MoneySavingExpert

Response to HM Treasury Consultation: Consumer Credit Act reform

MoneySavingExpert (MSE) welcomes the opportunity to respond to HM Treasury's (HMT) initial consultation on Consumer Credit Act (CCA) reform.

The CCA has played a vital role in safeguarding consumers participating in the consumer credit market since its conception. It's crucial that any reforms to the consumer credit framework do not remove or weaken existing consumer protections. HMT must be vigilant and carefully consider potential unintended negative consequences for consumers in all the decisions it takes.

Our submission primarily addresses our thoughts according to the three main CCA provision areas identified by the Financial Conduct Authority (FCA) and HMT: rights and protections; information requirements; and sanctions. We will also comment on other areas we have identified for Treasury consideration.

The proposed principles

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

Broadly speaking, MSE would like to see a more central focus placed on consumer protection. This should be embedded in the proposed principles for reform, with attention to given to consumers with characteristics of vulnerability or who may find themselves in vulnerable situations. As it stands, the only reference to this is within the "proportionate" principle – and even then, the present wording gives us cause for concern.

This currently states: "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**."

It is *always* appropriate to maintain high levels of consumer protection and care – both with and without the presence of vulnerability, which can be fluid – and the Treasury must revise these principles accordingly, seeing success through a clear consumer-first lens. Otherwise, there is risk of unintended negative consequences for borrowers in the consumer credit market.

On rights and protections:

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?

Question 14: Are there any rights and protections provisions which you feel should not be moved to FCA rules and should remain in legislation?

MSE is very mindful of the FCA's 2019 assertion (acknowledged by HMT in this consultation) that only a small number of CCA rights and protections could be moved into FCA rules without adversely affecting the appropriate degree of consumer protection, without changes to the regulator's rulemaking powers.[1]

MSE urges the Treasury to remain cognisant of this risk and carefully ensure that important safeguards are not lost or watered down. The Treasury must continue to work closely with the regulator with this objective in mind.

Section 75

Section 75 is a vital protection for consumers. It is essential that any reform to the CCA does not remove or weaken this provision.

The government has so far indicated that section 75 would likely remain in legislation following this process of reform, as the FCA couldn't use its general rule-making power under the Financial Services and Markets Act 2000 (FSMA) to replicate this – and it's not certain that would be possible even with amendments to the FSMA. If the Treasury finds – as expected – that its current protections cannot be replicated elsewhere, MSE therefore supports the argument that section 75 should be retained in legislation.

Notwithstanding, it is MSE's view that this protection should best reflect the modern consumer credit market so that it is as effective as possible. Innovations in the market, while often beneficial, have led to the emergence of some loopholes in the qualifying terms of section 75, which can lead to consumer detriment. For example, when a debtor-creditor-supplier link is broken by a third party – often a payment processor – the consumer potentially might not be eligible for section 75 protection.

HMT notes that the scope of section 75 may be reconsidered or clarified in this process of reform. If this opportunity presents itself without compromising the existence of this important protection, MSE encourages the Treasury to clarify the third-party payment processor loophole. Consumers shouldn't be left in the dark about their rights when making purchases using credit cards and should not be detrimentally affected by the use of third-party payment providers, which may be outside of their control.

This loophole can leave some consumers £1,000s out of pocket and we've seen confusion and frustration among MSE users around their rights in this area:

[1] Financial Conduct Authority, "Review of retained provisions of the Consumer Credit Act: Final report," March 2019, p.32. https://www.fca.org.uk/publication/corporate/review-of-retained-provisions-of-the-consumer-credit-act-final-report.pdf (Last accessed 31 March 2023).

I made a purchase online with a split transaction of £200 by card and £1000 by bank transfer. The thinking here was that by paying over £100 by card would protect the whole transaction. The retailer failed to supply the goods and agreed to refund me in full.

Despite many sources citing this approach to protecting your online purchases, ***I have learned the hard way that it's not strictly true****. The retailer refunded the card portion but has failed to return the rest despite several months of chasing. I eventually filed a Section 75 claim with my card provider and three months later got the result of their review where they're saying they can't uphold my claim for this reason:*

"…your transaction was submitted through a third-party business (or aggregator) … We consider that the use of [this] breaks the link between the Debtor, Creditor and Supplier. Therefore, regrettably, we are not in a position to consider your claim as it falls outside the scope of Section 75."

It's certainly ***a potential minefield****. If I telephone a company to provide [credit card] details for an order I generally have no idea which processing firm will be taking the payment; it could be WorldPay, Sage Pay, Stripe, Sum-up, or one of many other similar outfits. As far as I am concerned I have paid the company for my order on [credit card] and expect to qualify for S75 protection.*

If paying online on a website I will often be able to see whose system they are using - but not always, as some use their own branded interface with Stripe, WorldPay or similar API running in the background.

Surely ***this should not be a lottery for consumers****; it is such a vital aspect of consumer protection that some regulator must issue a definitive answer that a consumer can rely on in the case of a dispute.*

Firms ***should not be able to wriggle out of their responsibility to consumers*** *due to the presence of third-party payment providers, which consumers have no choice but to use when purchasing services.*

I've been left £678 out of pocket *and the legislation in place to protect me isn't worth the paper it is written on.*

The government has now confirmed the applicability of section 75 to qualifying buy now, pay later (BNPL) agreements once regulation of this market begins. This adaptability in response to changes to the consumer credit market is welcomed and we would like that approach to be replicated within CCA reform.

On information requirements:

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?

It's essential that consumers are given a real-world understanding of credit products. If moving information requirements into FCA rules will enable more flexibility – so that customers will be told the information they *really* need and in a way they will *really* comprehend – then the Treasury should seriously consider this, taking care to make sure it is properly executed.

There are plenty of instances in the modern consumer credit market where the information requirements placed on credit firms result in customers being more confused about their products and make comparisons more difficult.

Take the example of the requirements on the presentation of representative APRs – a consumer may see a higher APR than the actual interest rate charged due to the inclusion of annual card fees, or they may see a high representative APR used for a 0% balance transfer.

Firms are also required to show a representative example that often adds no new useful information for the customer, is poorly understood, and may also have little or no relation to the personal borrowing arrangement that a consumer is taking out. If lenders or brokers provide relevant and prominent product-level information, it would negate the need to give an unnecessary representative example.

Perhaps as a result, we are now seeing more moves to personalised pricing, or products with two or three versions, or different sets of terms.

As well as within the letter of the law, it's important that products are communicated in a way which is appropriate and meaningful for the consumer. Flexibility could be particularly beneficial, given ongoing innovation in the consumer credit market, to make rules which are more responsive to new types of products – as we've seen with BNPL. Should a move to FCA rules be made, a degree of prescription and baseline level of consistency would likely be needed between firms to minimise the potential for unintended consequences, such as consumer confusion around their options and their rights.

Moreover, if consumer credit information requirements were moved into FCA rules, MSE would still like to see consumers protected by the strong safeguards built into associated CCA sanctions.

On sanctions:

We give our general view here, rather than a direct response to the questions.

Strong CCA sanctions have certain features which make it important that they are retained within the Act:

- The CCA includes 'self-policing' sanctions which the FCA does not currently have powers to mimic, such as the ability to make contracts unenforceable in the event of firm misconduct. This leaves consumers better protected by the CCA's sanctions than they would be by the FCA's disciplinary and restitutionary powers alone.
- The CCA's sanctions apply to firms involved in credit agreements which are not within the FCA's regulatory perimeter – i.e., unauthorised third parties. This gives the CCA sanctions greater reach than the FCA's disciplinary and restitutionary powers.

These sanctions serve as a powerful deterrent to bad practice by firms. Without them, there is a danger that less reputable firms may perceive the risks of non-compliance to be lower, and accordingly move to a more reactive rather than proactive approach to treating customers fairly and appropriately – putting consumers at risk of harm in the process. HMT should remain vigilant to this risk.

The role of the new Consumer Duty

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?

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?

While MSE has welcomed the FCA's Consumer Duty – and we are hopeful that it may lead to a step change in how consumers are treated, if properly implemented and supervised – it should be complementary to, but not a replacement for, existing CCA safeguards. Higher expectations of firms and consumer outcomes is important, but the Consumer Duty shouldn't be used as a reason to dilute the rights and legal protections afforded by the CCA. HMT must be wary of such arguments.

Not only this, but importantly, the process of implementing the new Consumer Duty is still underway. To count on a programme which has not yet been fully introduced or demonstrated itself to be an effective mechanism for improving consumer protection is inherently risky for consumers.

This is the case across all aspects of the CCA, including information requirements, rights, protections and sanctions.

Small 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?

What constitutes a significant amount of money vastly differs depending on consumers' personal circumstances. For someone with low financial resilience, for example, losing an amount of money up to £50 could cause notable financial and emotional detriment. MSE sees that it may be sensible

and fairer for consumers for there to be no minimum threshold which reduces protections for 'small agreements', for both interest-free and interest-bearing credit.

We encourage HMT to consider how CCA reform might achieve this and also, more broadly, make requirements suitable for current and future types of 'small' credit agreements.

The reintroduction of "typical" APRs on cards and loans

Through its commitment to reform the CCA, the Treasury has the opportunity to look holistically at the whole regulatory structure around consumer credit and potential improvements. MSE would urge the Treasury to use this moment to endorse and facilitate the reintroduction of 'typical' APRs for credit cards and personal loans – though MSE understands the FCA currently has powers that could see this change happen sooner.

Until 2011, the UK used 'typical' APRs – where at least 66% of successful applicants had to get the advertised rate on credit cards and personal loans. Then 'representative' APRs were introduced across the European Union (EU) in 2011, meaning that a minimum of 51% of successful applicants must get the advertised rate.

The effect is that up to half of consumers who apply and are accepted for credit may not get the advertised rate, forcing them to choose between taking what's offered – a higher APR which is virtually uncapped – or turn it down, accept their credit file is marked and attempt to look elsewhere. This is inherently anti-competitive.

Now the UK is no longer part of the EU, MSE is calling on policymakers to return to typical APRs as a bare minimum, or better yet, set the level higher than 66%. This would mean that when people apply for credit, they'd have a better chance of getting the rate they've seen.

In this consultation, HMT discusses Consumer Credit Directive (CCD) regulation and rules in relation to the CCA. It notes that some FCA rules regarding consumer credit are also CCD-derived. For example, within the scope of the CCD are rules governing the content of representative examples in advertising. HMT highlights concerns raised by stakeholders regarding certain FCA rules in this area and says: "this reform will serve as an opportunity for the FCA to consider the legacy of the CCD and work to consider whether the rules remain appropriate and effective." MSE sees this as a perfect opportunity for the Treasury and regulator to act on reintroducing typical APRs, improving fairness, transparency and consumer outcomes.

We published a report in April 2022 outlining our campaign and recommendations.[2] The then-Chancellor and now Prime Minister, the Rt. Hon. Rishi Sunak MP, welcomed the report and asked the FCA to investigate at the time.[3]

Our research showed that, in the past three years, 40% of personal loan applicants and 28% of credit card applicants who recalled their experiences say they were offered a higher rate than advertised.

[2] MoneySavingExpert.com, "It's time for a 'Typical' solution to interest rate shock", April 2022. https://www.moneysavingexpert.com/content/dam/mse/downloads/MSE-Typical-APRs-Report.pdf (Last accessed 31 March 2023).

[3] MoneySavingExpert.com, "Chancellor to ask regulator to investigate credit card and loan APRs after MSE and Martin Lewis campaign", 4 April 2022. https://www.moneysavingexpert.com/news/2022/03/chancellor-ask-regulator-credit-card-loan-aprs-martin-lewis/ (Last accessed 31 March 2023).

Not only this, but many offered a higher rate since the representative APR regime was introduced in 2011 have told us how this negatively affected their financial and emotional wellbeing.

The full list of our recommendations contained in our report are as follows:

- **Replace representative APRs with typical APRs.** This means at least 66% (currently 51%) of successful applicants must be offered the advertised rate. Though even higher is better.
- **Cap the difference between the typical and maximum APR.**
- **Apply the improved APR rule to advertised 0% deal lengths for credit cards too** (so at least 66%+ accepted must get the advertised 0% length).
- **Mandate firms to disclose the average proportion of successful applicants who don't get the advertised APR**, and by how much.
- **Consider 'soft' credit searches for credit card and personal loan applications.** Or at the very least, before application, firms should communicate prominently the rate range for those accepted, but not at the advertised rate.

While the Treasury is currently consulting on CCA reform and looking comprehensively at the whole regulatory structure around consumer credit, this process will likely take years to consider and implement – and the reintroduction of typical APRs could happen earlier. We understand that the FCA already has the ability to amend its Consumer Credit Sourcebook to bring this change about. MSE would strongly encourage the Treasury to engage with the FCA on the possibility of earlier action.

Financial inclusion and mental health

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?

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

It is vital for HMT to use this opportunity to guarantee that an understanding and consideration of consumers' mental health and wellbeing is focal in the approach to and design of protections and requirements in the consumer credit market. It should also consider in detail how financial literacy and numeracy levels interact with consumer behaviour and understanding in the market, and design inclusive regulation with all of this in mind.

Alongside the FCA, the Treasury should work closely with partners who have expertise and operate in this space, from mental health and debt charities to those working to facilitate money management skills and financial education.

It is also essential for the government and regulator to hear from those with lived experiences, to understand their needs and interactions with the consumer credit market. They – and firms themselves – should be expected to think about what customers are vulnerable to, as well as the specific vulnerabilities they might experience. For example, research by the Money and Mental Health Policy Institute shows that someone with mental health problems may be more prone to

challenges such as reduced attention span, unreliable memory, and increased impulsivity – all of which could lead to increased risks when interacting with the consumer credit market.[4]

We have used mental health as an example here, but the Treasury and FCA must consider how vulnerability can be considered across all circumstances and embedded into governmental and regulatory decision-making during this process of reform.

Retained EU Law (REUL)

We understand that many rights and protections contained within the CCA were derived from the EU, such as those from the CCD, and it is the government's intention to retain, repeal or amend all pieces of REUL by 31 December 2023. Given that the government has said it envisages reform to the CCA will take a number of years, it must therefore take the necessary steps to ensure that no rights or protections are allowed to lapse unintentionally in December.

However, where prospects for enhanced consumer protections as a result of the UK leaving the EU have already been identified – for example the reintroduction of 'typical' APRs (as outlined on pages 6 and 7 of this response) – these should be taken at the earliest opportunity.

Final comments

MSE will continue to analyse the impact of CCA reform and review the government's direction of travel to ensure best outcomes for consumers during this process. We welcome further engagement with HMT throughout.

About MoneySavingExpert.com:

MoneySavingExpert.com is dedicated to cutting consumers' bills and fighting their corner. The free-to-use consumer finance help resource aims to show people how to save money on anything and everything, and campaigns for financial justice. It was set up in 2003 for just £100, and its free-to-use, ethical stance quickly made it the UK's biggest independent money website, according to internet ranking site Alexa.com, and the number one 'Business and Finance – Business Information' site, according to Hitwise.

It has more than 8.6 million people opted-in to receive the weekly MSE's Money Tips email, and 10.4 million unique monthly site users who visit 19.9 million times a month, including the MSE Forum, which has more than two million registered users. In September 2012, it joined the MoneySupermarket.com Group PLC.

In the event of any queries, please contact the campaigns team:
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[4] Merlyn Holkar, "Seeing through the fog," Money and Mental Health Policy Institute, January 2017. https://www.moneyandmentalhealth.org/wp-content/uploads/2017/02/Seeing-through-the-fog-Final-report-1.pdf (Last accessed 31 March 2023).