

Consumer Finance Update

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What we are covering today

- ▶ The Consumer Credit Directive
- ▶ Hot Topics

Consumer Credit Directive Overview and implementation

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Aims of today

- ▶ Overview of key Consumer Credit Directive (CCD) provisions
- ▶ BERR proposals for implementation - April consultation

Scope and Exemptions (Article 2)

- ▶ CCD applies to “credit agreements” subject to Article 2(2) exemptions
- ▶ “credit agreement” (Article 3(c)):
 - *An agreement whereby a creditor grants or promises to grant a consumer credit in the form of a deferred payment, loan or other similar financial accommodation, except for agreements for the provision on a continuing basis of services or for the supply of goods of the same kind, where the consumer pays for such services or goods for the duration of their provision by means of instalments*
- ▶ Consumers (Article 3(a)), not “individuals” (s 189 CCA)
- ▶ New terminology/concepts
 - No definition of credit (“Pay as you go”/premium finance)

Scope and Exemptions (Article 2)

Exemptions (Article 2(2)) include:

- Mortgages/other lending secured on property
- Loans to acquire or retain property rights
- Lending below €200 (£160) or above €75,000 (£60,260)
- Credit free of interest and charges
- Credit repayable within 3 months with only “insignificant charges”
- Employee, low rate loans not offered to the public
- Low rate loans to restricted group under statute (general interest purpose)
- Deferral of existing debt (free of charge)
- Some hire purchase and leasing agreements
- Light touch regime for overdrafts/overrunning

Scope and Exemptions (Article 2)

- ▶ BERR proposes:
 - General application of amended provisions to all CCA regulated agreements
 - Disapplication of new provisions to certain agreements (e.g. business lending, loans over €75,000 except consolidation loans)
 - Choice of compliance in some cases with either regime for out of scope agreements
- ▶ Utilisation of CCD exemptions only insofar as existing regime may be preserved

Current CCA Exemptions

BERR proposals - existing exemptions (s16, 16A-C CCA and Consumer Credit (Exempt Agreements) Order 1989 (EAO))

- ▶ High net worth individuals (s16A CCA)
 - Loans over €75,000 only
- ▶ Fixed sum D-C-S, 4 payments within 12 months (Article 3(1)(a)(i) EAO)
 - Retain with modification (credit free of interest and charges)
- ▶ Running account D-C-S: single payment exemption (Article 3(1)(a)(ii) EAO)
 - Charge cards - what are “insignificant charges”?
- ▶ Low rate D-C exemptions (Article 4(1)(b)&(c) EAO)
 - Retain with modification (employee loans – secondary activity)

Advertising (Article 4)

- ▶ Standard information to be included in advertising
 - Borrowing rate
 - Charges included in total cost of credit
 - Total amount of credit (Article 3(3(g)))
 - Representative (not typical) APR (Annex I)
- ▶ Other information if applicable (e.g. duration, cash price etc)
- ▶ Must be given by “representative example”
 - “prominent, clear and precise”
- ▶ Required where there is an indication of:
 - Interest rate
 - Any figures relating to the cost of credit
- ▶ Full application to web, TV and radio advertising

Advertising (Article 4)

BERR proposals to amend Consumer Credit (Advertisements) Regulations 2004 (CCAR):

- ▶ Scope – disapply for:
 - Secured lending (3 sets of requirements/2 APR calculations?)
 - Business lending
- ▶ APR
 - 50% (rather than 66%) rule
 - Assumptions - €1,500 (£1,200)
 - Incentives, comparative and non-status indications
- ▶ More than one representative example permitted
- ▶ Presentation (prominence, “together as a whole”)
- ▶ Restricted expressions
- ▶ Unsecured loan warning – charging order
- ▶ Web advertising

Pre-contractual information (SECCI) (Articles 5-7 and Annex II)

Standard European Consumer Credit Information (SECCI) sheet

- ▶ Prescribed information :
 - Exact format
 - Additional information by annex
- ▶ Minimum information for voice telephony (SECCI provided after agreement concluded + distance marketing information)
- ▶ New information not covered by current Consumer Credit (Disclosure of Information) Regulations 2004/Financial Services (Distance Marketing) Regulations 2004
- ▶ Draft agreement on request (unless creditor unwilling to proceed)
- ▶ Credit intermediaries acting in an “ancillary capacity” – lender provides

Pre-contractual information (SECCI) (Articles 5-7 and Annex II)

BERR proposals:

- ▶ Scope: All CCA agreements (except pawn) but optional compliance with SECCI or existing regime
 - Business lending
 - Secured lending
 - Loans over € 75,000 (except for consolidation)
- ▶ Prominence/interspersing
- ▶ Lobby for more “consumer friendly” language
- ▶ Provision of SECCI “in good time”
- ▶ Estimated information
 - Amount of credit can still be TBC
 - Assumptions for calculating APR (€ 1,500)

Contractual information (Article 10)

- ▶ Similar to requirements for pre-contractual information but...
 - No set form/order of information
- ▶ Information to be contained in credit agreement
 - No execution formalities (including requirement for a signature)
- ▶ Copies
- ▶ Amortisation tables on request

Contractual information (Article 10)

BERR proposals:

- ▶ Scope:
 - Amend Consumer Credit (Agreements) Regulations 1983/Consumer Credit (Cancellation and Copies of Documents) Regulations 1983 – existing coverage but...
 - Optional compliance for business lending, secured lending and loans above €75,000 (except consolidation loans) but
 - no amortisation tables
 - changes to ss62 & 63 CCA will apply (except to hire)
- ▶ Prominence/interspersion
- ▶ Cancellation notices
- ▶ Signatures (and signature box) still required
- ▶ Statutory statements/charging order
- ▶ Copies: 3 options
- ▶ Amendment to s77/78 CCA?

Adequate Explanations (Article 5.6)

- ▶ Creditors and (where applicable) credit intermediaries required to provide adequate explanations to enable consumer assessment of whether product is adapted to needs and financial situation
- ▶ “Personalised manner”
- ▶ BERR proposals:
 - Minimum and maximum approach (pro forma/script)
 - Maximum: 4 types of information (generic and product)
 - Level of information dependent on variables (channel, type of credit, type of consumer, associated risks)
 - Scope:
 - All agreements except secured loans
 - business loans/loans over €75,000 (except consolidation loans)?

Creditworthiness (Article 8)

- ▶ Assessment of creditworthiness on the basis of “sufficient information”:
 - Obtained from consumer (where appropriate)
 - Consultation of database
- ▶ Required for significant further advances
- ▶ Irresponsible lending

Creditworthiness (Article 8)

BERR proposals

- ▶ Minimum and maximum approach (consumer versus lender responsibility)
- ▶ Maximum:
 - information regarding wider economic circumstances (affordability)
 - Lender's decision open to scrutiny
 - Minimum standards and 3 levels of assessment: level 3 - verification of information, future economic changes
 - Political agenda
- ▶ Scope: full application except second charge mortgages and pawnbroking

Right of withdrawal (Article 14)

- 14 day right of withdrawal/cancellation for all credit agreements
- No corresponding right to withdraw from goods/services agreement
- Repayment of capital and interest within 30 days
- Automatic withdrawal from ancillary service agreement (BERR: would include PPI)
- Trumps other EU cancellation rights for in-scope agreements
- No entitlement to compensation

Right of Withdrawal (Article 14)

BERR proposals:

- ▶ Scope - extend to right to:
 - HP and conditional sale (increased risk to goods?)
 - Credit below €200 and, where credit is for consolidation, above €75,000
 - Business lending? (administration issues for single portfolios)
- ▶ Agreement will continue where capital/interest not repaid

Linked credit agreements/creditor liability (Article 15.2)

- Right of recourse against creditor for goods/services financed by a linked credit agreement
- Mismatch between Article 15.2 and s75 CCA
- BERR proposals :
 - Retain s75
 - Apply Article 15.2 to the shortfall
 - Apply to agreements not covered by s75 but in-scope
 - Consumer must try and fail to obtain satisfaction from supplier
 - Dual regime but limited application of Article 15.2?

Other key CCD provisions

- ▶ Early repayment (Article 16)
 - Also applies to partial repayment
 - Limited compensation available
 - Scope (BERR): all except second charge loans
- ▶ Assignment (Article 17)
 - Rights against assignee
 - Notice (who provides?)
- ▶ APR calculation (Article 19 and Annex 1)
 - High level, simplified assumptions (scope for inconsistency?)
 - Identical mathematical effect to current calculation
 - Removal of tolerances
- ▶ Credit intermediaries (Article 21)
 - Disclosures: status and fees
 - Definition (Article 3(f) and Recital 16)
 - BERR: 3 options proposed - extend definition of credit brokerage (excluding second charge lending) depending on industry impact

Other key CCD provisions

- ▶ Changes to the borrowing rate (Articles 11 and 12.2)
 - Special procedure if agreed (reference rates) + periodical notification
 - PSD cross-over
- ▶ Overdrafts
 - Light touch regime (advertising, no requirement for SECCI and APR)
 - Pre-contractual information (Article 6)
 - Minimum requirements for voice telephony
 - Draft agreement on request (except where creditor unwilling to proceed)
 - Contractual information (Article 10) (practical effect?)
 - Guidance on cost of credit calculation?
 - No Article 14 right of withdrawal
 - Statements (Article 12)

Other key CCD provisions

- ▶ Overrunning (Article 18)
 - Regular contractual information if unauthorised overdrafts tolerated
 - Notification of “significant overrunning” over 1 month (BERR: over £100)
- ▶ Open-ended agreements (Article 13)
 - Termination rights (if agreed - max 1 month consumer/2 months creditor)
 - Restriction on draw-down – objectively justified
 - Existing agreements (Article 30)
- ▶ Penalties (Article 23)
 - BERR: consistent with current penalties for similar offences

Implementation timescales

- ▶ 10 June 2009: Deadline to respond to BERR consultation
- ▶ Ongoing transposition workshops
 - Consistency between Member States?
- ▶ July(?): Response to consultation and draft regulations
- ▶ November(?): Final Regulations
- ▶ 11 June 2010: Implementation

Questions

Hot topics

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13 May 2009

Hot Topics

- ▶ Unfair relationships
- ▶ Unfair Terms in Consumer Contracts Regulations 1999
- ▶ Consumer Rights Directive
- ▶ Recent CCA Cases
- ▶ Current OFT Projects
- ▶ BCOBS

Unfair Relationships

- ▶ Section 140A Consumer Credit Act 1974
- ▶ The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair

Unfair Relationships – the OFT

- ▶ Guidance published May 2008
- ▶ Relevant issues
 - Unfair Terms in Consumer Contracts Regulations 1999
 - Unfair Contract Terms Act 1977
 - Matters relating to rates and charges
 - Certain business practices
 - TCF

What are the courts doing?

- ▶ Concern about the Unfair Relationship provisions and general vagueness
- ▶ Little by way of recorded cases
- ▶ PPI cases

Nine Regions (trading as Logbook Loans) –v- Sadeer

- ▶ Bromley County Court
- ▶ Loan of “last resort” secured on secondhand vehicle
- ▶ Entitlement to seize car without court order
- ▶ No pressure exerted on Mr Sadeer to take loan
- ▶ Relationship not unfair

Mohamad Khodari –v- Fahad Al Tamimi [2008] EWHC 3065 (QB)

- ▶ 10% return on loan made available for very short period
- ▶ Nothing unfair in the relationship which would justify invoking section 140A

Maple Leaf Macro Volatility Master Fund and another v Rouvroy and another [2009] EWHC 257 (Comm)

- ▶ Defendants created circumstances in which they had to resort to expensive funding
- ▶ Termination provision and securities lending provision
- ▶ No unfair exercise of rights
- ▶ No reason to invoke section 140A

Current position

- ▶ Courts appear to be adopting a fair and pragmatic approach
- ▶ Each case decided on individual facts
- ▶ No basis upon which a general conclusion can be drawn

Unfair Terms in Consumer Contracts Regulations 1999 – Recent cases

- ▶ Variation clauses:
 - “any other good reason”
 - “normally”
 - “at our sole discretion”

Consumer Rights Directive

- ▶ Brings together four existing directives
- ▶ Unfair Terms In Consumer Contracts 1999
- ▶ Move from indicative list to “black” list and “grey” list

“Black” list

- ▶ Contract terms which are in all circumstances considered unfair
- ▶ Terms already included in the indicative list

“Grey” list

- ▶ Already contained in indicative list
- ▶ Flexibility for financial services

Recent CCA Cases

- ▶ Heath –v- Southern Pacific [2009] EWHC 103 (Ch)
- ▶ Southern Pacific –v- Walker
- ▶ Hurstanger

OFT's Current Projects

- ▶ Irresponsible lending project
- ▶ Financial services strategy consultation

Banking: Conduct of Business

- ▶ Banking and Payment Services (“BPS”) regime takes effect 1 November 2009
- ▶ Overdrafts still under CCA
- ▶ Interaction with PSD

Any Questions?