November 2018

StepChange Debt Charity response to FCA Discussion Paper DP18/7: Review of retained provisions of the Consumer Credit Act interim report

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

StepChange Debt Charity is the largest specialist debt advice charity helping people across the UK. In 2016 we were contacted by almost 600,000 people seeking help with problem debts. Demand for our services has increased to its highest level in the first half of 2018 when 326,897 people contacted StepChange Debt Charity for help and support with their problem debt.

We welcome the opportunity to respond to the interim report of the review of the Consumer Credit Act. In our response to the initial call for input of the review, we noted our experience as a provider of free debt advice that there is a strong link between conduct problems among firms and personal debt problems. We noted that modern CCA legislation rests on extensive experience and several comprehensive reviews. We expressed caution that the FCA's regulatory toolkit would necessarily, in all cases, offer a more effective means of protecting consumers against conduct problems than certain provisions in the CCA and highlighted that CCA provisions protect particularly vulnerable consumers. Any changes to this regime must therefore be considered carefully.

In our response to the initial call for input of the review, we set out our concerns that:

- The objectives the FCA indicated for the review of balancing firms' and consumers' responsibilities, simplifying and modernising the consumer protection regime, and removing unnecessary or disproportionate burdens have the potential to be contradictory and result in an unintended weakening of consumer protection. We argued that the terms of reference for the review require that it does not adversely affect consumer protection and that this objective should shape the approach and recommendations of the review.
- It was not clear how the FCA would weigh the importance of these differing objectives, nor how the key concept of an 'appropriate degree of consumer protection' is defined.
- That it is inherently difficult to establish the effectiveness of preventative provisions in the CCA that are designed to discourage unfair or harmful practices. In the light of this difficulty, we expressed concern that provisions within the CCA that are effective preventative measures could be wrongly identified as disproportionately burdensome and the 'burden of proof' should point to leaving CCA provisions as they are, unless it can be shown that converting them to rules or guidance, or amending or updating them in another way will not reduce consumer protection and will confer a benefit to consumers or firms.
- That the aims of simplifying and updating provisions of the CCA could imply that complexity itself is always a bad thing. We argued that provisions of the CCA should not be prioritised for review because they are complex where they are delivering consumer protection that could not obviously be delivered another way.

We have been broadly reassured by the FCA's overall approach to the review and the detail of the analysis the interim report sets out. We have set out in our responses to questions two to five where we believe the FCA's final recommendations to the Treasury should be considered carefully.

Our principle point of feedback is this need to consider next steps carefully. A number of the changes indicated by the FCA cannot be achieved through a technical revision of legislation and FCA rules

and require a measured approach involving a thorough consultative process, supported in some cases by new research. We recognise that setting out these steps would pre-empt decisions on which the FCA is consulting. However, our view on the FCA's initial proposals depends in part on not only on whether but *how* these steps are taken forward and we would welcome further clarity on this point.

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

We have brief comments on several of the rights and protections touched on in section five of the interim report. Where we have not commented on a specific proposal, we are satisfied with the prospective approach the FCA has set out.

Refund of credit brokerage fees

We are satisfied that section 155 could be replaced with FCA rules and agree that there is scope to revisit rules governing the refund of credit brokerage fees. We note that the scope of this protection does not extend to situations where no introduction is made and is not automatically or promptly payable. In addition to considering options to address these gaps, reviewing the provision is an opportunity to consider what an appropriate framework for brokerage fee protections should look like in the light of digital brokerage platforms.

Non-contracting out

We agree with the FCA's judgement that the provision against contracting out should be retained in the CCA. We would like to highlight, however, the continuing use of 'workarounds', notably through 'logbook' loans made under the Bills of Sale Act. The Act is an archaic piece of legislation that sits outside the modern consumer protection framework. The Law Commission has set out in detail how this form of lending evades provisions in the CCA, such as the right to apply to a court for more time to pay and the hire purchase proscription against entering premises to take possession of goods (section 92).[1] The legislation also does not comply with modern standards that protect consumers and facilitate lending, such as CCA rules governing standard communications and electronic signatures. The Law Commission has put forward draft legislation to modernise the Bills of Sale Act through a Goods Mortgages Bill, which was consulted on by the Treasury and supported by consumer organisations. In the light of the government's decision not to proceed with this legislation the FCA should make recommendations to the Treasury to address the gaps in the consumer protection framework identified by the Law Commission. In particular, future legislation linked to the review of the CCA may provide an opportunity to incorporate the draft legislation.

[1] See Law Commission (2016) *LAW COM No 369, Bills of Sale* and Law Commission (2017) *From Bills of Sale to Goods Mortgages*.

Connected lender liability

We agree that there are opportunities to consider reviewing connected lender liability. Given that this provision is widely seen to be a cornerstone of consumer protection, we would caution against doing so with undue haste in the context of this review. We agree particularly that it would be helpful to give consideration to third party payments, which are being used in increasing frequency and appear increasingly likely to involve credit.

The principle justification for connected lender liability set out in the Crowther Review is that a seller and lender are closely connected and engaged in a joint venture (paragraphs 6.2.22 and 6.2.46). The application of this principle in the consumer protection framework now appears inconsistent in the light of new payment methods that are promoted by a seller and often involve credit, but which are not covered by the provision. However, given the potential difficulties arising from payment methods such as debit cards and third party payment platforms that may or may not involve credit (although each always involves a transaction fee), revision of connected lender liability to apply the protection consistently is clearly not a simple matter and requires careful consideration.

The interim review raises the question of whether connected lender liability remains proportionate. We do not consider that there has been any fundamental change to the rationale for the connected lender liability provisions. Since the rationale for the provision is joint venture, the question of what responsibilities rest on the lender in the event of a problem arising cannot be reduced to a simple question of the total payment advanced by the debtor: the intent of the provision is not merely to protect consumers against financial loss but to protect consumers by holding lenders and sellers engaged in joint activity accountable for the agreement advanced. In the light of this, we have not seen any clear reason put forward to justify revisiting the protection.

Variation of agreements (where not provided for in agreement)

In the light of our experience as a debt advice provider, we agree that it would be helpful to clarify issues around modification in the context of changes to credit agreements and forbearance. However, while the interim review document implies that formal modification of agreements is the norm, it has been our experience that when borrowers experience financial difficulty, changes to agreements most often occur informally through a unilateral 'forbearance' concession. This can benefit both firms and consumers, in terms of flexibility and administrative ease. However, there may be cases where making it easier for creditors and debtors to reschedule payments could also allow for new opportunities to more effectively manage financial difficulties: for example, people in the early stages of difficulty might benefit from rescheduling payments in a formal way that relieves payment difficulties without adversely affecting their credit reference agency data. This could encourage people to seek help with payment pressures before these grow into more severe debt problems. As the interim report notes, any changes around variation of agreements must be considered carefully to ensure that they do not have unintended consequences. We would be glad to participate in further discussions about this issue.

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

We agree with the FCA's analysis that most information requirements in the CCA could be replaced by FCA rules, with the associated sanctions retained in the CCA, and these requirements revisited to ensure they achieve the intended effect and are proportionate.

This noted, where prescriptiveness is found to work, it should continue. Providing consumers with full and timely information in a format that is suitable for their needs is central to consumer protection. In this respect it is important not to confuse minimum statutory information requirements with the manner in which creditors (and prospective creditors) may communicate with consumers. The fact that there are more effective ways to communicate information to consumers than documents containing a great deal of small print does not necessarily negate the value of such information as a backstop, nor does such information preclude additional forms of communication with customers. Communication around credit and arrears is vital: it is what allows people to plan their finances, keep up with credit commitments and respond when things go wrong. The structure and reliability of these communications is central to fair relationships between lenders and borrowers.

Reviewing requirements in the CCA creates an opportunity to test effective approaches to delivering information to consumers. More flexibility in the way that information is delivered could in some instances work to improve consumer protection. We know more now, for example, about the significance of the way that information is framed as well as specific wording for consumer comprehension and its impact. However, this also means that question of what future information requirements look like is one that must be considered in the round, not simply within the context of this review. An opportunity would be missed if these requirements were simply transposed into rules with adjustments to allow for proportionate flexibility, rather than revisited with the broader goal of increasing the effectiveness of consumer protection in mind. We therefore suggest a test and learn principle should be built into the process of developing new FCA rules, and revising these rules over time, potentially through a legislative provision in the CCA.

Assuming that the FCA takes forward the process of transferring CCA information provisions into FCA rules, it should continue to make explicit the guiding principle that there will be no reduction in consumer protection, and that the purpose of the review is to identify opportunities to enhance consumer protection without imposing disproportionate burdens on firms. By doing so, the FCA would establish a baseline that provides the reassurance necessary to foster a positive and constructive dialogue about new rules.

4. Do you have any comments on our analysis and initial views on sanctions or the associated issues in Annex 7?

5. In particular, do you have any views on our proposals in relation to unenforceability and disentitlement?

We note that transferring information requirements to FCA rules whilst retaining sanctions in the CCA raises the question of how and when sanctions will be applied. This point is central to retaining and enhancing the present level of consumer protection: FCA supervision is only likely to 'bite' on a serious or widespread breach of rules, while the detailed stipulations of the CCA and the associated sanctions provide strong and clear incentives for firms to have a culture and systems in place to deliver the expected communications. The interaction between information and sanctions should therefore be considered carefully.

We agree that the CCA provisions linked to unenforceability and disentitlement could not be repealed without unduly affecting consumer protection. The interim report sets out a number of issues around the proportionality of information sanctions (7.53). We are concerned that these issues are framed here in relation to the proportionality of disentitlement to technical or minor breaches. There is a wider context that frames any breach, significant or minor, and proportionality should be considered in this context. A breach may be technical or minor but form part of a pattern that impacts on consumers not only in an individual case but generally. A technical or minor breach may have limited impact on any individual consumer but, if unaddressed, foster failures that contribute to a wider breach that causes significant detriment. The links between information, sanctions and consumer protection should therefore be considered in the round. We note the interim report briefly acknowledges the 'self-policing' value of sanctions but does not discuss how information requirements could be transferred to rules while maintaining their effectiveness in this context. It is imperative to maintain and if appropriate strengthen this dimension of the relationship between information requirements and sanctions and the FCA should clarify its approach as it takes forward the review.

Criminal offences

We view the legal proscriptions against canvassing off trade premises as an important safeguard against approaches to people in a manner that can make them more vulnerable to poor lending practices, and who themselves are more likely to be vulnerable. The FCA recently concluded in its consultation CP18/12 that some customers continue to be unduly influenced by home credit representatives to keep borrowing (p. 31) and noted that:

> *Home collected credit firms are in a privileged position and have the potential to exploit their intimate knowledge of consumers' spending needs. The personal relationships can also be used as a means of subtly influencing consumers. In order to mitigate this, we think it is important that requests for borrowing should be initiated by consumers, not firms.*

We see no obvious reason why this offence is no longer relevant or necessary. In our response to CP18/12, we agreed that the FCA should clarify its interpretation of the existing legal protections.

With regard to the offence linked to circulators to minors, we take the view that caution should be exercised in assuming that this provision is outdated. It might be relevant, for example, in the context of the rapid growth in use of technology by children. While we agree that the risks of approaches to minors appear small in the mainstream credit market, the assumption that the measure has no modern relevance because it does not lead to prosecutions seems potentially speculative without further research.

We agree that the offences linked to credit reference agencies may no longer be proportionate or necessary in the light of current norms regarding access to data and the requirements of the General Data Protection Regulation.

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For more information visit the StepChange Debt Charity website www.stepchange.org.
For help and advice with problem debts call (Freephone) 0800 138 1111
Monday to Friday 8am to 8pm and Saturday 8am to 4pm, or use our online debt advice tool, Debt Remedy.

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