

MONEY  
ADVICE TRUST

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Consultation Response:

# HM Treasury Reforming the Consumer Credit Act 1974

Response by the Money Advice Trust

Date: March 2023

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# Introduction

## About the Money Advice Trust

The Money Advice Trust is a charity founded in 1991 to help people across the UK tackle their debts and manage their money with confidence.

The Trust's main activities are giving advice, supporting advisers and improving the UK's money and debt environment.

In 2022, our National Debtline and Business Debtline advisers provided help to 140,980 people by phone, webchat and our digital advice tool with 1.87 million visits to our advice websites. In addition to these frontline services, our Wiseradviser service provides training to free-to-client advice organisations across the UK and in 2022 we delivered this free training to 2,780 organisations.

We use the intelligence and insight gained from these activities to improve the UK's money and debt environment by contributing to policy developments and public debate around these issues.

Find out more at [www.moneyadvicetrust.org](https://www.moneyadvicetrust.org).

## Public disclosure

Please note that we consent to public disclosure of this response.

# Executive summary

We strongly welcomed the FCA's findings in the [final report of its review into the retained provisions of the CCA](#), issued in March 2019. We felt that this report was extremely helpful in spelling out the way forward, whilst preserving the essential consumer protections within the CCA. We would therefore be very concerned by any moving away from the suggested direction for reform as set out in the FCA report.

At the Money Advice Trust, we have many years of experience in giving debt advice to consumers and small businesses through our National Debtline and Business Debtline services. We routinely give advice to our callers on their rights in relation to the CCA. As well as advice over the phone, we provide an extensive library of online information for consumers on our websites.<sup>1 2</sup>

Our online factsheets and sample letters provide information to people on how to deal with different debt situations, including the action that creditors can take as well as their own rights. In 2022, the National Debtline and Business Debtline factsheets and online letters that contain information about key protections or rights afforded by the CCA had over 66,000 unique views.

Our case recording system keeps statistics on the types of debt our clients have. Of all non-priority debts held by our National Debtline clients in 2022, 69% were CCA-regulated debts. 6% of the priority debts we dealt with were hire-purchase debts and 1% were secured loans.

We have set out below a summary of our thinking on key elements of CCA reform as well as our substantive responses to the consultation paper.

## Information requirements

We support the intention to move information notices into the FCA rules instead of the CCA as it is possible to be more flexible on wording and for ease of updating in the rule book rather than CCA regulations. However, we think it is **crucial to preserve key elements of prescription and the mandated information on firms**. We do not support firms being given a free hand to present key consumer information in any way they like, using their own style and wording and making decisions as to prominence of wording. We feel that this would undermine consumer protection.

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<sup>1</sup> <https://nationaldebtline.org/fact-sheet-library/>

<https://nationaldebtline.org/sample-letters/>

<sup>2</sup> <https://www.businessdebtline.org/fact-sheet-library/>

<https://www.businessdebtline.org/sample-letters/>

## Rights and Protections

**It is vital to preserve the protections under the CCA that give individuals rights** they can use in a timely fashion. This might be directly with their lender or as part of a court process to deal with breaches affecting their individual credit agreement. This includes time order provisions for secured lending and hire purchase, section 75 protections, the unfair relationships rules, and the specific protections in place for hire purchase and conditional sale agreements.

In our view, the FCA's **new consumer duty is not a substitute for these rights and protections**. Whilst we fully support the consumer duty, it does not provide a remedy for an individual faced, for example, with a court claim for repossession of their house or car. The FCA may decide to take supervision or enforcement action against a firm they feel has acted unfairly, but this will be after a series of complaints or concerns raised by individuals or consumer bodies, and will only deal with harms retrospectively. The same applies to the individual right to complain to the Financial Ombudsman Service which may result in a complaint being upheld plus an element of compensation paid out, but this can be many months after the event.

Moving to FCA rules alone would drastically reduce consumer protection as this would strip the courts of extremely wide-ranging powers to alleviate unfairness in both CCA-regulated and many unregulated credit agreements. We have set out some relevant examples below.

- ✓ Default notices under s87: creditors are barred from taking several forms of enforcement action under s87 of the Act without first issuing a default notice and giving the consumer at least 14 days to remedy their breach of the agreement's terms. Failure to issue effectively bars court action to repossess good or land, enforce a security or claim amounts that would not yet be due under the original terms of the agreement. This ensures that consumers are made aware of the failure to comply with the terms of their agreement, and where possible, gives them time to fix this by providing them with a defence against the more draconian steps a creditor could take in court.
- ✓ Hire purchase and conditional sale protections: the Act places restrictions on when, where and how a creditor can repossess the goods from a consumer, and allows a court to intervene in many cases to let the consumer to retain the goods providing they make appropriate payments. Consumer protection would be greatly reduced if these protections, and the courts oversight of them, were to be removed.
- ✓ Time order and unfair relationship provisions: Sections in Part IX of the Act give the courts wide-ranging powers to intervene and remedy unfairness. A time order can be made before, during or after court action, and allows the court to extend the term of an agreement, reduce the amount that needs to be repaid each month and sometimes change the interest rate that applies, providing that it is just to do so. Unfair relationship provisions allow courts to grant relief from credit agreements (including many unregulated agreements) that impact on the consumer unfairly, potentially even where the terms of the agreement could be considered to be fair in and of themselves.

## Sanctions regime

**The sanctions regime should remain**, as we feel that these sanctions were put in place as consumer protection measures e.g. to deal with egregious firm behaviour such as not supplying credit agreements, or hiding interest accruing on arrears. We may not see such behaviour so often these days, as the legislation has acted as a deterrent where necessary against firms tempted to behave poorly and undermine consumer protections.

The scope of the sanctions regime was reduced in the 2006 Act, and we worry that removal of sanctions could encourage poor behaviour again by less reputable lenders. We are of course open to any way in which HM Treasury can find to **preserve the exact same sanctions powers** under FSMA instead, whilst retaining individual rights and remedies.

## A staggered approach to change

The Financial Services Act 2012 says:

*“In exercising their powers under this section, the Treasury must have regard to- (a) the importance of securing an appropriate degree of protection for consumers”.*<sup>3</sup>

**We believe it is therefore vital that any changes to the CCA must be made only when it is certain that the appropriate degree of protection has been maintained.** We would argue that individual protections afforded by the CCA cannot be diminished. Therefore, we would strongly suggest that any changes are brought in with extreme caution and made incrementally to ensure these protections are maintained.

Any proposals to move elements of the CCA into FCA rules constitute a substantial and long-term process that should not be carried out in haste. **We would suggest that changes to information requirements are brought forward first**, as this area appears to afford the greatest consensus amongst stakeholders. Done well, and with suitable prescription on wording, moving information requirements into FCA rules could enhance protections and understanding for the most vulnerable consumers.

We would also **urge government to clearly state in its response to this consultation, what elements of CCA protections will be ruled out of further discussion**, and are to be preserved so that we no longer have to debate these sections again. We could then move to a further stage once the information requirements are reformed, where we look further at other sections of the CCA, to ensure any further changes have consumer protections at their heart.

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<sup>3</sup> Financial Services Act 2012 Section 107 Power to make further provision about regulation of consumer credit

# Responses to individual questions

## Question 1: Do you agree with these proposed principles, and do you have views about tensions between them or relative prioritisations?

The proposed principles for reform that have been put forward do not go far enough in our view. Consumer protection should be front and centre of principles for reform, and this is substantially missing from the principles apart from a reference within the “proportionate” principle to vulnerable consumers.

This principle includes the following wording.

*“Some customers in this market may be vulnerable and due care will be given to ensure that high levels of consumer protection are maintained where appropriate.”*

We believe that this element for consumer protection should be the first guiding principle that is prioritised above all others. It should not form part of a principle of proportionality that runs the risk of favouring business needs over the rights of vulnerable consumers. We would like to see consumer protection as a distinct first principle for these reforms.

The wording as it stands should be strengthened as many customers in this market will be vulnerable given the nature of consumer credit lending. The FCA Financial Lives statistics demonstrate this point well.<sup>4</sup> High levels of consumer protection should be maintained in all circumstances. We do not think “where appropriate” is a strong enough term in this context.

## Question 2: Noting the governments' Net-Zero targets, how can CCA reform remove barriers that may otherwise prevent lenders from being able to offer financing for renewable energy solutions, such as electric vehicles and green home improvements?

We do not have the relevant expertise in this area to respond to this question in detail.

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<sup>4</sup> <https://www.fca.org.uk/news/press-releases/millions-britons-struggling-bills-warns-regulator>

However, we would be very wary of any attempt to reform the CCA to “remove barriers” that are put forward by lenders using green financing as a cover for removing consumer protections. It is vital that the government establishes that these barriers really exist for this type of credit, and that there are no other solutions within the proposed framework to deal with these concerns.

### Question 3: Are there any existing definitions or concepts in the CCA which should be updated and clarified when moved to FCA rules?

We have set out some of the existing definitions in the CCA which should be updated and clarified below.

- ✓ We agree that it would be beneficial for the rules, or alternatively an amended CCA, to provide a clear and consistent definition of the term ‘enforcement’.
- ✓ We would like the protections afforded under s77-79 of the Act, which stop enforcement until a creditor has responded to an information request as required under the Act, to remain or be replicated if moved to FCA rules. If these protections are moved to FCA rules, we would like the guidance given in CONC 13.1 to be replaced with definitive rules that are enforceable in court.
- ✓ Creditors are required to provide a ‘true copy’ of the agreement in response to a request under s77-79, the meaning of this term having been clarified by case law. A comprehensive definition should be provided by the rules if the Act is revoked.
- ✓ Currently, a creditor no longer has to comply with request made under s77-79 if a judgment has been obtained. We would like to see this restriction removed, an individual should always be entitled to this information, and a creditor who cannot set out the contents of the agreement that was made, or give a thorough breakdown of the outstanding debt, should not be allowed to enforce it.
- ✓ The requirement to send default notices under s87, which prevent creditors from taking certain forms of enforcement action without first notifying the consumer, and where possible giving them at least 14 days to remedy the breach, should be retained or replicated in the rules. We would like to see limits placed on the amount of time a creditor has to issue a default notice, as currently a creditor can delay issuing a notice in order to stop the cause of action accruing in some cases. This allows them to deprive consumers indefinitely from making the argument that debts are statute barred under the Limitation Act 1980.
- ✓ We would like the protections provided for goods on hire purchase or conditional sale agreements to be retained in the Act or replicated in the amended rules.



- ✓ This should include the requirement under s92 (which also applies to consumer hire agreements) that a court order is required to 'enter any premises' to repossess goods with the borrower's permission. It would be beneficial if the rules or the Act would clearly define the term 'premises' as it is not currently defined at all. We think that the whole of a client's property, including driveways or forecourts, should be defined as being premises. It is also unclear at the moment, if s92 applies to premises owned by third parties.
- ✓ Currently, s100 is silent on whether a creditor can charge for recovering goods if the consumer terminates an agreement under s99. We understand that in practice many creditors will include a term in the contract which says that they can charge for this. We advise that this is likely to be valid as long it reflects the costs that will be incurred by the creditor in doing this and the client is given the alternative option of returning the goods themselves to accessible location. It would be beneficial if the Act or rules provide clarity.
- ✓ Under s133 of the Act, a court can make an order transferring ownership of 'some' of the goods subject to a hire purchase agreement from the creditor to the consumer. We would like to see this power retained if the Act is replaced by rules but broadened so that a court can make this kind of order in cases where there is only a single item being hired.
- ✓ Some debt purchasers used to argue that they were not 'creditors' as defined under s189 of the Act, and so the duties that applied to creditors did not apply to them. In *Link Financial Ltd v Jones* [2012] EWHC 2402 (QB), [2013] 1 WLR 693, the court stated that statutory duties were transferred to the debt purchaser if the debt was legally assigned under s136 of the Law of Property Act 1925. The rights and responsibilities of debt purchasers and debt collection agencies should be clearly defined in the rules if the Act is revoked.
- ✓ If the Act is revoked, it will be important that the rules create an equivalent of time orders, made under s129 and sometimes in combination with s135 and s136. The rules will need to replicate the substantial body of case law that relates to time orders, defining terms such as 'any sum owed' and setting out when it will be just to make such orders.
- ✓ We would like to see the protection afforded to consumers under s75 of the Act retained or replicated in the rules. However, it has become difficult for consumers to tell when this protection applies, as whilst they may believe they are making payments directly to a supplier, in some cases another company is accepting the payment, taking the transaction beyond the scope of s75. We would like the Act or rules to be amended to remedy this.

- ✓ The Act and related legislation provides important legal protection to consumers. Firstly, s141 of the Act ensures that court claims for CCA-regulated debts must be started in the County Court. This protects consumers from the higher costs and procedural complexity in the High Court. In addition, the County Courts (Interest on Judgment Debts) Order 1991 ensures that statutory interest cannot be added to judgments debts resulting from CCA-regulated agreements. Should the Act be revoked, these same protections would be needed in the rules.
- ✓ Creditors can sometimes still claim that contractual interest accrues after a judgment has been made, if the credit agreement contains a term allowing this. The existing law on when this is enforceable is complex and uncertain, with potentially different outcomes depending on whether post-judgment contractual interest was included in the particulars of claim, when the judgment was made, and since 1 October 2008 under s130A of the Act, whether the correct notices have been sent. We would like to see the Act or rules amended to end creditors' ability to recover post-judgment interest conclusively, as currently consumers can end up trapped with debts that accrue more quickly than they can repay them.

#### Question 4: Are there concepts in the CCA which are not currently defined but which should be?

- ✓ We know individual consumers are sometimes successfully defending claims as the claimant is unable to satisfy the court that a default notice has been properly served prior the claim being made. However, not all consumers would realise that a defence may be available to them or have the confidence to do this. The rules should mitigate the disparity in outcomes by requiring creditors to provide the following information to the consumer when making a claim: a true copy of the original and current credit agreement, evidence that a default notice was served and when this took place, and a breakdown of the account.
- ✓ The Act gives courts wide-powers to intervene in credit agreements to remedy unfairness using time orders and the unfair relationship provisions. If these sections of the Act are not retained, we would like equivalent powers to exist under the Rules. However, it is currently difficult for consumers to know that these powers exist at all. The current law is obscure to consumers, and at times even to advisers. For example, unfair relationship provisions cannot generally be used for regulated mortgage contracts (RMCs). However, they do apply to RMCs that were previously CCA-regulated before 21 March 2016. To remedy this kind of issue, the rules should require creditors to tell consumers about all the kinds of help that may be available under the rules or Act when they default on an agreement.
- ✓ Buy now pay later (BNPL) agreements are currently exempt agreements, although we are aware there is a separate consultation which proposes to bring these kinds of agreements under the Act.

- ✓ There is an increasing number of mobile phone providers who offer device contracts separately to tariff contracts. Device contracts are CCA regulated loans, but often contain terms that allow the provider to cut the consumer's phone service if they default on the loan. This can lead to vulnerable individuals losing access to an essential service (both phone and internet) and causes a particular problem if the individual wants to have a DRO or be declared bankrupt. We would like to see specific rules for device contracts which restrict providers rights to end the service agreement if a customer has only defaulted on a CCA-regulated device credit agreement.

### Question 5: Do you believe the business lending scope of the CCA should be changed?

We believe that more self-employed individuals should be afforded the protection available under the CCA. In our experience, small business owners are generally no less financially vulnerable than the general public and may be more predisposed to harm related to credit use and borrowing due to their financial dependence on, and emotional investment in, the success of their business.

When we speak to client with a mixture of regulated and unregulated debts (due to the business exemption), they can be confused that the same protections don't apply to all their debts. Although exempt agreements have to include a business exemption declaration, many will not understand the consequences of this or even that it applies in cases where the credit is not solely for business use. In some cases, the credit may have been obtained for personal reasons, even though the declaration says otherwise (the business exemption will still apply unless the creditor was also aware of this).

We would like to see the requirements on creditors strengthened to help customers understand that there is an exemption and the consequences of this. The declaration should be more prominent and the protections that are being lost should be set out. The agreement should also clearly set out how the credit will be used, either solely or predominately, for business purposes.

We have come across many cases where a lender has taken steps to avoid CCA-regulation and arranged unaffordable agreements that can be ruinous for the borrower. This may be achieved by only lending amounts above the £25,000 limit or by insisting that sole traders set up a limited company to access funding.

Poor practice can include the following.

- ✓ High pressure and underhand sales tactics, such as turning up very late to appointments and discouraging the borrower from reading paperwork due to lack of time.
- ✓ Setting up very artificial arrangements to avoid regulation and oversight, such as agreeing to buy goods with little value to 'hire' back to the consumer, so the agreement is not 'cash lending' and so does not fall within the jurisdiction of the FOS.

- ✓ Asking individuals to appoint sometimes vulnerable relatives as directors of limited companies so that charges can be obtained against their homes to secured high-interest loans.
- ✓ Refusing to settle complaints unless the consumer signs a non-disclosure agreement.

We think the business exemption should be removed for sole traders, and they should have the same protections under the Act or rules as other consumers. The high-net-worth exemption would continue to be available to sole traders who have access to the resources to enable them to enter into unregulated agreements having received appropriate advice.

We would also like to see improved protections for micro-businesses that do not currently benefit from CCA protections, such as partnerships of more than three persons and limited companies.

**Question 6: Do you support the conclusion of the Retained Provisions Report that most Information Requirements could be replaced by FCA rules without adversely affecting the appropriate degree of consumer protection, and that it is desirable to do so? Are there any additional factors the government should consider given the context changes since the report's publication in 2019?**

We broadly support the conclusion of the Retained Provisions Report that most information requirements could be replaced by FCA rules without adversely affecting appropriate consumer protections. We accept the arguments made that if the content of notices and information sheets were to be included in the CONC rules, there would more flexibility to update these more regularly than would be afforded under the need to use a legislative vehicle to implement change. Our views have not changed since the report was published.

**However, this is subject to an important caveat. We accept the case for updating and modernising some of the wording on the default notices and other notices, but it is vital that these notices continue to have prescribed wording and a prescribed format with penalties for improper use or failure to serve the notices at the correct time.**

We do not accept the argument that it is generally burdensome for firms to comply with the information requirements. As the notices and forms are generally prescribed in terms and format, then compliance should be straightforward to achieve.

**Question 7: In what circumstances is it important that the form, content and timing of pre-contractual and post-contractual information provided to consumers is mandated and prescribed? What are the risks to providing lenders more flexibility in this area?**

As we have said, we believe that it is vital that consumer credit contracts and notices should continue to contain prescribed wording and a prescribed format.

We would caution against providing lenders more flexibility in this area. In our experience, there are risks in relaxing the provisions on mandatory requirements and prescription. Moving away from prescription on the belief that all lenders in the market will behave well and follow best practice is a significant risk, and one we think the government should not take. We cannot develop a legislative model that only recognises the best type of creditor behaviour and intentions instead of taking a precautionary approach to protect consumers against the worst lender practices.

There is a significant risk that high-cost lenders on the margins of the market and who may be less reputable will be tempted to use misleading and obscure language to confuse vulnerable consumers. Key terms may be hidden in the small print, and consumers could find themselves with onerous and unfair credit agreements and be confused as to their rights when further information notices are sent to them.

As we said in our consultation response at the time, we would not support a move of the information requirements to within CONC rules if this would allow any variations in the style, wording and presentation of credit agreements. We would be very concerned that such a relaxation of the rules would lead to consumer confusion, make the task of enforcement of compliance harder, make it extremely difficult to take action against lenders for any breach or for consumers to challenge their agreements. There needs to be prescribed terms and conditions for all agreements. It is very important to avoid any relaxation in the rules that allowed firms to “hide” key information in amongst less important information or in the small print.

The use of a set format in notices using prescribed terms, and simple clear wording preserves the key messages. If the rules for notices are too loose and flexible then the regulator will spend a disproportionate amount of time monitoring whether the notices used by a particular company are compliant with the regulations or the “spirit” of the regulations. This will not only tie up regulatory time which would be better spent elsewhere, but cause uncertainty for consumers and their advisers, who will have to attempt to judge on an individual basis whether the contract or notice is compliant or not.

We accept that there are some advantages to a change of approach. These include:

- ✓ a general aim to reduce complexity in wording and style;
- ✓ a general aim to reduce the amount of information sent if this is substantial and confusing for consumers, to allow for key terms to be highlighted;
- ✓ allow the FCA more flexibility to amend wording in a timely fashion;
- ✓ allow the right information to be sent out at the right time; and
- ✓ allow the FCA to keep up with changes in technology.

It should be possible to follow consumers’ preferences as to whether they prefer digital or paper delivery of information and notices, to receive information by a variety of mediums.

We believe that before making a decision, the FCA should carry out comprehensive research using behavioural economics to test what works best for consumers in relation to how they absorb the information they receive and what level of information works to enable people to make informed choices.

This would lead to the optimal design for information notice and form requirements to ensure people take the relevant action as a result of the information they receive. There should be prescribed wording in place but there is certainly room for good practice guidance from the FCA on what “good” information looks like and how it should be delivered.

This would also require a comprehensive review of the wording of existing notices with the following aims.

- ✓ Simple plain English wording.
- ✓ A requirement to use consistent wording and prescribed phrasing.
- ✓ Establish what the most important messages are and prescribe wording for these messages.
- ✓ The layout of a notice should also be prescribed. It should not be possible for key messages to be hidden in the small print.
- ✓ The use of positive messages which diminishes formal and intimidating language.
- ✓ Key messages are emphasised and not lost in the small print.

The content of notices and forms will then need to be reviewed and updated regularly to ensure that out-of-date or less helpful information is removed.

**Question 8: The Consumer Understanding outcome in the Consumer Duty posits that consumers should be given the information they need, at the right time, and presented in a way they can understand it. Does the implementation of this section, and the Consumer Duty more broadly, go some way to substitute the need for prescription in CCA information requirements?**

Whilst we very much support the implementation of the Consumer Duty by the FCA, **we do not agree** that the consumer understanding outcome will be a substitute for the need for prescription in CCA information requirements. The consumer duty can only advance the consumer protection objective if properly supervised and enforced by the FCA. We believe that a reformed authorisations process and robust supervision and enforcement regimes under the FCA will be crucial to the success of the consumer duty measures. However, this will not replace rights under an individual credit agreement.

The CCA information requirements have penalties for improper use or the failure to serve the notices at the correct time. the Consumer Duty does not have any element of automatic penalties for any failures by firms to abide by FCA rules and does not have the same effect as CCA protections. There is no element of consumer redress and no court protection for individual consumer credit agreements under the Consumer Duty.

As we have said, we believe that it is vital that consumer credit contracts and notices should continue to contain prescribed wording and a prescribed format. We have set out our reasoning in our response to question 7.



As the paper says under section 4.13:

*“There are risks to allowing firms flexibility on the form, content and timing of pre-contractual information, as without a level of prescription not all firms can be relied upon to provide the appropriate information to their customers at the appropriate time. The government also knows that customers find information such as arrears notices and default sum notices useful (including the signposting to forms of advice and support) and any delays in customers receiving this information may have an adverse effect on their ability to get back on track with their payments.”*

We very much agree that there must be prescription for the form and content of information. This does not mean that information must be complicated, lengthy and formally worded. New information rules should ensure that communications are simple, straightforward and easy to understand, but crucially, use standard wording and format.

The information sheets that accompany arrears and default notices which include signposting to sources of debt advice, are a very good example of how the CCA requires the information sheets to be issued.<sup>5</sup> the wording of the information sheets can be easily updated by the FCA as required, and indeed have been updated in consultation with consumer groups, to reflect more targeted language and help where people have mental health issues.<sup>6</sup> However, the wording remains in a prescribed format and firms are not allowed to come up with their own potentially confusing variations.

**Question 9: Given the increasing using of smartphones and other mobile devices to take out credit products how can consumer information be delivered on devices in a way that sufficiently engages consumers whilst ensuring they receive all necessary information?**

It is important that consumer information is provided on mobile devices in a way that allows consumers to understand what they are signing up to and so that they received the necessary information whilst not looking at pages of background small print.

We would suggest that government requires FCA research to be carried out with consumers to test what works best for contractual information on mobile devices. Research should also establish how people best understand the information they are provided with and how these can be designed to elicit the most proactive response.

The FCA research should be comprehensive, using behavioural economics to test what works best for consumers in relation to how they absorb the information they receive and what level of information works to enable people to make informed choices.

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<sup>5</sup> <https://www.fca.org.uk/firms/information-sheets-consumer-credit>

<sup>6</sup> <https://www.fca.org.uk/publication/information-sheets/arrears-may-2021-cmyk-a4.pdf>

Question 10: Are there any areas where, in your view, consumer protection legislation, rules and/or guidance, outside of the CCA, makes for appropriate levels of consumer protections and mirrors or replicates the effects of the provisions in the CCA?

We do not accept that the consumer protection legislation, rules and guidance available outside of the CCA replicates the protections of the CCA and there are serious limitations on the scope of the available legislation or rules in many cases. We have set out some of these in our response to question 11 below.

The FCA paper set out a range of key provisions that in their view could not be repealed. We see no reason to disagree with their assessment since that point.

**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

Question 11: If other consumer protection legislation, rules and/or guidance, outside of the CCA, falls short of replicating the effect of the provisions in the CCA, where do these gaps exist and how significant are they?

As we have said, we believe that other consumer protection legislation rules and guidance, fall seriously short of replicating the effect of the provisions of the CCA in many cases. We have set out some of these areas below.



## Consumer Credit sourcebook (CONC)

The CONC rules are very important in setting out how lenders should treat consumers in relation to their credit agreements and allow the FCA to take action to deal with breaches of the rules accordingly. However, CONC rules are not a substitute for legal rights when an individual vulnerable consumer is faced with the immediate threat of a court claim for repossession of their home, or repossession of a hire purchase vehicle, or a court claim to recover money owed under an unfair consumer credit contract. The courts are not required to take CONC rules into account when making a decision in a court case relating to a CCA agreement.

The FCA may decide to take supervision or enforcement action against a firm they feel has acted unfairly, but this will be after a series of complaints or concerns raised by individuals or consumer bodies, and will only deal with harms retrospectively.

### The new consumer duty

In our view, the FCA's new consumer duty is not a substitute for these rights and protections. Whilst we fully support the consumer duty, it does not provide a remedy for an individual faced, for example, with a court claim for repossession of their house or car for the same reasons set out above.

In order to obtain good consumer outcomes, the consumer duty will need to be accompanied by enhanced and more robust FCA authorisations, supervision and enforcement regimes. An enhanced supervision and enforcement regime will allow the FCA to better monitor firms to identify poor practice and intervene before that practice becomes the market norm.

However, individual consumers would need to rely on the FCA to take such preventative action, or use its enforcement powers, as the consumer duty does not contain an individual right to take private action.

### Redress through the Financial Ombudsman Service

We of course value the individual right to complain to the Financial Ombudsman Service which may result in a complaint being upheld plus an element of compensation paid out. This does, however, rely upon an individual having the capacity, or determination, in potentially vulnerable circumstances to make a complaint. In addition, the outcome may be many months after the event and is not a substitute for calling upon specific legal rights as part of a defence in a court case regarding a CCA regulated agreement. The Ombudsman cannot rule that an agreement is unenforceable or provide the same level of redress that courts can under the CCA.

We are doubtful if individual rulings by the Ombudsman or Ombudsman guidance will be treated in the same way as caselaw in a court case either.

In addition, if the lender becomes insolvent, the consumer may only get a fraction of what they are owed back. This has become all too apparent in relation to irresponsible lending decisions where lenders have gone into administration.

## Private right of action under FSMA

We have set out our thoughts on the limitations of the private right of action in our response to question 14 below. This is no substitute for the enforcement and sanctions regime under the CCA.

## Unfair contract terms under the Consumer Rights Act 2015

These give the FCA powers to challenge unfair terms in financial services consumer contracts.<sup>7</sup> These do not appear to be much used, although we note that the FCA used its powers to change contract terms for buy now pay later firms, in the absence of any CCA or FCA regulation of such lending.<sup>8</sup>

Under the Act, an unfair term is not binding on a consumer. This for the most part replicates protections that already existed under the Unfair terms in Consumer Contracts Regulations 1999, which were repealed with the 2015 Act came into force. The unfair relationships provisions in the CCA 1974 provide a greater level of consumer protection, as a court can decide that a relationship is unfair even when the terms of the agreement would be considered to be fair under the Consumer Rights Act 2015.

The paper recognises that *“the Consumer Rights Act 2015 does not apply to business customers, so business lending covered by the CCA is excluded from its scope”* so is limited in practical effect.

We note that the Consumer Rights Act 2015 is classed as being retained EU law and falls within the scope of the Retained EU Law (Revocation and Reform) Bill 2022.

## Consumer Protection from Unfair Trading Regulations 2008

This legislation would again seem to have limited scope for an individual consumer to use as a remedy, as it may require a complaint to trading standards, and for an investigation to be carried out by local offices who may not be resourced to conduct investigations into potential criminal breaches of the rules unless very serious. The regulations provide consumers with rights of redress through the courts, and a claim for damages which would be unlikely to be taken up by many consumers due to the expense of making a claim and the potential for legal costs.

We note that the Consumer Protection from Unfair Trading Regs. 2008 is also classed as being retained EU law and falls within the scope of the Retained EU Law (Revocation and Reform) Bill 2022.

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<sup>7</sup> <https://www.fca.org.uk/firms/unfair-contract-terms>

<sup>8</sup> [FCA drives changes to Buy Now, Pay Later \(BNPL\) firms' contract terms | FCA](#)

**Question 12: The FCA's Consumer Duty mandates a consumer support outcome. How does the Consumer Duty interact with the rights and protections provided to consumers in the specific consumer credit regulatory regime, which currently consists of the CCA and FCA rules?**

As we have said in our response to question 11 above, we do not believe that the consumer duty is a substitute for the rights and protections afforded by the CCA.

The FCA is unable to use the consumer duty to provide a legal remedy in court, for an individual who is dealing with a court claim affecting their specific consumer credit agreement.

The FCA can act to improve the ways in which lenders provide goods and services under the consumer duty, and influence lender behaviour in a sector. This could lead to improved consumer outcomes across customers of a specific lender or sector. This does not achieve the same level of protection as the individual CCA rights.

We have seen many cases where the FCA has acted to put in place new rules or take enforcement action against a sector it deems to not have been treating customers fairly, such as payday lending, the home credit sector and rent to own. This will typically take place some years down the line after individual consumers and consumer bodies have raised their concerns with the FCA. This means that any redress for consumers takes place retrospectively if at all and must by necessity take a broad-brush approach. This does nothing to relieve the detriment suffered by an individual consumer at the time their lender treated them unfairly or took action in court that led to a loss of home, or vehicle.

The ability of the FCA to take supervision or enforcement action against a particular firm is limited by the resources available. This cannot be relied upon to be an adequate substitute for individual rights afforded by the CCA to use as a defence in court.

The same applies to the individual right to complain to the Financial Ombudsman Service which may result in a complaint being upheld plus an element of compensation paid out, but this can be many months after the event. Again, this is not a substitute for the immediate action that a consumer, their adviser or solicitor can take during court action to protect a house, or vehicle or argue that a credit agreement is unfair. Being able to assist a vulnerable client in court provides an immediate remedy that gives potential resolution for that person's problem. Many of our clients in vulnerable circumstances are unlikely to have the time or capacity to make a complaint to the ombudsman or to carry this through over many months, due to other pressures.

The FCA has chosen not to bring in a private right of action for the consumer duty at this point which seems to us another reason not to see the consumer duty as any form of adequate replacement of CCA protections. Alongside most other consumer groups, we supported attaching the private right of action to the consumer duty in our consultation response. We think that a private right of action would be particularly beneficial for establishing industry-wide consumer redress schemes for breaches of the principle.

As the financial services compensation scheme does not apply to consumer credit cases, and there seems to be no intention to change the rules to cover consumer credit firms, there are limited avenues available for redress for individual consumers. Even where the FCA have ordered firms to set up compensation schemes for their individual customers, these schemes of arrangement have not worked as the firms have become insolvent and little if any compensation paid.<sup>9</sup>

**Question 13: If it is possible to amend the FCA's FSMA rule-making power to enable FCA rules to replicate the effect of rights and protections currently in the CCA, what is your view on the risks and benefits of doing this?**

The paper does not state how it might be possible to amend the FCA's FSMA rule-making powers to enable FCA rules to replicate the rights and protections currently in the CCA. We are therefore unsure how to respond to this question regarding the hypothetical risks and benefits that might result.

Assuming that FCA rules can replicate the rights and protections exactly, there is the potential benefit that the existing laws could be improved, and areas of uncertainty clarified. However, moving also comes with substantial risk as existing case law would potentially be lost and would need to be replicated within the rules for them to have similar effect. In addition, any changes made could have unintended consequences and create new problems. Certainly, it would seem very difficult to move quickly on this, given that there is over 40 years of case law and the 1974 Act interacts with many other pieces of legislation. The Act also currently applies to some kinds of agreement for which FCA authorisation is not required. For example, non-commercial agreements are regulated by the Act (although exempt from certain parts), will the FCA make rules for these kinds of agreement in place of the Act?

**Question 14: Are there any rights and protections provisions which you feel should not be moved to FCA rules and should remain in legislation? Please provide an explanation of why you hold these views.**

As, we have said, at the Money Advice Trust, we have many years of experience in giving debt advice to consumers and small businesses through our National Debtline and Business Debtline services. We routinely give advice to our callers on their rights in relation to the CCA. As well as advice over the phone, we provide an extensive library of online information for consumers on our websites.<sup>10 11</sup>

Our online factsheets and sample letters provide information to people on how to deal with different debt situations, including the action that creditors can take as well as their own rights. In 2022, the National Debtline and Business Debtline factsheets and online letters that contain information about key protections or rights afforded by the CCA had over 66,000 unique views.

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<sup>9</sup> <https://debtcamel.co.uk/provident-scheme-claim-refund/>

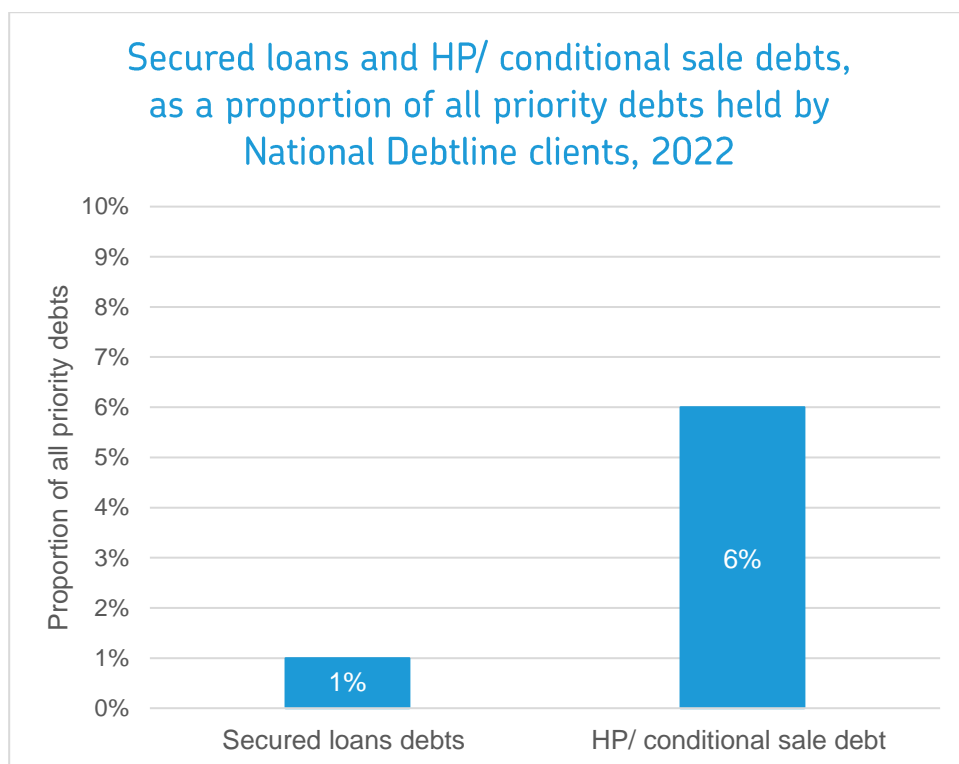
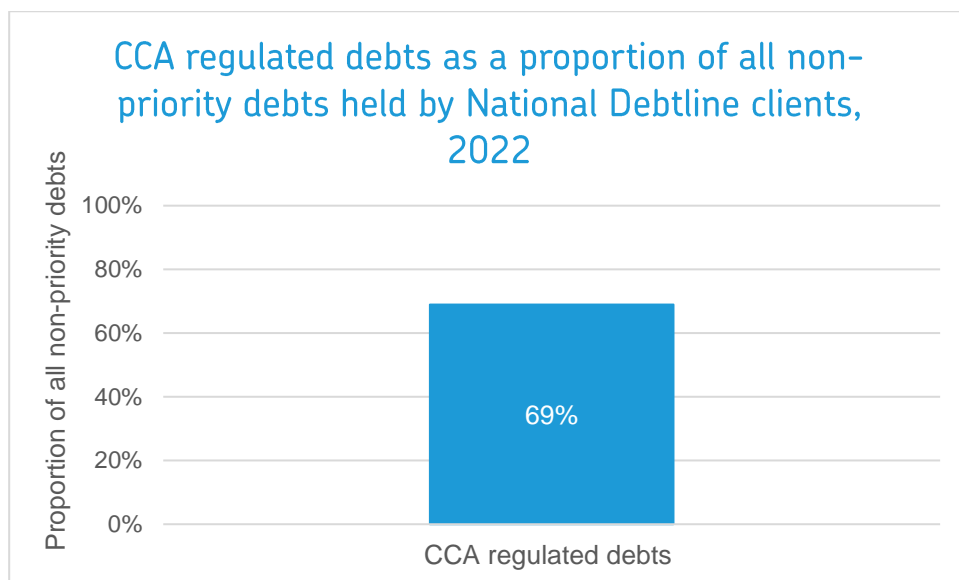
<sup>10</sup> <https://nationaldebtline.org/fact-sheet-library/>

<https://nationaldebtline.org/sample-letters/>

<sup>11</sup> <https://www.businessdebtline.org/fact-sheet-library/>

<https://www.businessdebtline.org/sample-letters/>

Our case recording system keeps statistics on the types of debt our clients have. Of all non-priority debts held by our National Debtline clients in 2022, 69% were CCA-regulated debts. 6% of the priority debts we dealt with were hire-purchase debts and 1% were secured loans.



We have set out some points below on the rights and protections that should not be removed, and the inadequacy of the FSMA private right of action to act as a substitute.

## Private right of action

We understand that if the rights and protections under the CCA are removed, that the remedy available to customers under FSMA would be private action for breach of statutory duty. We agree with the FCA conclusion that this would not “*achieve a comparable standard of protection for consumers*”.<sup>12</sup>

The automatic nature of the unenforceability rules is also of vital importance. There is little chance that vulnerable people in debt will be in a position to counterclaim for damages for a breach of statutory duty when taken to court by their lender. Indeed section 7.45 of the FCA paper states:

*“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.”*

The analysis in the FCA paper at point 7.39 puts this very well.

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

Indeed, the HM Treasury consultation in section 4.21 recognises that:

*“...the measure of damages for loss in a private right of action claim brought under section 138D FSMA is unlikely to be comparable to that which could be provided by a court under section 127 of the CCA. For example, the CCA includes the power for a court to reduce the customer’s liability (section 127(2)), make a time order rescheduling payment (section 129), or otherwise alter the terms of the agreement (section 136) which are more extensive powers than under FSMA.”*

## Enforcement orders

It is vital to retain the important protections provided by the sections of the CCA that cover enforcement orders for breaches of the Act. We would need convincing that any of the remaining protections in relation to unenforceability of agreements should be removed. S127 already provides for the court to have regard to the prejudice caused to any person and the degree of culpability of the lender before making an enforcement order. This seems sufficient protection for lenders.

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<sup>12</sup> [Review of retained provisions of the Consumer Credit Act: Final report \(fca.org.uk\)](https://www.fca.org.uk/publications/review-of-retained-provisions-of-the-consumer-credit-act-1974)



## Sanctions and unenforceability provisions

The FCA concluded that it is not possible to replicate the current CCA unenforceability provisions under the FSMA rule-making powers.

We agree that the provisions should not be repealed as the FCA is unable to replicate these sanctions under the FSMA regime. FCA disciplinary powers are not a substitute for these sanctions. The sanctions regime was set up to protect consumers who are vulnerable and have fallen behind with their payments. Removal of sanctions for non-compliance would only encourage less-compliant lender behaviour. The consumer credit market is wide, and elements of the high-cost credit market may not behave in the same way as a mainstream lender who is operating according to best practice principles.

We note the argument that sanctions can be disproportionate when these are applied where a breach is relatively technical and minor. We agree that sanctions should not be applied in such cases. The difficulty with section 41 of the CCA is that it may not be sufficiently clear for lenders to decide when an error or omission does not breach the rules. The FCA should create clearer guidance that sets out when a breach will not count because it *“does not affect the substance of the required information”*.

We agree that sanctions should be retained. However, these should be complemented by moving the information requirements to FCA rules which will allow these to be amended and updated more easily. This should help to make it easier for firms to achieve greater clarity about the notice requirements on them to avoid inadvertent non-compliance.

## Criminal offences

It is clear that it is not possible to replicate the limited number of CCA criminal offences under the FSMA rules. For criminal offences, we can see the argument that they may not be necessary to be retained under the CCA, given the FCA can take action against firms who are acting in breach of the general prohibition under FSMA. However, we think that abolishing criminal offences may well signal that the FCA is no longer taking the issues of canvassing off trade premises or sending circulars to minors as seriously. Overall, offences need to be retained or an equivalent put in place that enhances rather than diminishes consumer protection.

In addition, the criminal nature of canvassing off trade premises has been used to support the FCA's proposals in relation to its proposed remedies in the High-Cost Credit Review. The desired deterrent effect of these provisions would be undermined if the offence was abolished in the CCA.

Question 15: Given this, to what extent do time orders provide additional protections to these rules and guidance? What evidence are you aware of that the existence of this right changes firm behaviour and improves consumer outcomes?

We agree with the FCA view in their final report of the retained provisions<sup>13</sup> that the powers of the court to make time orders are a: “*strong consumer protection measure with no analogy in the FSMA framework*”.

We would argue that there is still a requirement for a powerful consumer protection mechanism to be kept in place to allow consumers to reschedule payments under an individual credit agreement when a borrower has financial difficulties. Time orders can reschedule not just the monthly payments, but the terms and conditions of the agreement, and consequent interest rate and charges.

There is no substitute in FSMA for time order powers. FCA forbearance guidance does not give the power to the FCA to order a firm to rewrite the contractual terms of an individual agreement or reschedule or freeze interest. There is no timely redress for the consumer unless they obtain a time order in court on their individual agreement.

The FCA has issued revised mortgage guidance in the expectation that there will be a rise in mortgage borrowers facing payment difficulties due to interest rate rises and the cost-of-living crisis.<sup>14</sup> We can expect to see more court repossession cases in the near future and this is already reflected in HMCTS mortgage possession statistics which say that mortgage claims and repossessions “*have increased significantly when compared to the same quarter in 2021*”.<sup>15</sup> Time orders are particularly valuable for regulated mortgage contracts where an individual might face repossession.<sup>16</sup> A time order might help where someone cannot afford repayments temporarily, but their situation is likely to improve, or where compound interest is being added and the amount owed is increasing.

The FCA Consumer duty is not a substitute for a time order in an individual credit agreement. As a set of FCA principles and guidance, it cannot be used at the point where someone may lose their car or home in a court claim. There is no access to individual redress under consumer duty beyond a retrospective complaint to the Financial Ombudsman Service. It is unclear that courts are required to have regard to FCA MCOB or CONC rules or the consumer duty in making its decisions in an individual county court case.

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<sup>13</sup> [Review of retained provisions of the Consumer Credit Act: Final report \(fca.org.uk\)](https://www.fca.org.uk/news/press-releases/fca-confirms-help-mortgage-borrowers-struggling-payments)

<sup>14</sup> <https://www.fca.org.uk/news/press-releases/fca-confirms-help-mortgage-borrowers-struggling-payments> The FCA has also published new data and analysis on the mortgage market. This shows that, in addition to the households already behind on payments, 356,000 mortgage borrowers could face payment difficulties by the end of June 2024.

<sup>15</sup> [Mortgage and landlord possession statistics: October to December 2022 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-october-to-december-2022)

<sup>16</sup> [https://england.shelter.org.uk/professional\\_resources/legal/possession\\_and\\_eviction/mortgage\\_possession\\_proceedings/time\\_orders\\_in\\_mortgage\\_arrears\\_possession\\_cases](https://england.shelter.org.uk/professional_resources/legal/possession_and_eviction/mortgage_possession_proceedings/time_orders_in_mortgage_arrears_possession_cases)



The numbers of cases which lead to a time order being put in place may be low, but this does not minimise the impact of the provisions. There will be cases where lenders are persuaded to accept an arrangement that is analogous to a time order by advisers or consumers. There is also the possible element of a deterrence effect on lenders who are dissuaded from taking unfair action because of the very existence of time order remedies under the CCA. As the FCA goes on to say:

*“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.”*

In addition, court-based remedies are likely to be used less often currently due to the restrictions in place on access to Legal Help in court for debt advice cases. We note that these restrictions may be eased following the outcome of a HMCTS Legal Help pilot.<sup>17</sup>

We would also argue that many hire purchase suspended return orders will have a time order element which may not be counted as time order cases in any official court statistics. These orders will be part of a repossession case for hire purchase goods so not always via an originating time order application on an N440 form.

A complaint to the Financial Ombudsman Service does not offer the same level of swift legal protection in particular cases. It will not be as swift as an application to court for a time order on a hire purchase/conditional sale agreement, or regulated mortgage contract. It cannot adjudicate on an unenforceability or unfair relationships case. Nor does the ombudsman have the court's power to rewrite agreements and ensure further enforcement is prevented.

More generally, we have long argued for improvements in the law relating to time orders. In our view, the process of applying for time orders is expensive, time consuming and obscure, and do not apply to most borrowers. The amendments introduced in October 2008 under the Consumer Credit Act 2006 (CCA 06) will make little difference in practice. Unless the issues that have arisen relating to the definition of “temporary” financial difficulties are resolved, a time order remains an unreliable remedy for those with debts outstanding on CCA-regulated loans.

If time order provisions cannot be replicated in FCA rules or embedded within FSMA, then these should remain in legislation so that consumers are still afforded this protection. If time order provisions are removed, then the associated case law will also lose its status as binding precedent.

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<sup>17</sup> <https://www.gov.uk/guidance/early-legal-advice-pilot#:~:text=The%20pilot%20enables%20participants%20to,categories%2C%20or%20all%20the%20categories>.

## Question 16: What is your view on the usefulness of the right to voluntary termination and its role in protecting consumers? Are there improvements that could be made to the functioning of this right?

The ability to terminate a hire-purchase, conditional sale or hire agreement under sections 99 and 100 are key protections under the CCA. We strongly believe that these protections should be retained. We agree with the FCA that these provisions provide vital consumer protection for individual agreements.

The protections afforded by the CCA for hire-purchase, conditional sale and hire agreements are vital, as this type of agreement can be used for a range of purposes such as purchase of mobile homes as well as vehicle agreements, so will affect peoples' housing as well as vehicles, perhaps required for getting to work, school and to assist people with disabilities to get about. We believe that the extra protections under CCA rules for hire purchase agreements need to be retained.

We note that the paper is silent on sections 90, 91 and 92 of the CCA which states that creditors cannot recover possession of goods without a court order where one-third or more of the total price of the goods has been paid. This again, is a vital protection for consumers as breach of the protections means that the agreement is terminated, and the consumer released from all liability under subsequent sections. The FCA report recommends that these protections are retained as they are not replicable under FCA rules.

*"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."*

The extra protections provided by the CCA also mean that if the consumer has paid more than a third, the creditor would need to take court action to repossess the goods. This gives a consumer the opportunity to apply for a time order as part of their response to the court claim without payment of an additional court fee (which is high).

We see no validity in the argument that these consumer protections are disproportionate. Indeed, the rise of PCP agreements means that the prevailing industry model is predicated upon the widespread early termination of agreements.

Given that there is always the threat that non-payment could result in the loss of the goods (which is of course not possible with unsecured personal finance) under a hire purchase or conditional sale agreement means that the consumer is already at a disadvantage with this type of loan as compared with ordinary unsecured credit. The fact that the goods are not owned by the consumer until the final payment is made means that their position is always less secure than if they had taken out a personal loan.

Companies do not make it easy to negotiate reduced payments and hold the threat of repossession of the goods to ensure their agreements are treated with greater priority than money owed to other creditors. We would suggest that the greater rights of the lender are to some extent mitigated by the right to voluntarily terminate the agreement.

Consumers who contact National Debtline have issues with their agreements in a variety of areas, such as being misled by the lender regarding the meaning of these provisions and with regard to the lender's responsibilities and the consumer's right to terminate. We believe that the provisions within sections 99 and 100 of the CCA are essential to protect the rights of consumers who have entered into hire purchase and conditional sale agreements and who are no longer able to afford the payments.

We suggest that there is a need to issue guidance regarding these provisions in order to make it absolutely clear that consumers retain an automatic right to voluntarily terminate their agreement until the point when the agreement has been terminated by the lender. We believe that these protections should remain in place and be strengthened by additional guidance.

We can see the rationale for replacing the termination notices in sections 101 to 103 of the CCA with requirements under FCA CONC rules.

Our advisers routinely discuss the hire purchase protections with clients at National Debtline and Business Debtline and see these as invaluable for consumers both in relation to the section 90 court action protections and the voluntary termination sections. The provisions allowing clients to voluntarily terminate hire purchase agreements allows them to be clear exactly how much they will still owe on the agreement. This knowledge provides very important protections for consumers who otherwise are vulnerable to uncertainty about what they will owe depending upon how much a creditor chooses to sell a vehicle for.

**Question 17: To what extent do the FSMA and FOS regimes make the unfair relationship provisions unnecessary? If these provisions are to be kept in legislation, with other rights and protections moving to FCA rules, does this create more complexity and confusion for lenders and borrowers and what will the effect on innovation in the sector be?**

There is no equivalent in FSMA of the unfair credit relationships test which was introduced by the 2006 Act under section 140A of the CCA 1974 and replaced the previous rules on "extortionate credit". This provides the court with wider powers to release security, rewrite agreements and liabilities. In contrast, consumers only have a right of private action for damages for similar practices under FSMA.

We completely support the retention of the unfair relationships provisions as a key consumer protection. The extensive powers to reopen credit agreements and to allow the courts to use wide discretion to provide relief from the consequences of an unfair relationship are vital and should be retained. This protection is not possible to replicate under FSMA rules.

It is also important that the unfair relationships provisions can apply more widely and can protect consumers who have credit agreements that are not regulated under the CCA (although not regulated mortgage contracts any longer).

In its final report, the FCA also supports the retention of unfair relationships provisions.

*“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.”*

Whilst we believe that actions to challenge unfair credit relationships could be made more accessible to consumers, due to the difficulties in making an application and potential for legal costs, we remain strongly in support of this part of the CCA. It does not appear to us that FOS would have the equivalent powers to rewrite agreements or change its terms or conditions and prevent enforcement in the same way as the unfair relationships test. A FOS decision also does not create caselaw and cannot be taken as a legal precedent. However, unfair relationships cases have informed the FCA and FOS approach to unaffordability complaints<sup>18</sup> and to PPI.<sup>19</sup>

There is no equivalent under the consumer duty as again, there is no individual right of action to change terms and conditions of a credit agreement and to consider the overall relationship between a consumer and the lender.

We do not agree with arguments that there are few unfair relationships applications and therefore the provisions are not needed. The cases that have been reported can set valuable legal precedent. These cases help to set the boundaries of fairness for lenders, the loss of which would be difficult to calculate, but would have a longer-term detrimental effect. Debt advisers and legal advisers will be able to reference unfair relationships protections in the course of their advice work, and correspondence, without the need for a formal application to be made. The ability of the courts to use wide discretion and to step in for individual cases of unfairness is inevitably going to keep lenders’ minds focussed on how they treat consumers more broadly. The existence of the unfair relationship provisions act as a powerful deterrent against bad behaviour by less scrupulous lenders.

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<sup>18</sup> Kerrigan & Others v Elevate Credit International Ltd (t/a Sunny) (in administration) - [2020] GCCR 1815

<sup>19</sup> <https://www.fca.org.uk/news/press-releases/fca-provides-update-ppi>

Supreme Court Judgment: Plevin v Paragon Personal Finance Ltd, November 2014. The court ruled that a failure by a lender to disclose to a borrower at point of sale the large commissions payable out of the PPI premium made the relationship between the lender and the borrower unfair under section 140A of the Consumer Credit Act 1974.

Question 18: Would you be supportive of HM Treasury exploring the option of amending FSMA rule-making powers in such a way to enable unenforceability to apply to breaches of FCA rules in a similar manner to how unenforceability applies under the CCA, noting there would not be a role for court action in this scenario?

We would be supportive of HM Treasury working with the FCA to explore the option of amending FSMA rule-making powers to an extent. However, we would be extremely wary of removing the sanctions regime under the CCA without the equivalent consumer protections for individual credit agreements being in place under FCA rules. We recognise that the FCA has a range of powers to take enforcement action against firms for non-compliance with the rules, but that this does not replace the importance of the statutory rights in relation to a consumer's particular individual credit agreement.

It is vital that CCA protections, particularly the self-policing sanctions, or the equivalent remain in place given the vulnerability of many using consumer credit products.

We have strong concerns that the proposals will not apply to individual credit agreements automatically but will be sanctions that apply to firms retrospectively for a breach of FCA rules. The paper rightly points out that the FCA has finite resources and is unable to closely supervise all firms in the market at all times. The FCA cannot take action to help prevent harm to an individual who is trying to address a particular problem relating to their credit agreement. By the time the FCA is in a position to take action against the lender, or issue new guidance or rules affecting that class of lending, or prohibiting certain behaviour by lenders, that individual will already have suffered detriment. As we have argued before, the right to take court action for damages under FSMA is not a right that a vulnerable consumer is likely to be in a position to attempt to use.

Question 19: Do you agree that the government should consider the proportionality of sanctions and ensure that they are relative to the consumer harm caused/potentially caused?

It is vital to retain the important protections provided by the sections of the CCA that cover enforcement orders for breaches of the Act. We would need convincing that any of the remaining protections in relation to unenforceability of agreements should be removed.

S127 already provides for the court to have regard to the prejudice caused to any person and the degree of culpability of the lender before making an enforcement order. This seems sufficient protection for lenders.

The sanctions regime was set up to protect consumers who are vulnerable and have fallen behind with their payments. Removal of sanctions for non-compliance would only encourage less-compliant lender behaviour. The consumer credit market is wide, and elements of the high-cost credit market may not behave in the same way as a mainstream lender who is operating according to best practice principles.



We note the argument that sanctions can be disproportionate when these are applied where a breach is relatively technical and minor. We agree that sanctions should not be applied in such cases. The difficulty with section 41 of the CCA is that it may not be sufficiently clear for lenders to decide when an error or omission does not breach the rules. The FCA should create clearer guidance that sets out when a breach will not count because it *“does not affect the substance of the required information”*.

We agree that sanctions should be retained. However, these should be complemented by moving the information requirements to FCA rules which will allow these to be amended and updated more easily. This should help to make it easier for firms to achieve greater clarity about the notice requirements on them to avoid inadvertent non-compliance.

**Question 20: What types of breaches of CCA rules do you think that sanctions should attach themselves to and why? For example, should the disentitlement sanction be limited to the small sub-set of cases giving rise to unenforceability, where there is the greatest risk of harm?**

We understand that breaches of any FSMA rules would not automatically render the variation in agreement invalid.

We understand that if the unenforceability provisions are removed, that the remedy available to customers under FSMA would be private action for breach of statutory duty. We agree with the FCA in their final report that this would not *“achieve a comparable standard of protection for consumers”*.

The automatic nature of the unenforceability rules is also of vital importance. There is little chance that vulnerable people in debt will be in a position to counterclaim for damages for a breach of statutory duty when taken to court by their lender.

It is also vital to preserve the sanctions of temporary unenforceability of the agreement against non-compliance by lenders. The sanction of temporary unenforceability for a “period of non-compliance” where there is nothing further to pay under the agreement until a compliant statement is provided by the lender, is a concept that does not exist under CONC rules or under FSMA.

The automatic nature of the disentitlement and unenforceability measures removes the onus on individual consumers to take action themselves. It is not a remedy that normally needs the individual consumer to make their own application for.

We think in relation to the “self-policing” role that disentitlement and unenforceability plays is very valid. This is important in incentivising firms to comply with the requirements and to make sure they provide the designated information to customers at the correct points.

We do not want to see a situation where firms see the risks associated with non-compliance to have been substantially lowered, which could be the case if the sanctions were to be removed. This could incentivise firms not to be so rigorous in ensuring they comply.

### Question 21: How valuable are the CCA provisions that give rise to a criminal offence? (See Annex 2 for list of CCA provisions that give rise to criminal offences)

The FCA report made it clear that it is not possible to replicate the limited number of CCA criminal offences under the FSMA rules.

For criminal offences, we can see the argument that they may not be necessary to be retained under the CCA, given the FCA can take action against firms who are acting in breach of the general prohibition under FSMA. However, we think that abolishing criminal offences may well signal that the FCA is no longer taking the issues of canvassing off trade premises or sending circulars to minors as seriously. Overall, offences need to be retained or an equivalent put in place that enhances rather than diminishes consumer protection.

In addition, the criminal nature of canvassing off trade premises has been used to support the FCA's proposals in relation to its proposed remedies in the High-Cost Credit Review. The desired deterrent effect of these provisions would be undermined if the offence was abolished in the CCA.

### Question 22: Are there any provisions that are outdated because the practices they pertain to are not used anymore, or would removing some CCA provisions lead to the return of these practices?

We believe these provisions provide strong deterrents and remain beneficial to the regime. There may be fewer instances of the behaviour that leads to the designated criminal offences because the practices were stamped out by the strong legal protections put in place by the original Act. We do not favour a relaxing of these protections that could run the risk of encouraging less reputable firms to start up such practices again. We would reference the recent FCA activity regarding disclosure and sales practice in the current home credit market<sup>20</sup> as an example of how markets could develop to encompass attempts to sell unsolicited credit to vulnerable consumers in their own homes.

It is therefore not a good idea to remove these protections as we then run the risk of such practices reappearing. We agree that the offences of canvassing off trade premises and the offence of advertising via sending circulars to minors are particularly vital to retain as a deterrent.

### Question 23: What is your view on the merits in increasing the standards of conduct for consumer hire agreements to make them comparable to those for consumer credit?

We very much support increasing the regulatory standards for consumer hire agreements to match those for consumer credit hire purchase and conditional sale agreements.

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<sup>20</sup> <https://www.fca.org.uk/news/press-releases/fca-publishes-outcome-high-cost-credit-review>

This review is an ideal opportunity to assess long-standing anomalies in consumer protection. The aim should be to ensure that types of credit lending that have developed over time such as consumer hire agreements for household goods, are not given an unmerited exemption from consumer protection.

The paper rightly points out that consumer hire agreements for household goods are outside the price cap and other protections for rent to own agreements, despite being very similar products. We would argue that equivalent consumer protection should be ensured because low income and potentially vulnerable borrowers are more likely to borrow under rent to own or consumer hire agreements.

#### Question 24: Should the section 17 provisions which enable exemptions from specific elements of the CCA and CONC continue to exist? What would be the impact of these provisions not applying?

We appreciate that there is a potential for small agreements under £50 for BNPL and interest-bearing credit to be treated differently under current proposals for BNPL. We think it would be preferable for the regulatory approach to be aligned for both types of credit. As it is now accepted by government that BNPL borrowers need protection for agreements below £50, then it would appear logical that borrowers taking out regulated interest-bearing credit should have the same protections.

We would argue this is the case because low income and potentially vulnerable borrowers are more likely to borrow smaller sums, and the risk is inevitably higher where credit could be advanced which accrues high interest charges, that people may struggle to pay back. Inability to pay, or being overstretched could have a disproportionate effect on their finances. This may lead to a higher impact on some consumers, particularly if there are multiple sums borrowed, and a repeat pattern of borrowing.

#### Question 25: How can this reform ensure that firms provide information to consumers which is accessible for a wide range of financial literacy and numeracy levels?

We agree that reform of the information requirements provides an opportunity to ensure that complex language is simplified and written in a clear way so that consumers can understand their contracts and the formal notices they receive.

There are well established sources of expertise in the field of simple English and simple numeracy that should be consulted as part of any reform process. We would suggest that government requires FCA research to be carried out with consumers to test what works best for contractual information. Research should also establish how people best understand information notices and how these can be designed to elicit the most proactive response.

The FCA research should be comprehensive, using behavioural economics to test what works best for consumers in relation to how they absorb the information they receive and what level of information works to enable people to make informed choices.



## Question 26: In what ways should this reform ensure that consumers' mental health and wellbeing is supported throughout the consumer credit product lifecycle?

As set out elsewhere in this response, we support the intention to move information notices into the FCA rules instead of the CCA (albeit retaining prescribed wording and prescribed format). This will enable the FCA to update the rules more easily to ensure they are appropriate for consumers and provide the necessary information without doing so in a way that can be detrimental to peoples' mental health and wellbeing.

In addition, we would highlight that people with mental health conditions may be less able to engage in processes or understand complex agreements, due to the impact of their condition and any medication they are taking for this. Ensuring a high level of consumer protection, including safeguards where things go wrong, is therefore vitally important and highlights why key provisions must be retained to ensure the same level of consumer protection.

Following on from the points made in our answer to question 25, we would encourage HM Treasury and the FCA to work directly with people with experience of mental health conditions – and organisations that represent them - to understand their needs – and to design regulation with this in mind.<sup>21</sup> Once again, we would highlight the need for a cautious and incremental approach to any changes to the CCA to enable this to happen and to reduce the risk of causing a negative impact on people's mental health and wellbeing through a diminishing of consumer protection.

## Question 27: What are the key considerations that the government need to take into account when reforming the CCA 70 to ensure that Sharia compliant loans can be expressly accommodated? Which areas of the CCA are not currently compatible with Islamic Finance, and how could they be amended to accommodate Sharia compliant loans?

We do not have the relevant expertise in this area to respond to this question.

## Question 28: If interest rates are prohibited for Islamic Finance products, how does the government ensure that Islamic finance and non-Islamic finance products can be easily compared, given that APR values are used for comparative purposes?

We do not have the relevant expertise in this area to respond to this question.

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<sup>21</sup> In partnership with Fair By Design, we have produced [guidance on inclusive design](#) for firms and [regulators](#), which sets out how this can be achieved, including practical approaches to working directly with people with lived experience.

## Question 29: Are you aware of any implications of our policy approach on people with protected characteristics?

Some of the worst outcomes we see are for people who have protected characteristics, and another characteristic that places them at greater risk of harm (vulnerability).

Research by Fair By Design and the University of Bristol's Personal Finance Research Centre has found that people on low incomes and with certain protected characteristics are more likely to be paying extra costs for essentials such as credit and insurance. This is the case even when compared with low-income households as a whole – suggesting that the marketplace is discriminating against groups of people, albeit indirectly.<sup>22</sup>

In addition, people with mental or physical health conditions may find it harder to represent their own interests or to engage in certain processes. This can be the case for a wide range of reasons including, but not limited to, difficulties with comprehension, challenges communicating or utilising certain communications channels, energy levels, the effect of medication and the inaccessibility of certain processes or communication channels.

People with health conditions or disabilities are therefore more likely to need to rely on consumer protections and rights set out in the CCA. Any move to diminish this level of consumer protection could disproportionately impact upon these groups.

## Question 30: Do you have any views on how the government can mitigate any disproportionate impacts on protected characteristics?

We believe that it is vital that provisions in the CCA are retained that give individual rights and protections. The automatic nature of the many of the provisions such as the unenforceability rules is also of vital importance in protecting vulnerable consumers who are more at risk of harm.

It is vital that CCA protections, particularly the self-policing sanctions, or the equivalent remain in place given the vulnerability of many using consumer credit products. There is little chance that vulnerable people in debt will be in a position to counterclaim for damages for a breach of statutory duty when taken to court by their lender.

## For more information on our response, please contact:

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<sup>22</sup> Davies, S., and Collings, D., [\*The inequality of poverty: Exploring the link between the poverty premium and protected characteristics\*](#), February 2021



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