Response to HM Treasury:

Reforming the Consumer Credit Act 1974 Consultation

March 2023

Introduction

The Centre for Responsible Credit and the We Are Debt Advisers campaign group are pleased to make this joint response to the HM Treasury consultation concerning possible reform of the Consumer Credit Act 1974.

The Centre for Responsible Credit is a registered charity working to influence the regulation of credit markets, and to improve the way that credit is provided. We also work to create better support and solutions for people who are struggling with debt. Further details can be found at www.responsible-credit.org.uk

The We Are Debt Advisers campaign is a network of over 700 debt advice workers, campaigning for improvements to the provision of debt advice and for more effective debt solutions. Further details can be found at https://wearedebtadvisers.uk/

Our concerns

We are jointly concerned about the proposed approach of removing the statutory consumer protections currently contained in the Consumer Credit Act and replacing these with FCA rules/ guidance. This concern arises because (i) as the consultation document itself points out, many of the current consumer protections cannot simply be replicated in FCA rules and could be eroded to some degree as a result; and (ii) the FCA has a poor record when it comes to enforcing its rules. We therefore have little confidence that removing statutory provisions and replacing these with FCA rules will be to the benefit of consumers.

Potential erosion of consumer protections

Whilst we can appreciate that in some areas, notably in respect of information requirements, there is a need for an agile regulatory framework, there should – in our view – always be a statutory backstop providing for consumers to exercise legal rights and for courts to apply sanctions. The consultation document appears to recognise this need (for example at para 4.40):

"One example of how the FCA's rulemaking powers could be extended is by amending FSMA to allow the FCA to apply unenforceability as a sanction for a breach of FCA rules. Sections 26-30 of FSMA currently state when an agreement is unenforceable and then give the FCA and the courts power to

allow enforcement if it appears just and equitable. This reform will consider whether provisions such as these could be extended or supplemented to provide for unenforceability in a similar manner as under the CCA."

If Government is committed to maintaining the same level of statutory protection, by simply moving this from the Consumer Credit Act to FSMA, then we would have less cause for concern. However, the paragraph goes onto say:

"The government could explore extending these exemptions to facilitate a replication of the unenforceability, and thus consumer protections, found in the CCA, however it would be for the FCA to consult on this issue and to decide when such sanctions were appropriate."

If it is Government's intention to facilitate a review of the current provisions relating to unenforceability, then it should provide for Parliament to debate these within a reform of the legislation, rather than leave this to an FCA consultation process to determine.

Similarly at Para 4.23 the consultation document notes:

"…there are many rights and protections that could not be replicated using the FCA's current rule-making power, such as Section 75. The FCA could not use their general rule-making power under FSMA to make a rule that replicates the meaning and effect of this provision, and it is not certain that would be possible, even with amendments to FSMA. In this instance it is likely that Section 75 would remain in legislation, so that consumers are still afforded this protection. It may also be undesirable to move some provisions, such as section 75, to FCA rules, in part because the associated case law could lose its status as binding precedent. However, as part of the review, the scope of Section 75 may be reconsidered or clarified, in which case the existing case law may no longer be relevant. Furthermore, the current operation of Section 75 means that this protection might not apply when the supplier uses a third-party payment processer which can break the required debtor-creditor supplier link. This can create confusion for consumers over whether they are protected by the provision or not and the government believes there is merit in clarifying how this provision should operate."

This seems to indicate that whilst it is "likely" Section 75 would remain in legislation, Government is not necessarily committed to this. We would therefore like to place on record that we believe Section 75 should remain in legislation and that if clarification regarding the use of third-party payment processors is required then an amendment concerning this should be made.

The consultation document also proceeds to identify many other instances where important statutory protections are provided by the Consumer Credit Act. These include:

- Unfair Relationships, with Financial Ombudsman Service (FOS) and FCA rules being a weak alternative to the powers that courts have to rewrite terms and conditions;
- Time Orders, where FCA rules simply cannot change the term of an agreement or the interest rate, and which offers a significant 'backstop' protection for mortgage borrowers in possession proceedings, as well as in respect of consumer credit debtors;
- The voluntary termination of Hire Purchase agreements, where the consultation document indicates that government is considering restricting the right to people who are in 'financial difficulty'.

We strongly oppose any watering down of these protections and rights. We do not consider the FCA's rules concerning the fair treatment of people in arrears and the Tailored Support

Guidance to be adequate substitutes, and note that there have been few, if any, enforcement actions taken by the FCA with respect to breaches of those (see below).

Similarly, para 4.24 of the consultation document points out that:

"The CCA (as an Act of Parliament) does many other things that the FCA cannot under its current rule-making powers."

These include directly giving consumers specific rights and entitlements in their contractual relationships with firms and making any contract terms inconsistent with these void; as well as providing for judicial control and powers in relation to agreements and for the onus of proof in certain court proceedings.

We do not believe that these important protections should be replaced by FCA rules, and we have not seen any case for doing so presented in the consultation document. There does not appear to be any case made by HM Treasury for change.

A failure to enforce existing rules

Having searched the FCA's notices and decisions and details of the fines that it has imposed for the past two years, we are aware of only three enforcement actions with respect to the FCA's CONC rules. These are restricted to High-Cost Short Term Credit lenders such as Amigo Loans, Micro-E C.I.C, and TFS Loans.

This is despite, for example, the FCA finding[1], in June last year, that "most firms" did not consistently:

- Explore customers' circumstances fully to provide help and support that was appropriate and tailored to their specific individual circumstances.
- Identify the specific needs and circumstances of customers with vulnerable characteristics to provide help and support that took account of these.
- Help customers in financial difficulty access money guidance or free debt advice.

The FCA's 'Dear CEO' letter regarding these problems was sent to 3,500 firms.

However, in November 2022[2], the FCA revealed that its findings were based on a review of just 65 firms, and only 37 assessments had been conducted with respect to customer outcomes. Despite the small number of firms assessed, it reported "that many need to do a lot better".

It also highlighted what it was doing with respect to those firms that had been assessed and where it had found that improvements were needed:

"We have identified areas for improvement across all firms. 32 out of 65 firms have been asked to make material and significant changes to their processes.

- *Of these, 25 firms have made changes based on our feedback or their own assessments and 1 firm has exited the market. We are continuing to engage with the remaining 6 firms on the detail of changes they need to make.*

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[1] Dear CEO letter 16th June 2022, https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-rising-cost-of-living-acting-now-support-consumers.pdf

[2] https://www.fca.org.uk/publication/research/borrowers-in-financial-difficulty-following-coronavirus-pandemic-key-findings.pdf

- *Of the 32 firms asked to make material and significant changes, 12 firms have been asked to undertake past business reviews to date, or a similar review of the treatment of borrowers in financial difficulty had already been initiated by the firm independently of our feedback.*
- *All 12 of the above firms have appointed third parties to assist with their past business review or assess their forbearance policies and procedures.*
- *So far 7 of the 32 firms asked to make material and significant changes have provided remediation to customers. This is either following our reviews or through wider pieces of work being initiated within the firm on the treatment of borrowers in financial difficulty.*
- *At the time of writing, these 7 firms have estimated that they need to provide £12.38 million in remediation to 59,491 customers."*

Whilst the actions taken with respect to the 65 firms under assessment are very positive, the obvious problem is that 3,435 firms were not been assessed at all. It appears the FCA's expectation is that by simply writing to the Chief Executives, most of these will improve their practices. This is an astonishingly naïve approach but arises because the FCA does not have adequate resources to enforce its rules - through the robust supervision of firms - effectively.

FCA rules and guidance are not therefore adequate to protect consumers because they are not effectively enforced. This is also likely to be true of the new Consumer Duty.

Conclusion

In view of the above, we do not consider that the statutory protections provided by the Consumer Credit Act should be replaced by FCA rules. It is critical that consumers retain their legal rights and entitlements and have a means of enforcing these, if necessary, through the courts.

Whilst there is scope for a more agile regime to be established with respect to information requirements, we would like this to be backed up by a legislative protection that agreements would remain unenforceable unless approved by the courts if the FCA rules are breached.

In respect of other statutory protections afforded by the Consumer Credit Act, we see no convincing case for change presented within the consultation document.

Finally, we urge HM Treasury to consider whether the FCA is adequately resourced to enforce its current rules and the FCA to provide more robust supervision of consumer credit lenders with respect to those and the new Consumer Duty.