaches that are likely by their nature to cause material harm, to incentivise firms to comply and so avoid such harm. This would be in line with the original policy intention.
- Tailor-made options: Reviewing the information needs of customers as described in Chapter 6 would provide an opportunity to identify which requirements are sufficiently significant to merit self-policing sanctions for breaches and to tailor the application of the sanctions accordingly. For example, certain identified obligations could be unenforceable (rather than the entire agreement being unenforceable) so that the sanction is clearly focused and proportionate to the potential harm.
- Identifying key information: A possible approach might be to identify a set of key information or 'prescribed terms' and to limit breaches to where such information or terms are missing or substantively wrong, or are not corrected within a specified period, or where the required notice or statement was not provided at all. We recognise though that there might be unintended errors where the sanctions may not be proportionate, depending on the circumstances.
- Limiting disentitlement: An option might be to apply this only in a small sub-set of cases giving rise to unenforceability, where there is the greatest risk of harm. We do however recognise challenges in assessing varying degrees of potential harm to

which to apply different sanctions, and agree that this would require more detailed consideration.

- Reformulation of enforcement: There may be merit in clarifying the meaning of enforcement, or its scope and effect, to ensure that it operates as an effective incentive for firms to comply with information requirements.
- Clarifying regulation 41: We accept that the current provision has not operated as originally intended, and may have only limited utility. There may be merit in clarifying the scope of regulation 41, or any successor provision, to ensure it is effective in saving minor errors or omissions from the sanctions.

7.90 Some respondents noted that section 127 requires the court to consider prejudice and culpability in deciding whether to make an enforcement order. This ensures an appropriate balance between the interests of customers and firms. However, there is no equivalent process for unenforceability during breach and disentitlement. Here there is no arbiter for disentitlement and the current sanctions are 'all or nothing'.

7.91 Arguably, therefore, the court should be given a power to exercise discretion to grant relief from disentitlement sanctions, based on prejudice and culpability, similar to section 127 cases. Some stakeholders suggested that it is inconsistent for the court to have a role in potentially allowing enforcement of some agreements (if certain provisions are not complied with) and yet there is no such jurisdiction in relation to others, where the impact on the parties may be greater.

7.92 We can see merit in considering a potential role for the court, to mitigate the risk of disproportionate outcomes in cases where disentitlement is involved. Firms would in effect have a 'back-stop' to seek relief from sanctions in appropriate cases, and this might be particularly relevant where a breach was minor and inadvertent and applied across a large portfolio, giving rise to potentially significant financial consequences.

7.93 However, we recognise that this approach would have practical challenges. For example, where a breach affected a whole loan book, whether it would be appropriate for the court to consider such matters on a portfolio basis or whether the circumstances and situation of each individual customer would need to be taken into account. Also, how customers might engage in the process, for example whether they should be given notice of the firm's intention to apply to the court and be able to make representations and, if so, how they might be properly advised as to what they should do.

Criminal sanctions

7.94 Some CCA provisions give rise to a criminal offence. We consider that the most important of these relate to canvassing off trade premises (sections 49 and 154) and circulars to minors (section 50).

7.95 Criminal offences are intended to be a strong deterrent to firms and a strong incentive to comply with key requirements. We are not, however, aware of any prosecutions under these provisions, or consumers using them as a way of holding firms to account.

7.96 Very few respondents to the interim report had strong views on this issue. Consumer groups were keen for retention of criminal sanctions, in all or most cases, and were concerned that removal of the offences of canvassing or sending circulars to minors might give a message that such breaches were no longer to be taken seriously.

7.97 In general, we remain of the view that the criminal offences in the CCA may no longer be necessary and their removal would be unlikely to result in a loss of appropriate consumer protection. In most cases, conduct issues for authorised persons could be addressed through targeted supervisory or enforcement action based on FCA rules and by reference to the FSMA regulatory toolkit, including powers to require remediation or impose fines.

7.98 We also recognise that applying criminal offences to authorised persons would be inconsistent with the general approach under FSMA. Under section 138E FSMA, a person who breaches an FCA rule does not incur criminal liability as a result. In contrast to the CCA regime, FSMA generally limits criminal liability to where regulated activities are undertaken by persons outside the regulatory perimeter.

7.99 However, current FSMA rule-making powers would not enable the FCA to make rules in relation to non-authorised persons. This is relevant to the prohibitions on canvassing and circulars to minors, which apply to individuals. This also means that, under the CCA, individuals involved in a business can be guilty of an offence irrespective of whether the business itself has breached FCA rules. This may be a powerful incentive on individuals to comply with relevant requirements.

7.100 We noted in the interim report that, in practice, persons canvassing off trade premises, or sending circulars to minors, are likely to be doing so in order to receive a commercial benefit from lending or broking and so are likely to be straying into regulated activity. As such, if unauthorised, they are likely to be committing a criminal offence by breaching the general prohibition under FSMA.

7.101 However, it may be more straightforward to demonstrate that a person has been canvassing cash loans off trade premises than to prove that the person has breached the general prohibition by making cash loans 'by way of business'. Similarly, it may not always be straightforward to demonstrate that sending credit advertisements is part of regulated lending or broking.

7.102 In addition, there may be instances where a non-authorised person is acting in breach of the current CCA provisions but without engaging in regulated activity by way of business. The person would be outside the FCA's jurisdiction, unless there are breaches of other consumer protection law that could be enforced.

7.103 We agree, therefore, that there may be arguments in favour of keeping the current offences in respect of canvassing and/or circulars to minors, particularly where it might not be clear if the 'by way of business test' is satisfied. In our view, this merits further consideration.

7.104 If the current offences are removed – either generally or in respect of persons who are or should be authorised because they are carrying on regulated activity by way of business – we agree with stakeholders that it should be made clear that this in no way reflects a view as to the importance of the provisions. In the case of canvassing cash loans off trade premises, we have issued guidance reinforcing our interpretation of the CCA provisions and sending a strong message to firms regarding the importance of compliance.[64]

64 CP18/43: High-cost Credit Review: Feedback on CP18/12 with final rules and guidance and consultation on Buy Now Pay Later offers (December 2018).

Review of retained provisions of the Consumer Credit Act: Annexes to the final report

Annex 1
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—

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

(c) 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 2
Summary of responses to the interim report

1. This annex summarises the feedback we received to the questions in our interim report, published in August 2018, and sets out our responses. Further detail is in Chapters 4-7 (and Annexes 5-7) of this report.

2. We received 30 written responses from a range of stakeholders including firms, trade bodies, consumer groups and other interested parties.

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

3. Stakeholders generally agreed with the views set out in the interim report regarding changes in consumer credit markets. Responses focused in particular on the impact of new technology which has changed the nature of products and the ways customers want, and expect, to interact with firms.

4. One industry stakeholder noted that the consumer credit sector is one of the most diverse regulated by the FCA, comprising a wide range of products serving different types of customer. Other stakeholders noted that the types of product available in the market have changed, for example forms of hire are increasingly becoming alternatives to ownership. In addition, personal contract plans (PCPs) differ from traditional forms of hire-purchase.

5. Consumer groups pointed to the significant expansion of unsecured borrowing over the years, and an increase in the availability of high-cost credit products. They argued that this inevitably leads to an increase in the number of borrowers who may be in vulnerable circumstances. An increase in lending also means an increase in the number of consumers who are likely to get into problem debt. One respondent noted that people with problem debt may also be experiencing a mental health problem which can make it more difficult to manage their finances.

6. Respondents agreed that there are some key differences between the CCA and FSMA regimes. However, different stakeholders drew different conclusions as to what that should mean for the review.

7. Consumer groups argued that the combination of the FCA's public enforcement regime and the statutory rights in the CCA delivers important protections, and therefore the regimes complement each other.

8. Industry respondents generally felt that principles-based regulation under FSMA is more appropriate in ensuring firms deliver the right outcomes for consumers, when compared to a prescriptive legislative regime. Furthermore, the FCA's Handbook is more readily accessible and easier to navigate than the CCA.

9. Industry respondents felt that, given the extent of the FCA's powers, the statutory rights and protections provided by the CCA are no longer necessary. However, consumer groups argued that the CCA remains an important tool for consumers and advisers to hold the industry to account.

10. Industry respondents noted that the mortgage regime has similar information requirements and yet non-compliance does not lead to the same sanctions. They did not agree with the FCA's view that there are key differences between consumer credit and mortgage lending that justify a different regime.

Our response

We agree that technological developments have been a key driver of change in the ways consumers and firms interact, with particular implications for the information requirement provisions. We also agree that there are other aspects of change that need to be considered, in particular the changing nature of products and the potential increase in vulnerability of customers.

Given the differences between the CCA and FSMA regimes, we do not agree with the view expressed by some industry stakeholders that the transfer of consumer credit regulation to the FCA removes the need for CCA rights and protections, or that the FCA's supervisory and enforcement toolkit removes the need for CCA sanctions. In most cases, the rights and remedies of consumers provided for in the CCA could not be replaced by FCA rules or guidance without adversely affecting the appropriate degree of protection. We agree, in principle, with those respondents that argued that the regimes are complementary.

Consumer credit markets present unique risks that may not be present in other markets. Potentially significant risks can also arise in other markets, but the risks present themselves in different

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

11. Respondents generally agreed that most of the CCA provisions in the rights and protections theme could not be replicated under the FCA's current rule-making powers. Respondents differed, however, in their views as to whether the CCA provisions are relevant in today's market.

12. Some industry respondents, whilst agreeing with the need to maintain an appropriate degree of consumer protection, felt that retaining CCA provisions in their current form is unnecessary to achieve this. They argued that many of the provisions are no longer relevant in today's market, do not promote good consumer outcomes or give rise to disproportionate burdens on firms. As such, some provisions should be repealed without any form of replacement.

13. An example raised was antecedent negotiations under section 56 of the CCA which some stakeholders felt can give rise to unjust and disproportionate results, particularly in cases where a firm takes reasonable steps to ensure that an intermediary complies with the regulatory framework. Some respondents also felt that there is a reduced need for section 56 in light of other consumer protection legislation. They argued that the Consumer Protection from Unfair Trading Regulations protect consumers from unfair, misleading or aggressive selling practices and provide adequate safeguards and recourse for consumers even where a party to a transaction is not an authorised person. One respondent felt that the Consumer Rights Act achieves similar outcomes to section 56 by making such representations a term of the contract.

14. Consumer bodies, on the other hand, argued that the various CCA provisions continue to provide important protection for consumers, many of whom may be vulnerable. They advocated retaining rights and protections in legislation, as replacing them with FCA rules would not have substantively the same effect. For example, the unfair relationships provisions allow the courts to reopen and rewrite credit agreements, but the Financial Ombudsman Service does not have equivalent powers and so this important protection would be lost.

15. Some respondents argued that rights and protections are better preserved in legislation given the parliamentary scrutiny involved in changing, amending or repealing legislation.

16. Most respondents agreed that there are issues with the operation of some of the current provisions. These include, for example, where provisions do not fully align with other regulatory requirements contained in the CCA or other legislation. This can give rise to confusion for both firms and consumers – for example, in relation to rights of withdrawal and early repayment.

17. Stakeholders also questioned whether some provisions are fulfilling their original policy rationale. An example was time orders where, although seen as a strong consumer protection measure by many, it was noted that the process of applying is expensive, time-consuming and obscure. It was argued that resolving these issues could improve rights and protections and give greater clarity to firms.

Our response

We do not agree that the level of consumer protection provided by the majority of rights and protections in the CCA can be replaced by FCA rules in a way that would achieve substantially the same level of consumer protection. Furthermore, we do not agree that many of the provisions are no longer relevant in today's market. Rather, we think these provisions provide important rights and protections to consumers who may be particularly vulnerable. As such, our view remains that they could not be repealed without adversely affecting the appropriate degree of consumer protection.

A small number of the 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.

However, we recognise that there are issues with some of the provisions covered by this theme, including those raised by stakeholders. We agree, therefore, that there is merit in considering improvements to these provisions to ensure that they continue to provide an appropriate degree of consumer protection without imposing disproportionate burdens on firms.

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

18. Most respondents broadly agreed with our initial views that most of the information requirements could, in principle, be moved into FCA rules. Most respondents agreed that this would be preferential as it would provide an opportunity to review the form and content of the information to improve customer understanding and engagement. Stakeholders felt this should be done through consumer research and testing, drawing from the FCA's work on behavioural economics and smarter disclosure.

19. One industry body, however, felt that the information requirements had stood the test of time and were well known across the sector. They were concerned that making wholesale changes to these requirements by moving them to the FCA Handbook risked creating uncertainty and disruption with no clear benefits.

20. Issues regarding post-contract information were highlighted both in terms of the requirements on timing of providing the information, and content. In terms of timing, there was a general consensus that the current requirements provide little flexibility for firms when dealing with customers in financial difficulties. For example, the customer may be confused where the notice of sums in arrears is triggered by two contractual payment arrears but alternative payment arrangements have been agreed with the firm.

21. Stakeholders raised issues with the requirement to send a notice of sums in arrears to 'gone aways' and to customers who are subject to a debt solution.

22. In terms of content, there was a general view that much of the prescribed wording in the post-contract information requirements is too legalistic or outdated, and does not meet the needs of customers in financial difficulty (for example, default notices and notices of sums in arrears). Stakeholders also raised concerns that some of the prescribed wording carries an aggressive tone and does not allow firms to tailor messages where it may be helpful to do so.

23. Industry respondents were keen for prescription to be reduced and for firms to be allowed to determine what information should be provided to a customer and at what times. Consumer groups, however, were concerned that reducing the level of prescription could make it harder to enforce compliance and firms could not be relied upon to highlight key risks or important pieces of information.

24. Some industry respondents highlighted that the various CCA provisions entitling consumers to request a copy agreement or statement are fragmented, with a high degree of overlap.

25. Respondents raised issues with the different approaches to pre-contract information and the form and content of agreements in the 1983 and 2010 Agreements Regulations and the Disclosure Regulations. Industry respondents highlighted a preference for a single regime that considered any overlap with pre-contract explanations, to avoid duplication and information overload.

26. Another key concern was the documentation of an agreement as a multiple agreement. Industry stakeholders argued that the current provisions do not make the agreements clear or easy to understand for customers and are unduly complex and hard to comply with.

27. Similar concerns were raised with respect to the provisions on modifying agreements. Industry raised concerns that the current requirements make the process complex to document and cumbersome to apply. It was claimed that this results in firms being unable to be sufficiently flexible in the range of forbearance options offered where a customer is in payment difficulties.

28. One consumer body raised concerns in respect of the application of the statutory limitation periods in relation to the service of a default notice, asking that the FCA clarify when the cause of action for the recovery of a debt arises for the purposes of determining whether a claim is statute-barred.
Some industry respondents argued that it should not be necessary each time a new credit-token is issued to include a copy of the credit agreement as required by section 85. This was felt to be burdensome on firms, particularly where mobile payments were involved which could potentially be considered to be a credit-token. Some respondents suggested that it should be sufficient if consumers are reminded that they have the right to request a copy of the agreement.

29. Another concern raised by stakeholders was with respect to the electronic transmission of documents. Industry respondents felt that the requirement for express consent by the customer is too inflexible.

Our response

The issues identified by stakeholders are ones that we are familiar with and many were raised previously in response to the earlier Call for Input. There were not many significant new concerns. We agree that many of the issues that have been highlighted are ones that would warrant review.

We recognise that, if the information requirements were to move to the FCA's Handbook, this would represent a major shift for firms who have been used to a set of CCA requirements for some time. The potential benefits from moving many of the information requirements could, however, outweigh any costs or other disadvantages of change, depending for example on whether this affected the civil consequences of non-compliance. However, we note that it may be a significant transition, and consideration would need to be given to the potential burden on firms and ensuring appropriate transitional arrangements.

In some cases, we do not consider that an information requirement could be moved to the FCA Handbook without adversely affecting the appropriate degree of consumer protection.

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?**

30. More so than in other areas, responses to the questions on the sanctions theme drew strongly opposing views from industry and consumer groups. Most respondents focused on the sanctions introduced under the 2006 Act relating to the effect of non-compliance with arrears notices and annual statements (unenforceability during breach and disentitlement to interest and charges).

31. The primary position set out by industry respondents was a strong disagreement with the FCA's view of the need to retain a self-policing element, given the toolkit available to the FCA and the fact that standards have risen since the transfer. Respondents noted that the authorisation gateway is a high bar for firms to meet and the FCA has been willing to intervene in sectors where there is risk of consumer harm. Therefore, the fear of FCA action is itself enough of a deterrent against non-compliance.

32. Respondents disagreed that a self-policing element is needed because of the size of the market and the FCA's inability to supervise such a large number of firms individually, noting that this is also the case in other markets the FCA regulates.

33. Industry respondents argued that it is unfair to impose sanctions on what tend to be minor technical errors rather than those which cause harm. If an error was applied across a lender's operational processes this could give rise to a systemic issue even if there had been no impact on consumers. Industry respondents also observed that the approach is not consistent with similar information rules in the mortgage regime or in relation to peer-to-peer lending.

34. Industry respondents set out a secondary position that, if these sanctions were to be retained, then they should apply to a narrower set of circumstances and should be limited so they apply only if, on the facts, an omission or error has caused material consumer harm. Some respondents suggested that a power should be given to the court to exercise discretion to grant relief from these sanctions, based on prejudice and culpability, similar to the position in relation to improperly-executed agreements.

35. However, one industry respondent felt that the idea of limiting the sanctions in this way highlighted the disproportionate nature of the sanctions in cases where the material harm caused did not warrant redress amounting to 100% of interest and charges for the period of non-compliance. Some respondents also raised concerns with applying the sanctions to a narrower set of key terms as minor technical errors might still arise, many of which may not cause consumer harm.

36. Consumer groups, on the other hand, felt strongly that the sanctions operate as an important self-policing tool, and a crucial form of consumer protection, and continue to be important in incentivising firms to comply with the requirements by providing designated information to customers at the right times. They argued that the FCA's powers could not provide an adequate substitute for the important rights and protections in relation to a consumer's individual agreement.

37. Consumer groups argued that the FSMA private right of action would not be an adequate recourse of redress to rely on given that a consumer would need substantial funds to engage in damages-style litigation. The burden of proof would be on them to attribute any loss experienced to a breach of an FCA rule.

38. Other points raised by stakeholders included:

- Industry felt that 'enforceability' should not be redefined as this is settled in case law. However, one trade body felt clarity or guidance on what firms can do when an agreement is unenforceable would be welcome.
- Industry argued that regulation 41 of the 2007 Information Regulations should be clarified or its scope extended because they believed that its ambit is too narrow to save minor errors from breaching the requirements. One firm highlighted that it only applies to information and not to the triggers. A concept of material harm should be contained in legislation so that the courts can adjudicate.
- Very few stakeholders responded to the FCA's views in the interim report on criminal offences. Those industry respondents that did respond supported the removal of criminal offences. However, consumer groups were keen for their retention because they were wary that removing the offences could signal that the issues covered by these sanctions are no longer to be taken seriously. It was felt that the provisions with respect to canvassing off trade premises are an important safeguard for potentially vulnerable consumers.

Our response

We consider that there remains a need for automatic self-policing sanctions in the consumer credit regulatory regime. We agree that the authorisation gateway and increased supervisory and enforcement powers have been important in addressing consumer harm, and the FCA has intervened in a number of sectors. However, we remain of the view that the sanctions provide an important consumer protection measure to incentivise firms to comply with the information requirements and provide customers with the required information at the required times.

We can, however, see some force in the argument that, in their current form and scope of application, the sanctions – in particular, unenforceability during a breach and disentitlement to interest and default sums – can be disproportionate. We have suggested possible ways of addressing this in Chapter 7.

We agree that any further consideration of the sanctions should consider the scope and effectiveness of regulation 41, and whether the court should be given a role with respect to sanctions relating to disentitlement and unenforceability during breach. We also see merit in clarifying the meaning of unenforceability so that firms are certain about the steps they are allowed to take where an agreement is unenforceable, and there is greater clarity for customers as to the level of protection they have in a given situation.

We note the views with respect to criminal offences, and have taken these into account.

List of non-confidential respondents

Admiral Loans

American Express services Europe Limited

Association of Short Term Lenders

British Vehicle Rental and Leasing Association

Chartered Trading Standards Institute

Citizens Advice (England & Wales)

Citizens Advice Scotland

Consumer Finance Association

Credit Services Association

FCA Consumer Panel

Finance & Leasing Association

IWOCA

Kate Urell - Gough Square Chambers

Money Advice Trust

Money and Mental Health Policy Institute

Money Charity

MoneySavingExpert.com

National Franchised Dealers Association

National Pawnbrokers Association

Northridge Finance

Professor Eva Lomnicka

Royal Bank of Scotland Group plc

StepChange

Volkswagen Financial Services (UK) Limited

Which?

Annex 3
Research undertaken

1. Following publication of the interim report, we carried out research with consumers and firms on aspects of the CCA retained provisions. This annex summarises the approach and high-level findings of this research.

Consumer research

2. We commissioned Kantar TNS to conduct a quantitative survey via its omnibus. The fieldwork was carried out over two waves: the first took place from 7 to 11 November 2018, and the second from 21 to 25 November 2018. Across these two waves, Kantar TNS conducted a total of 4,000 face-to-face interviews with individuals across the UK, aged 18 and over.

3. Kantar TNS employed a random location methodology for each wave, involving a varying number of sample points depending upon the length of the questionnaire. Sampling points were areas of similar population sizes formed by the combination of wards, with the constraint that each point must be contained within a single Government Office Region. The sampling points were defined using 2001 Census small area statistics and the Postcode Address File. Sampling points used for the omnibus surveys were selected and checked to ensure they were representative by an urban and rural classification.

Findings

4. Respondents were asked if they had used or taken out a credit product in the past 12 months. In total, 1,011 (25% of consumers) reported that they had. 21% of consumers in the survey said they had used or taken out a credit card, 4% a store card, 3% motor finance, 2% a personal loan, 1% catalogue credit, 1% other retail credit and 0.5% a payday loan or other short-term credit.

5. Of these respondents, we asked whether they were personally or jointly responsible for making financial decisions in relation to credit products. 56% reported that they were personally responsible, while 42% were jointly responsible.

6. The remainder of the survey focussed on the 989 consumers who had used or taken out a credit product in the past 12 months and were personally or jointly responsible for making financial decisions in relation to credit.

7. We asked these respondents whether they were aware of any additional consumer protection when paying for goods or services using a credit card. 75% reported that they were aware, and 25% were unaware.

8. We asked what additional protection they would get. 12% said fraud cover/ protection against fraud, 11% said insurance cover/protection for faulty/damaged goods and 10% said they would be covered if anything goes wrong. A further 7% said insurance cover/ protection over a certain amount, 7% said insurance (unspecified), 6% said protection/ cover (unspecified) and 4% said cover if the company goes out of business.

9. We then pointed out that section 75 is a legal right that protects you when you spend on your credit card; for example, if goods or services are not supplied, or are faulty or not as described, you may be able to claim against your card provider as well as, or instead of, the supplier. We asked consumers whether they had been aware of this protection before the interview. 68% said they had been aware. This included 70% of consumers with a credit card, 72% a store card and 86% other retail credit.

10. We asked consumers whether, knowing they had this protection, this would make them more likely to pay for goods or services by credit card. 36% said it would definitely make them more likely to do so, and 26% possibly more likely, with 38% saying no more likely. Consumers who were aware of section 75 were more likely to pay using a credit card (74%) than those unaware (26%).

11. We asked consumers how they would prefer to receive statements and notices, or details of changes to terms and conditions, from their lender. 48% said by email, 36% paper, 12% website and 3% SMS/text.

12. Respondents also stated their second preferences. 30% said email, 20% paper, 20% SMS/text and 16% website. Third preferences were 27% for SMS/text, 24% website, 14% paper and 6% email. In total, therefore, 84% specified email as among their top three preferences, 70% paper, 52% website and 50% SMS/text. In terms of least preferred, 24% said SMS/text, 24% website, 22% paper and 1% email.

13. We asked 826 consumers what they do with a monthly statement from their lender. 48% reported that they read it in full, 26% just read the important parts, 17% just check the financial details, 4% do not read it but keep it in case it is needed later and 2% do not read it and throw it away.

14. We asked 136 consumers what they do with an annual statement from their lender. 38% reported that they read it in full, 34% just read the important parts, 10% just check the financial details, 10% do not read it but keep it in case it is needed later and 1% do not read it and throw it away.

15. We asked consumers whether – in respect of any credit product used over the past 12 months (irrespective of when it had been taken out) – they had missed or been late with any payment under any of their credit agreements in the past 12 months. Only 5% reported that this was the case. For consumers with 3 credit products, this increased to 12%, and to 22% for those with 4 or more.

16. Of those consumers who had missed or been late with a payment in the past 12 months, we asked whether their lender had sent a formal letter or notice about the missed payments together with information from the FCA on where they could get help or advice. 66% reported that they did get such a letter or notice, 31% said that they did not and 3% did not know or could not remember.

17. Of those consumers who had received such a notice or letter, 55% reported that they read it in full, 26% just read the important parts, 4% just checked the financial details and 13% did not read it and threw it away.

18. Of those consumers who had missed or been late with a payment, 13% reported that they had received a formal notice from their lender because the lender either wanted to terminate the credit agreement or to take action against them.

Firm research

19. We sent out an information request in January 2019 to 254 FCA-regulated firms. We selected the firms based on those that held consumer credit lending or consumer hiring permissions. Many of the firms we selected held both permissions. We did not include firms that acted only as a broker, or only held permissions to exercise the rights of a lender or owner and did not enter into new agreements. The sample included firms of varying sizes. Responding to the questionnaire was entirely voluntary. In total, 60 firms responded, resulting in a response rate of 23%.

20. A variety of different types of firm responded, including retail banks, credit card issuers, online retail finance providers, high-cost credit providers, motor finance providers and leasing firms.

21. The information request was sent to firms using the FCA's in-house survey tool, providing a unique URL to each firm in the sample, asking for the information in the form of a series of questions. Not all firms were asked every question, as some were conditional on the answers to earlier questions.

Findings

22. Of the 60 firms who responded, we asked how many new regulated credit agreements (excluding modifying agreements) were entered into in the past 12 months. The total figure was 20 million, with an aggregate value of £79,740 million. The average value of agreements in the sample was £3,911.

23. Of the 60 firms, 1 firm had agreements secured on land, 16 had agreements over £60,260 (0.1% of the total number of agreements in the sample) and 20 had agreements for business purposes (1.1% of the total). 9 firms had conditional sale agreements (1.4% of the total), 29 firms had hire-purchase agreements (8.5% of the total) and 23 firms had regulated hire agreements (0.8% of the total).

24. 52% of agreements in the sample had been entered into online.

25. Of the 60 firms, 5 firms had entered into agreements under the 1983 regulations (0.1% of the total). A further 6.1% of agreements could have been made under the 1983 regulations but the firm chose to use the 2010 regulations instead.

26. 13 firms reported that they entered into modifying agreements for regulated credit agreements in the past 12 months, and 9 for regulated hire agreements. The total number of modifying agreements was 162,770 for credit agreements. Most firms that entered into modifying agreements were in the vehicle finance and leasing sector. This commonly involved replacement of the vehicle, refinance of a balloon payment, extension of the term or modification of the mileage allowance.

27. 9 firms said that they entered into modifying agreements for forbearance purposes but the number of occasions where this occurred was very small apart from one non-motor firm which had entered into 132,724 such agreements. 18 firms reported that they had not entered into modifying agreements when they had wanted to, and most gave the reasons as being due to the process being onerous and the documentation requirements being too complex, risking unenforceability.

28. 20 firms reported that agreements had been subject to voluntary termination by the customer in the past 12 months, representing 136,255 agreements. Of these, they said that 26,100 had been terminated because of repayment difficulties (although one non-motor firm accounted for 17,644 of these).

29. Firms reported that 1.5 million agreements had been sent a first notice of sums in arrears (NOSIA) in the past 12 months under section 86B CCA, and 2.4 million under section 86C, totalling 4.0 million. Of these, 76% were sent by post, 17% electronically and 1% both by post and electronically. In 16 cases, the consumer receiving a first NOSIA applied for a time order.

30. Firms reported that 60,603 notices under section 76 CCA were sent in the past 12 months, 4,137,431 under section 87 (default notices) and 137,451 under section 98, totalling 4.3 million. In 20 cases, the consumer applied for a time order.

31. Firms reported that in 532,796 agreements, there was a 'gone away', in other words the customer was no longer at their address and there was no forwarding address.

32. Where an annual statement under section 77A CCA was sent, 67% were sent by post and 33% were sent electronically. None were sent by both methods.

33. Where a monthly statement under section 78(4) was sent, 48% were sent by post and 51% were sent electronically. 1% were sent both by post and electronically.

34. 15 firms reported that they had identified improperly-executed agreements, totalling 1.3 million agreements. An enforcement order was applied for in 446 cases, and granted in 268 cases, and in a further 2 cases subject to conditions. The outcome of the remaining court applications is not known and possibly the firms did not proceed with those applications. There were no cases where an enforcement order was applied for but declined.

35. Firms reported that they had identified 57,413 agreements as non-compliant with section 77A CCA, and 243,354 with section 86B or 86C. Of these, the customer was reimbursed in full in 278,389 cases, and in part in 701 cases.

36. No firms in the survey had sent notices of post-judgment interest under section 130A of the CCA.

Annex 4
CCA provisions: allocation to themes

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:

- provides a summary of the key provisions under each sub-theme
- considers how far the meaning and effect of the relevant CCA provisions could be reproduced by FCA rules and, in light of that, gives our view on whether the CCA provision could be repealed and replaced with an FCA rule without adversely affecting the appropriate degree of consumer protection
- sets out, where appropriate, the policy rationale for the provisions and highlights 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 6 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 and certain types of exempt agreement. It does not, however, 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.

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 and 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 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 a 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 6 months. The consumer also has a right to cancel a distance brokerage contract, although this is limited to a 14-day cooling-off period.[65]

8. However, we do not consider that these alternative routes, either individually or together, provide a sufficient level of consumer protection. This is because consumers would be unlikely to seek a refund under the general law of contract and in most cases may not be aware of their contractual rights.

9. 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. Our view, therefore, is that section 155 could be repealed and replaced by an FCA rule without adversely affecting the appropriate degree of consumer protection. This would have the advantage of bringing it together with existing CONC rules and guidance relating to credit broker fees. It would also provide an opportunity to consider the issues that stakeholders have identified with the current provision (see Chapter 5).

Prospective agreements

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

11. 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.

12. Section 55C entitles the customer to request a copy of the prospective credit agreement (or such of its terms as have 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.

13. In principle, section 55C could be replaced by an FCA rule imposing a duty to provide a draft copy of the prospective agreement. 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).

14. However, our 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 (see Chapter 6).

15. 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

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

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.

16. Withdrawal from a prospective 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 (see below). These include cancellation of any linked transaction (as defined in section 19); withdrawal of any offer by the consumer to enter into a linked transaction; recovery of payments made; and the return of part-exchange goods or payment of a part-exchange allowance.

17. An FCA rule could not require that withdrawal from a prospective agreement renders a linked transaction 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.

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

19. 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.[66] This notice must state the customer's right to withdraw from the prospective agreement and how and when the customer can exercise that right.

20. 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 7 days before an unexecuted agreement is sent to the customer for signature
- the firm has not approached the customer during this consideration period
- the firm has not received a notice of withdrawal from the customer before sending the unexecuted agreement

21. The obligation under section 58 could, in principle, be replaced by FCA rules, but we could not reproduce the consequences of non-compliance. Our view is that section 58 should be retained in legislation, to maintain an appropriate degree of consumer protection, 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 agreements, given the transfer of second-charge mortgage regulation to the MCOB regime and the exemptions in articles 60C and 60D of the RAO.

22. Section 59, subject to certain exceptions[67], 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 a potential constraint on creditors or owners exerting pressure on customers to enter into regulated agreements.

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

23. 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 view, therefore, is that section 59 could not be repealed without adversely affecting the appropriate degree of consumer protection, and so it should be retained in legislation.

Antecedent negotiations

24. 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 is intended to finance (the negotiator).

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

26. 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 is liable for any misrepresentations by the negotiator and 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.

27. 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.

28. 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 credit or 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.

29. 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 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.

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

31. As noted in Chapter 5, there may be circumstances in which the consumer may be deprived of this protection. For example, case law[68] has decided that where goods are sold by a supplier to an intermediary credit broker who then sells the goods to the

68 Black Horse Ltd v Langford [2007] EWHC 907 (QB).

creditor, the consumer is not protected by section 56(2) on the basis that the supplier is not the credit-broker within section 56(1)(b).

Multiple agreements

32. 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.

33. 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.

34. 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 (the £25,000 financial limit was removed for consumer borrowing in 2008 but remains for business borrowing). 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 those that apply to the predominant category.

35. 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.

36. 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.

37. It is argued that the law in this area is uncertain, despite court judgments.[69] In particular, the reference to 'category of agreement' in section 18 is not defined, which can give rise to inconsistent interpretations. As a result, the provisions can create uncertainty and complexity, for example where creditors seek to offer flexible products that combine different forms of credit, so undermining product innovation.

38. 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'.[70]

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

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

39. Our 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, we agree that it could benefit from simplification and clarification, particularly in relation to its scope and effect. We note that 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

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

41. 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.

42. 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.

43. A few stakeholders suggested that if this protection is retained in the CCA, it should be extended to protections in CONC and regulations made under the CCA.

44. 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 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 decline to do so.

45. 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.

46. FSMA expressly provides that a breach of an FCA rule cannot make any transaction void. Our view is that section 173 should be retained in respect of those CCA provisions that remain in the CCA or other legislation, as its repeal would adversely affect the appropriate degree of consumer protection.

Connected lender liability

47. Section 75 provides that where the debtor has, in relation to certain types of transaction 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 customer may, therefore, choose to pursue a claim against either the supplier or the creditor or both. The creditor cannot insist as a pre-condition of its liability under section 75 that the customer should first claim against the supplier.

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

49. 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.

50. 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.

51. 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 chargeback rules under the relevant card payment scheme.

52. 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 liability can be far in excess of the amount of credit 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.

53. 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.

54. 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.

55. The Crowther Report noted that a consumer buying goods that prove 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.

56. 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.

57. 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 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 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.

58. 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. This is also likely to ensure that finance providers attend to complaints, to avoid litigation.

59. The OFT reviewed section 75 in the 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.[71] 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.[72]

60. 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

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

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

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.[73]

61. 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 sections 75 and 75A. Our view therefore is the provisions should be retained in legislation, as their repeal would adversely affect the appropriate degree of consumer protection.

62. However, as noted in Chapter 5, we consider that there would be merit in further considering the issues that have been identified with these provisions to ensure that they provide an appropriate level of consumer protection without imposing undue or disproportionate burdens on firms, and to clarify or update the scope of section 75 protection.

Variation of agreements

63. 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.[74] However, the CCA regulates certain aspects of the variation of regulated credit and hire agreements.

Unilateral variation

64. 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 this notice must be given.[75]

65. 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.

66. We have published guidance on the fairness of variation terms in financial services consumer contracts under the Consumer Rights Act, including interest rate variations.[76]

67. 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.

68. The information that must be given 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.

73 Office of Fair Trading v Lloyds TSB Bank plc [2007] UKHL 48.
74 www.fca.org.uk/firms/unfair-contract-terms
75 Consumer Credit (Notice of Variation of Agreements) Regulations 1977, SI 1977/328.
76 FG18/7: Fairness of variation terms in financial services contracts under the Consumer Rights Act 2015 (December 2018) www.fca.org.uk/publication/finalised-guidance/fg18-07.pdf

69. 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. A term which is found to be unfair is 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.

70. We could, in principle, make rules imposing similar obligations on creditors to give notice of unilateral variation to the terms of an agreement, and to communicate information to the debtor where there will be a change in the interest rate. 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.

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

72. 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 view is that it should be retained in the CCA alongside section 82(1), to avoid undue fragmentation of the regulatory regime.

Modifying agreements

73. 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.

74. Modifying agreements must comply with the CCA regulations on pre-contract disclosure and agreements, which include specific provisions for modifying agreements, and with Part 5 of the CCA. In particular, the customer must be informed of, and consent to, the proposed changes.

75. 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.

76. Some stakeholders have argued that the modifying agreement provisions are complex, cumbersome and overly prescriptive, and the consequence of non-compliance (unenforceability of the agreement) unduly burdensome. They argue that these difficulties present an obstacle to simple variation or to assisting customers in financial difficulties to reschedule payments. In particular, the complexity involved in documenting changes as a modifying agreement and the need to obtain the customer's signature deter firms from using this approach, despite the fact that it would produce the most beneficial outcome for the customer.

77. They have called, therefore, for a simplification of the requirements with a view to reducing the administrative hurdles for both firms and consumers. A few called for outright repeal.

78. Consumer groups noted that when borrowers experience financial difficulty, changes to agreements most often occur informally through a unilateral 'forbearance' concession rather than as a variation of the terms. However, this does not give the customer the same level of certainty, as a concession could be withdrawn. Customers

in the early stages of financial difficulty might benefit from a formal rescheduling of payments that relieves payment difficulties without adversely affecting their credit record.

79. 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 relevant form and content requirements.

80. Our view is that section 82(2) should remain in legislation, but with the associated information requirements being repealed and replaced by FCA rules (see Chapter 6).

81. However, we agree that there is a case to consider whether it would be possible to clarify and simplify the provisions whilst still achieving the policy objectives. The detailed content requirements could be considered as part of any wider decisions in relation to information requirements more generally.

Notices in relation to enforcement

82. 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 aim is to safeguard the customer's position against unfairness or hardship, given the inequality of bargaining power.

83. Section 76 requires notice to be given, in the prescribed form, at least 7 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.

84. 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.

85. Section 98 requires 7 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.[77]

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

87. 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 a creditor failing to provide the relevant notice. 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.

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

88. These provisions provide important protections to consumers in giving them a chance to take action to preclude enforcement. Our view, therefore, 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. However, as noted in Chapter 6, there would be scope to improve the associated information requirements.

Death of debtor or hirer

89. 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.

90. 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 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. It does not apply to open-end agreements.

91. 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.

92. We consider that the policy rationale for section 86 remains valid. It safeguards the customer's family from distress, and from unfairness or hardship.

93. We do not consider that section 86 could be replaced by an FCA rule. This is because 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.

94. Our view, therefore, is that repeal of section 86 would adversely affect the appropriate degree of consumer protection and so it should be retained in legislation.

Other restrictions on remedies for default

95. 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 an order of the court.

96. 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).

97. 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.

98. 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.

99. 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.

100. Our view is that sections 90 to 92 should be retained in legislation 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'[78], our view is that it promotes appropriate emphasis on compliance with the key provisions in relation to protected goods.

Provisions about interest

101. 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 default interest can be charged.

102. Section 93 prevents a creditor from increasing interest following the customer's 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.

103. The County Courts (Interest on Judgment Debts) Order 1991 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 credit 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.

104. 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.

105. 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 6 months.

106. We consider the policy rationale for these provisions still compelling.

107. In principle, we could make rules that place obligations on firms that reflected the substance of sections 86F, 93 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

78 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.

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.

108. 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 view, therefore, is that repealing sections 86F, 93 and 130A would adversely affect the appropriate degree of consumer protection, and so they should be retained in legislation.

Security

109. 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.

110. Sections 106 and 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 treated as never having effect.

111. For example, under section 113, a 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.

112. 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.

113. A general FCA rule could not operate in a similar way. Our view is that preserving these provisions in legislation is necessary to ensure there is an effective anti-evasion mechanism and to support the other components of the regime for securities. Our view, therefore, is that repeal would adversely affect the appropriate degree of consumer protection and they should be retained in legislation.

Unauthorised payments and credit-tokens

114. 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.

115. 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.

116. 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.

117. 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.

118. 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.

119. 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.

120. 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.

121. 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.[79]

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

123. 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.

124. 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 the CCA provisions with the PSRs where a CCA-regulated agreement is also an agreement for payment services. However, we consider that the CCA provisions 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.

125. One stakeholder expressed concern that replacing CCA provisions with the PSRs could have unintended consequences that result in exacerbating a customer's debt problems. For example, the PSRs require the refund for an unauthorised transaction to be provided as soon as practicable, and in any event no later than the end of the business day following the day the firm becomes aware of the unauthorised transaction. Where, after investigation, the transaction is found to be authorised, the transaction would be re-applied to the customer's account. It is possible that the

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

customer may have used the credit that was refunded to the account prior to the investigation and reapplying the initial transaction may result in an unaffordable debt for the customer. It was suggested, therefore, that credit and non-credit products should be treated differently in relation to unauthorised transactions.

Pawnbroking

126. 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 6 months from the making of the agreement. The parties can agree 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 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[80], 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 as to the outcome of the sale, and the proceeds, and any surplus must be returned to the customer.[81] 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.

127. 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, however, needed in relation to taking articles in pawn and the realisation of unredeemed pawns.

128. We could, in principle, make rules under FSMA achieving something similar to some of the provisions of sections 116 to 121 (although these would need to be reformulated as conduct obligations on firms 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 by FCA rules.

80 Or, where the debtor or hirer is entitled to apply for a time order under section 129(1), 5 days after the end of the redemption period.

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

129. On section 117, we could not relieve a pawnbroker from potential liability in tort or delict[82] 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.

130. 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.[83]

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

132. We nevertheless consider that there would be benefit in modernising the provisions, to ensure they are fit for purpose and reflect modern forms of communication.

133. For example, consideration could be given to clarifying what some stakeholders have stated causes confusion for firms. This is in relation to the need for pawnbrokers to serve a notice of intention of sale under section 121, in the prescribed form, as well as a default notice under section 87. A few stakeholders have suggested that it was an oversight not to exempt pawnbroking from the requirement to serve a default notice in cases where a notice of intention of sale under section 121 has been served, as the effect and intent are similar.

Exiting the agreement

Withdrawal and cancellation

134. The right of withdrawal in section 66A 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.

135. 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)
- in cases where section 63 applies, the day on which the debtor receives a copy of the agreement under that section

136. 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

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

83 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.

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.

137. 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.

138. 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 included oral representations made by the negotiator in the presence of the customer. In addition to doorstep sales, this may include situations where 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.

139. This right applies for 5 days following receipt of the copy agreement or notice of cancellation, or (in some cases) 14 days from the making of the agreement.

140. 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.

141. The policy rationale for the various 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 with other legislation including the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which can cause confusion.

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

143. 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 66(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.

144. 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).

145. Similarly, while in principle we could make rules conferring a 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.

146. 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.

147. We could not make an FCA rule placing a 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 part-exchange goods in the negotiator in certain circumstances.

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

149. However, as mentioned in Chapter 5, having two separate regimes for withdrawal and cancellation could potentially cause confusion for consumers and firms because of the differences in the requirements and obligations under both regimes. We consider, therefore, that there is a case to consider aligning the requirements (subject to EU law while it applies) to simplify firms' obligations and provide for greater legal certainty for firms and consumers. It would also provide an opportunity to review the scope and application of the provisions.

Early repayment

150. 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.

151. Regulations under section 95 provide for calculation of the minimum rebate and the settlement date in the case of full or partial early settlement.[84]

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

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

153. 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.

154. Section 97 entitles a customer to request a settlement statement showing how much it will cost to settle.[85] If the creditor fails to provide this statement, within 7 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.

155. The full and partial early repayment provisions differ. For example, no unenforceability sanction attaches to a firm's failure to comply with the partial repayment provisions[86] whereas a failure to comply with the full repayment provisions makes the agreement unenforceable while the default continues[87] and the court has no discretion to enforce in that period.

156. In principle, we could make an FCA rule requiring a creditor to permit a debtor to make an early repayment, in full or in part, at any time. We could also oblige creditors to include in their agreements a contractual right for the debtor to do so. A breach of such a 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.

157. We could not, however, provide in an FCA rule that a debtor has a 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.

158. 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 (where applicable).

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

160. 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 (section 172).

161. Our 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 or other legislation in order to preserve the coherence of the regulatory regime.

85 Consumer Credit (Settlement Information) Regulations 1983, SI 1983/1564.
86 Section 97A.
87 Section 97.

162. However, we agree that there may be merit in aligning the full and partial repayment provisions, and simplifying aspects taking into account the different customer journeys and credit products. If the associated information requirements[88] were replaced by FCA rules, this would provide an opportunity to review the information provisions in detail and the flexibility to keep them more up to date.

Termination of agreements

Open-ended credit agreements

163. Section 98A, which implements the CCD, entitles the customer, by notice and free of charge, to terminate an open-end 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 1 month. The creditor may require the notice of termination to be in writing; otherwise it may take any form.

164. 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 2 months' notice on paper or another durable medium.

165. 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.

166. An FCA rule could not replicate a statutory right for the customer to terminate an open-end agreement as section 98A does. Our view, therefore, is that this provision should be retained in legislation, because its repeal would adversely affect the appropriate degree of consumer protection.

Right to terminate hire agreements

167. 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 or to agreements where the hirer is required to make payments exceeding £1,500.

168. As stated in Chapter 5, we consider that section 101 could be repealed and replaced by FCA rules, without adversely affecting the appropriate degree of consumer protection. However, we agree with stakeholders that the provisions could benefit from a more fundamental review, as part of the process of looking at the appropriate treatment of hire agreements relative to hire-purchase and other credit agreements.

Right to terminate hire-purchase and conditional sale agreements

169. 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 that amount. This is usually referred to as voluntary termination.

88 Consumer Credit (Settlement Information) Regulations 2004 SI 2004/1483.

170. This right of voluntary termination may be particularly helpful where a customer has suffered a change in circumstances and wishes to limit their liability by handing back the goods. However, it is not limited to such cases. 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.

171. 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.

172. 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

173. 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.

174. 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.[89]

175. 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.

176. We could not make FCA rules replicating the effect of sections 99 and 100. For example, we could not make rules unravelling the passing of title to goods, or providing a role for the courts as currently provided for in section 100.

177. Our view, therefore, is that the provisions should be retained in legislation, because their repeal would adversely affect the appropriate degree of consumer protection. However, we agree with stakeholders that there may be merit in a review of the provisions, and how they operate, taking into account changes in the market and the relevant products.

89 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).

Other provisions

178. Section 102 entitles a customer to treat certain persons as agents of the creditor or owner for the purpose of receiving any notice rescinding a regulated agreement. An FCA rule could not deem a person (who may not be an authorised person) to be another's agent for the purposes of receiving a notice rescinding a regulated agreement. Therefore, our view is that section 102 should be retained in legislation, as its repeal would adversely affect the appropriate degree of consumer protection.

179. Section 103 entitles a customer to request a termination statement from the creditor or owner, confirming that the agreement has ended and that any indebtedness has been discharged. Non-compliance is actionable as a breach of statutory duty, which is similar to section 138D FSMA. Under section 172(2), any termination statement given to the customer under section 103 is binding on the trader.

180. In principle, we consider that section 103 could be replaced by an FCA rule (although section 172(2) would no longer apply to termination statements) without adversely affecting the appropriate degree of consumer protection.

Judicial protections

181. 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.[90]

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

183. Accordingly, the CCA gives the courts functions allowing the court to intervene in the contractual agreement between the customer and the firm. These include the power to make time orders, reopen agreements under the unfair relationships test and make enforcement orders in relation to mortgage agreements.

Time orders

184. Section 129 enables the court to make a time order, in certain circumstances, allowing the customer more time to make payments under a regulated 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.

185. 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.

90 Crowther Report, paragraph 6.10.1.

186. 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.

187. 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

188. 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).

189. 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.

190. 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.

191. As noted in Chapter 5, our view is that the provisions should be retained in the CCA or other legislation, on the grounds that their repeal would adversely affect the appropriate degree of consumer protection, in particular for vulnerable consumers in financial difficulties. However, we agree there may be merit in reviewing the triggers for a time order application and the associated procedures.

Unfair relationships

192. 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.

193. 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.

194. 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.

195. 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

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

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

198. 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.

199. 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.

200. 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. This provides a very wide jurisdiction.

201. 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.

202. Although 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, some consumer groups argue that the courts have interpreted the provisions too narrowly and it would be helpful to have statutory guidance to help guide the courts.

203. 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.

204. Industry stakeholders have 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 court's involvement in resolving disputes as inconsistent with the regulatory approach generally under FSMA.

205. For the reasons explained in Chapter 5, we consider that the unfair relationships provisions should be retained in legislation as they could not be replaced by FCA rules without adversely affecting the appropriate degree of consumer protection. We do not consider it necessary to provide guidance on the meaning of 'unfairness'.

Enforcement of land mortgages

206. 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 the time.

207. 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 view this provision as a powerful consumer protection measure which should be retained.

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

Annex 6
Information requirements: supplementary analysis

1. In this annex, we provide supplementary detail on the CCA provisions in Chapter 6 which require creditors and owners to provide customers with information in relation to regulated credit and hire agreements.

2. It aims to inform the analysis in chapter 6 on whether the provisions could be repealed and replaced with FCA rules without adversely affecting the appropriate degree of consumer protection. We look at the content of and rationale for the requirements, and explore some of the issues we have identified.

Introduction

3. 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.'[91]

4. 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

5. 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, 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

91 Crowther Report, paragraph 6.1.2.

- whether to repeal, amend or maintain existing CCA information requirements that are not required by but are compatible with the CCD

6. 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.

7. 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[92] or for business purposes, and pawn agreements. It does not apply to agreements secured on land or unarranged overdrafts.

8. In general, the Government's approach was to retain existing CCA provisions wherever this was permitted by the CCD, to minimise the impact on firms and consumers.

9. For example, the CCD does not require agreements to be signed but 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 agreement must be signed by the customer and by or on behalf of the firm.

Level of prescription: Rationale and risks

10. One of the recurrent themes raised by industry representatives in response to the interim report and at stakeholder roundtables was the level of prescription in the CCA requirements and the associated regulations.

11. 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 unnecessary constraints on firms and to lead to poor outcomes for customers. Consumer organisations, on the other hand, emphasised the importance of the consumer protections which the information requirements provide.

12. 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.

Prescribing information

13. A requirement to provide information can be at a number of different levels of prescription, according to the amount of discretion that firms have.

14. 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.

92 Where they are not residential renovation agreements.

15. The purpose of prescribing 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 required information can contribute to:

- providing essential information to protect the customer
- ensuring customers receive a minimum level of information
- enabling customers to make informed choices

16. There are, however, also risks. These include:

- Changes in the market or in customer needs may render 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.

17. 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

18. 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.

19. 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 enjoy a consistent level of protection. Because firms have little or no discretion, prescribing forms of wording is not in itself burdensome for firms as compliance is comparatively simple.

20. However, this presupposes that the form of wording prescribed is effective. In order to ensure that 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.

21. Wording which is not clear or causes customers to react negatively could lead to consumer harm, and also burdens on firms due to queries and complaints. Furthermore, if prescribed wording is not consistent with the rest of the firm's communication, for example in relation to the style of language used, this may reduce its effectiveness.

Prescribing form

22. 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 other important pieces of information do not get through to the customer or are less likely to do so.

23. 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. These may relate to the size of the text used (or use of bold or underlining) and/or 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.

24. 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.

25. 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.

Pre-contractual information

26. 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[93]

27. Section 55 provides that regulations may require specified information to be disclosed in the prescribed manner before a regulated agreement is made.

28. This power was first exercised through the 2004 Disclosure Regulations.[94] These originally applied to all regulated credit and hire agreements, with the exception of distance contracts (which were covered by the Distance Marketing Regulations[95]) 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.

29. The CCD pre-contractual information requirements were implemented through the 2010 Disclosure Regulations.[96] These also apply to some (but not all) types of credit agreement outside the scope of the CCD, but not to consumer hire agreements.

30. Credit agreements that are secured on land, for credit over £60,260, or entered into by a customer for business purposes, are subject to the 2004 Regulations, but with firms being permitted to apply the 2010 Regulations instead. The Government took the view that it might be easier and less disruptive for firms to continue to apply the 2004 Regulations to these types of agreement, but that firms should be able to operate a

93 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.'

94 Consumer Credit (Disclosure of Information) Regulations 2004, SI 2004/1481.

95 Financial Services (Distance Marketing) Regulations 2004, SI 2004/2095.

96 Consumer Credit (Disclosure of Information) Regulations 2010, SI 2010/1013.

uniform regime across their entire loan book if they choose.[97]

31. In accordance with the CCD, there is a 'lighter' disclosure regime in the 2010 Regulations for arranged overdrafts.[98] Different requirements also apply to distance contracts and telephone contracts. Pawn agreements are covered where the borrower is either a new customer of the firm or expressly requests the information.

32. Firms have argued that having different requirements applying to different types of credit agreement 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 can be provided immediately after the agreement has been concluded.

Required information

33. 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

34. 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.

35. The 2010 Regulations require similar information, including about the rights of withdrawal and early repayment and the consequences of missing payments, but without prescribing the precise wording which must be used.

36. 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.

37. 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 prescribed pre-contract credit information form.

Form

38. The 2010 Regulations require firms to provide the information in the precise format set out in the prescribed form. It must be provided 'in good time' before the agreement is made.[99]

39. The required information must be presented in the form and order set out in the form, including with the prescribed headings and sub-headings, and must be clear and easily legible. This ensures all pre-contractual credit information is presented in a consistent way, and makes it easier for customers to compare credit offers.

97 Consultation on Proposals for Implementing the Consumer Credit Directive (BERR, April 2009).

98 Arranged overdrafts are referred to in the 2010 Regulations as 'authorised non-business overdraft agreements'.

99 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 agreement.

40. In the case of arranged overdrafts a shorter version of the form may – but does not have to – be used. If it is not used, the required information must be disclosed in writing with all items of information equally prominent.

41. 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:

- the document must have the title 'Pre-contract Information' and contain the prescribed headings
- the required information or forms of wording must 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

42. 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

43. 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.'[100]

44. In line with this, section 60 requires regulations to be made on the form and content of regulated credit and hire agreements.

45. 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

46. The section 60 power was exercised initially by means of the 1983 Agreements Regulations[101] which set out the contractual information requirements for all credit and hire agreements. They were substantially amended in 2004.[102]

100 Crowther Report, paragraph 6.5.1.
101 Consumer Credit (Agreements) Regulations 1983, SI 1983/1553.
102 Consumer Credit (Agreements) (Amendment) Regulations 2004, SI 2004/1482.

47. The CCD form and content requirements were implemented through the 2010 Agreements Regulations.[103] The scope of the 2010 Agreements Regulations corresponds to that of the 2010 Disclosure Regulations.

48. A creditor may choose to apply either the 2010 or the 1983 Regulations to credit agreements that are secured on land, for credit over £60,260, or entered into for business purposes. The same regime must be chosen as for the provision of the pre-contractual information; a creditor cannot 'mix and match' for an individual agreement.[104]

Required information

49. 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.

50. 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.

51. 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

52. The 1983 Regulations contain a number of forms of wording, corresponding 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, such as a warning about the consequences of missing payments.

53. 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.

54. 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.

103 Consumer Credit (Agreements) Regulations 2010, SI 2010/1014.

104 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).

Form

55. The 1983 Regulations prescribe sub-headings under which the contractual information must be provided[105] 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. There must be no interspersion with other information or wording, for example including explanatory notes in the body of the agreement.

56. These form requirements were introduced in 2004[106] with the objective of making agreements clearer, more consistent and more transparent.

57. 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 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.

58. 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[107] 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).

59. 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 achieved will depend on the effectiveness of the requirements.

60. Stakeholders have argued 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.

61. 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

62. Section 82(1) provides that where a firm wishes to make use of a clause in the credit or hire agreement to unilaterally vary the agreement, the customer must be informed of the details of the variation before it can take effect.[108] On the other hand, 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.

105 The prescribed subheadings are 'key financial information', 'other financial information' and 'key information'.
106 Consumer Credit (Agreements) (Amendment) Regulations 2004, SI 2004/1482.
107 This can be done by any appropriate means, including by using capital letters, underlining, larger or bold print.
108 See also Annex 5. Interest rate variations are covered by section 78A.

63. The form and content requirements for modifying agreements are set out in the relevant Disclosure Regulations and Agreements Regulations.

64. A modifying agreement must clearly identify the aspects of the original agreement which are being modified, and that 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.

65. The 1983 Regulations require the same forms of wording to be included in modifying 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. These are not prescribed by the 2010 Regulations.

66. 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.

67. Industry representatives have argued that, in practice, modifying agreements may be the result of discussions with the customer about setting up a repayment plan. In such cases, it may be important to be able to conclude the agreement quickly, given that the customer may be in a financially vulnerable situation. In addition, 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.

68. 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 and limited basis, and as a consequence might constrain the range of variations that might otherwise be desirable, for example when exercising forbearance. Such informal arrangements could in some circumstances leave the customer without the legal protection provided by contract law or the CCA as they may not be binding and could be withdrawn by the firm.

Copy agreements

69. 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.

70. 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.

71. 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.[109]

72. 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.

73. Some stakeholders have argued that the differing scope and requirements give rise to undue complexity, and there should be a single regime applying to all credit and hire agreements. However, 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

74. 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.[110]

75. The requirement to give notice of cancellation rights is set out in section 64. Form and content requirements are prescribed in the Cancellation Notices Regulations.[111]

76. A 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 7 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.

77. 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.

78. Some stakeholders have argued that the detailed information 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 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

79. 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'

109 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.

110 In addition, some consumer hire agreements to which section 67 does not apply may be subject to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

111 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

80. However, firms may opt to apply the CCD regime to many agreements falling within the scope of the pre-CCD regime.[112] 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. In particular, whether they choose to operate under the CCD regime to ensure a common process.

Post-contractual information: statements

81. 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.[113] The table below summarises the relevant requirements.[114]

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)

82. 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

83. 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 Regulations[115] and the 2007 Information Requirements Regulations.[116]

84. 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.

112 The main exception to this is hire agreements, which must be concluded under the pre-CCD regime.
113 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), which implement CCD requirements, are not included in this analysis.
114 Additional statement requirements exist in relation to sureties in section 107 (fixed-sum credit agreements), section 108 (running-account credit agreements) and section 109 (hire agreements).
115 Consumer Credit (Running-Account Credit information) Regulations 1983, SI 1983/1570.
116 Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007, SI 2007/1167.

85. 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.[117]

86. 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

87. 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), other debits to the account (such as default charges) and interest (the amount payable and how it has been calculated).

88. 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'.[118]

89. 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.[119]

90. 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 objectives which are less burdensome for firms, for example by imposing less detailed requirements.

Forms of wording

91. 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.

92. Any review would need to 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.

117 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.

118 Ditto.

119 The UK Cards Association (now part of UK Finance) published best practice guidelines on credit card statement summary boxes, and firms 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

93. 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.

94. 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 its name and logo in the usual format, size and colour.

Statements upon request

95. Sections 77, 78 and 79 require a creditor or owner to provide a statement of account if requested to do so in writing by the debtor or hirer. Under the Prescribed Periods Regulations[120] 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.

96. 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 1 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.

97. 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.

98. 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).

99. On the other hand, it may be questioned whether the signature requirement continues to protect or reassure customers 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

100. 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

120 Consumer Credit (Prescribed Periods for Giving Information) Regulations 1983, SI 1983/1569.

as a settlement statement. The Settlement Information Regulations[121] require the statement to be provided within 7 working days of the creditor receiving the request. The request need only be in writing if the agreement is secured on land.

101. 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.

102. As with statements on request provided under sections 77, 78 and 79, the creditor does not have to respond to a request made within 1 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.

103. 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 1 month of receiving the request. This avoids duplication.

Post-contractual information: notices

104. 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.

105. 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 may be a greater potential for customers, in particular vulnerable ones, to suffer harm.

106. 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 the agreement.	No
ss87/88	Default notices	Firm must serve notice on customer before becoming entitled by reason of 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

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

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

107. 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.

108. The requirement to provide customers with at least 7 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.

109. 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.

110. The form and content of all three types of notice are detailed in the Enforcement, Default and Termination Notices Regulations.[122]

Required information

111. The information which firms are required to include in each type of notice includes that the 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, and how and when it intends to do so.

112. 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.[123]

113. 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.

114. 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.

115. 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

122 Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983, SI 1983/1561.
123 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

was the approach taken to sections 86B, 86C and 86E.[124]

Forms of wording

116. 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.

117. These forms of wording aim to protect customers. However, it could be considered whether simple information requirements might 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.

118. 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

119. 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

120. 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.

121. 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 and Principle 7 which require information to be communicated to customers in a way which is clear, fair and not misleading.

Arrears notices and default sum notices

122. 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.[125]

124 Consumer Credit Act 2006: Response to Consultation on draft statutory instruments: exemptions, post-contract information, licensing (BERR, March 2007).

125 We consider the triggers separately below.

123. 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 2 payments that were due.[126] 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 2 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.

These 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.

124. 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.[127] 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.

125. The 2007 Regulations[128] prescribe the form and content of these notices.

126. Some stakeholders 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

127. Firms are required to include the same core information in all three 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.

128. 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.

129. 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:

126 Where the payments are made weekly or more frequently, it is the sum of the last 4 payments.
127 See footnote 55 above.
128 SI 2007/1167.

130. 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.

131. Notices provided under sections 86C or 86E may be incorporated into another notice or statement under the CCA, and information need not be duplicated.

132. Where agreed with the customer, notices under section 86B may relate to more than one agreement (aggregation).

Forms of wording

133. The forms of wording applicable to these notices depend 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.

134. 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.

135. It is argued that the language and tone may not always be in line with that used in firms' communications, and the requirements may constrain firms in ways which may not be in the interests of the customer, particularly those who may be vulnerable.

Form

136. The regulations require that arrears notices and default sum notices are easily legible, of a colour readily distinguishable from the background, and written in plain, intelligible language.

137. 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 and logos of the parties). This protects customers against firms relegating pieces of information to the 'small print'.

138. 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.

Triggers for issuing arrears notices

139. 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 the sum of 2 regular payments.[129] A further notice must be issued within 6 months if the customer remains in arrears.

129 Or 4 missed payments where repayments are scheduled weekly or more frequently.

140. For running-account credit, the trigger is missing 2 consecutive payments. A further notice is triggered after the next 2 missed payments. A customer who repeatedly misses every second payment under a running-account agreement will, however, not receive an arrears notice.

141. Some 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 the customer about the arrears by the time the trigger point is reached or an agreed repayment plan may be in place which is being maintained. They question why a formal notice is needed in such circumstances.

142. Firms have also stated that there is uncertainty as to when they should stop sending arrears notices for fixed-sum credit agreements as it is unclear when an account ceases being in arrears, for example where regular contractual payments are up to date but there are unpaid default charges or default interest.

143. 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 for specific reasons it might not be appropriate, it may cause confusion or distress to the customer.

144. There may be instances in which a formal notice contributes 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.

Updating and modernising

145. In this section, we consider some CCA themes which cross cut other provisions in the CCA, where stakeholders argue that they may not be working well for either customers or firms, and should be considered for updating and modernising. The issues 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

146. 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

147. 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.

148. 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.[130] 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.

149. 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.

150. 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.

151. 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.

152. Requiring the customer to physically sign a document may 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.

153. 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.

154. 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.

155. 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.

156. 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.

157. An option might be to require only the debtor/hirer to sign. 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 amount and/or duration. This could, however, have unintended consequences, such as firms changing their product offerings.

130 Consultation on Proposals for Implementing the Consumer Credit Directive (BERR, April 2009).

Use of electronic signatures

158. The 2004 Electronic Communications Order[131] amended the CCA and regulations to permit the use of electronic communications. However, it did not clarify what constitutes a valid electronic signature.

159. This was considered by the High Court in 2014.[132] The court confirmed that agreements under the CCA can be validly concluded with an electronic signature, and 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.

160. 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.133

161. Electronic signatures may 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.

162. 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 other relevant legislation.

Service of documents

163. 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.

164. 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.

131 Consumer Credit Act 1974 (Electronic Communications) Order 2004, SI 2004/3236.

132 Bassano v Toft & Ors [2014] EWHC 377 (QB).

133 The Law Commission is undertaking a project which seeks to address any uncertainty as to the formalities around the electronic execution of documents generally – www.lawcom.gov.uk/project/electronic-execution-of-documents/

165. 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 occupants 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 result in the customer receiving the information, so fails to provide them with the protection intended.

166. 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.

167. 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 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. The provider can simply cancel the contract.
- 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.

168. The issue of 'gone-aways' was considered by BIS/HMT in 2010[134] 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.

169. In addition, a requirement to serve notices may continue to apply even where the customer is deceased. Some stakeholders have highlighted concerns with this, for

134 Consumer credit and personal insolvency review: summary of responses on consumer credit and formal response on personal insolvency (BIS/HMT, July 2011).

example in relation to undue stress this may cause to the customer's next of kin.

Electronic transmission of documents – section 176A

170. Section 176A was added by the 2004 Electronic Communications Order.135 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
- 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

171. Some stakeholders have 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

172. Section 176A(1)(a) requires that a customer agrees before documents may be sent to them electronically by the firm. In our 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.

173. Industry stakeholders argue that the consent requirement does not reflect the realities of modern communications and is burdensome:

- 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.
- 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.
- Firms should be permitted to take account of the uses and experience of their customer base to be able to infer customers' preferred choice of communication.

174. However, in our view section 176A is 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'.[136] We clarify this in our guidance on the PSRs:

> '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

135 SI 2004/3236.
136 Payment Services Regulations 2017 (SI 2017/752), regulation 53.

the information at least once a month on paper or another durable medium.'[137]

175. 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.

176. As discussed in Chapter 7, we are of the view that it remains appropriate to require explicit consent to receiving communication via electronic means and such consent cannot be implied or inferred by the firm.

Form of document

177. Section 176A(1)(c) provides that to be deemed to have been transmitted electronically:

> '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'.

178. 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'.[138]

179. 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.[139] 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

180. 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'.[140] 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.

181. 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

137 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.

138 Ditto, paragraph 8.74.

139 The concept of 'durable medium' was introduced in EU law 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

140 Consumer Credit (Enforcement, Default and Termination Notices) (Amendment) Regulations 2004, SI 2004/3237.

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.[141]

182. 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.

183. The use of smartphones and mobile apps may mean that most people experiencing financial difficulties will continue to have access to email, internet and mobile apps. As a result, some consumers may be more likely to be contactable electronically than by post, if they have unstable and unpredictable housing arrangements. For these customers, sending notices by post may not be a helpful safeguard.

184. On the other hand, 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.

185. 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

186. 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

187. 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 the firm is not entitled to enforce the agreement for the duration of the breach.

188. The form and content requirements for copy documents are set out in the 1983 Cancellation Notices and Copies of Documents Regulations.[142]

189. 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 2009.[143] Key aspects of the judgment are summarised in guidance in CONC 13.

141 Explanatory Memorandum to the Consumer Credit (Enforcement, Default and Termination Notices) (Amendment) Regulations 2004, 2004 No 3237.

142 Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983, SI 1983/1557.

143 Carey v HSBC Bank plc [2009] EWHC 3417 (QB).

190. 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.

191. 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.

192. In some cases, a customer may not want a copy of the original agreement, and it may meet the customer's needs for the firm to send only the current agreement.

Copy agreements on issue of new credit-tokens

193. 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) is issued, for example a replacement credit card when the card expires or is lost or stolen. Failure to comply makes the agreement unenforceable while the breach continues.

194. 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.

195. Some 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.

196. 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.

Enforcement notices and termination notices: notice period

197. A firm is required to give the customer at least 7 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.

198. The period for default notices was extended from 7 to 14 days by the 2006 Act. The rationale was that 7 days was 'not enough time for a consumer to work out what is required and respond'.[144] Unlike enforcement and termination notices, default

144 Explanatory Memorandum to the Consumer Credit (Enforcement, Default and Termination Notices) (Amendment) Regulations 2006, 2006 No 3094.

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.

199. 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.

200. 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.

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
- 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'.[145]

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'.[146]

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'.[147]

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'.[148]

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

145 Crowther Report, paragraph 6.1.15.
146 Ditto.
147 Ditto.
148 Paragraph 6.11.1.

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'.[149]

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
- 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
- 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.

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
- 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.

149 Paragraph 6.11.9.

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.[150] 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 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.

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

150 Consumer Credit (Agreements) Regulations 1983, SI 1983/1553, Schedule 6.

'something more drastic was needed in order to focus attention on the need for lenders to comply strictly with these particular obligations'.[151]

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 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.

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 and 86C 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,

151 www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd030710/will-3.htm

and section 76 lists actions which constitute enforcement. The same approach to unenforceability is used in the CCA in sections 55 and 61B.

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.[152] 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.[153] The judge 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.[154]

41. Industry responses to the interim report indicate that some 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. Others consider that there is some uncertainty as to the steps firms are permitted to take and there may be a question as to whether unenforceability applies differently in relation to other provisions under the CCA.

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:[155]

152 FG17/1: Guarantor loans: Default notices (January 2017).
153 McGuffick v The Royal Bank of Scotland plc [2009] EWHC 2386 (Comm).
154 See also CONC 13.1.6G.
155 www.publications.parliament.uk/pa/ld200506/ldhansrd/vo051108/text/51108-36.htm

> '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 sanctions should be disapplied in cases where the breach involves only insubstantial errors or omissions.

46. Regulation 41 of the 2007 Regulations 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.[156]

47. 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.

48. 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.

49. However, firms may be uncertain as to the scope of regulation 41 and the extent to which they can rely on it in practice, in the absence of reported case law.

50. The application of the 'de minimis' principle was considered in the JP Morgan case.[157] 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.

156 Regulation 41 (errors and omissions) of the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007, SI 2007/1167.

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

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'.

51. 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

52. The CCA includes a number of criminal offences.

53. 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.

54. 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.

55. As noted above, some other criminal offences were removed in 2008, on the basis that they were considered disproportionate.

Canvassing off trade premises

56. 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.

57. 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.

58. Section 49 prohibits the canvassing of debtor-creditor agreements (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 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.

59. There is no equivalent ban on canvassing debtor-creditor-supplier agreements (linked to the purchase of goods or services) or consumer hire agreements.

60. This policy intention is reflected in the Notes on Clauses to the Bill:

61. '… 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'.

62. In practice, section 49 is mainly relevant to the home-collected credit sector. We have issued guidance reinforcing our interpretation of this provision, in light of concerns regarding practices in that sector.[158] However, we recognise that firms may be unclear as to the meaning of 'a previous occasion', and whether this implies a minimum time gap between the request and the visit. There may also be some uncertainty as to the scope of trade premises.

63. 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.

64. We are not aware of any instance where the offences have been prosecuted.

Circulars to minors

65. 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, this applies broadly to any individual.

66. 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.

67. 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, involving authorised firms, it seems likely that these would be inadvertent (for example, due to incorrect data or a systems error).

68. 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.

69. We are not aware of any instance where the offence has been prosecuted.

Credit reference agencies

70. 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.[159]

71. 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.

158 CP18/43: High-cost Credit Review: Feedback on CP18/12 with final rules and guidance and consultation on Buy Now Pay Later offers (December 2018).

159 Crowther Report, paragraph 9.1.16.

Criminal offences apply where a CRA fails to disclose filed information upon request, or to correct wrong information.

72. The CCA provisions relating to individuals were subsumed into the Data Protection Act 1998 and subsequently the Data Protection Act 2018 (DPA) and the General Data Protection Regulation 2018 (GDPR).[160] 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.

73. Other legislation sets out principles for the sharing of credit information in respect of small and medium-sized enterprises (SMEs).[161] This legislation also applies CCA provisions to designated CRAs who may not be acting within the regulatory perimeter.

74. 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

75. Where an agreement requires the debtor or hirer to keep goods in their possession or control, they must, within 7 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.

76. 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.

77. Section 119 providers that a person who refuses without reasonable cause to allow a pawned item to be redeemed commits an offence.

Other sanctions

78. In addition to unenforceability and disentitlement, and criminal offences, there are a number of other sanctions in the CCA which we set out below.

79. 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).

80. 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.

81. 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).

160 Sections 7 DPA 1998 set out the data subject's right of access, which is now contained in Article 15 of the GDPR. Section 8 DPA 1998 contained further provisions related to the right of access, some of which is now contained in Article 12 of the GDPR. Section 9 DPA 1998 (Application of section 7 where data controller is credit reference agency) related to the obligations of credit reference agencies, which is now contained in s13 DPA 2018 (Obligations of credit reference agencies).

161 Small and Medium Sized Business (Credit Information) Regulations 2015, SI 2015/1945.

82. 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.

83. 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'.

84. 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.

85. The unfair relationships provisions are considered in Annex 5.

86. 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'.[162]

87. 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.

162 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
PRIN	Principles for Businesses sourcebook
PS	Policy statement
PSRs	Payment Services Regulations 2017
RAO	Financial Services (Regulated Activities) Order 2001
SI	Statutory instrument
SUP	Supervision sourcebook
TSS	Trading standards services
UK	United Kingdom
2006 Act	Consumer Credit Act 2006

We have developed this report 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.

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