`

HM Treasury

Reforming the Consumer Credit Act 1974 Consultation

Response on behalf of Barclays Bank UK plc, and Barclays Bank plc, and Clydesdale Financial Services Limited

March 2023

Submission by Barclays

Barclays is a universal consumer and wholesale bank with global reach, offering products and services across personal, corporate and investment banking, credit cards and wealth management. With over 330 years of history and expertise in banking, Barclays operates in over 40 countries and employs approximately 85,000 people. Barclays moves, lends, invests and protects money for customers and clients worldwide.

We welcome the opportunity to respond to HM Treasury's (HMT) consultation on Reforming the Consumer Credit Act (CCA) 1974.

Executive Summary

Approach to reform

We strongly support consumer credit reform and the principles set out in the consultation paper, and encourage HMT to continue to approach this reform in an ambitious manner, not limited to using today's regime as a blueprint for the future. Accordingly, we welcome the opportunity to develop a regime that supports and complements innovation in product type and in technology in line with HMT's forward looking and proportionality principles. We also encourage the delivery of any changes in a timely manner, not limiting reform to piecemeal execution.

Net Zero

The barriers to the UK achieving its net zero targets are complex and nuanced. However, there are specific aspects of consumer credit regulation that contribute to lenders being disinclined to provide financing for green technologies and products, which could in turn support this. One aspect is the level of prescription required by the CCA and the sanctions attached to non-compliance. Section 56 and 75, and the extent of liability a lender could face, with far reaching consequential disproportionate losses are also barriers in this area. We therefore support green financing being made exempt from the CCA to support the development of innovation.

Section 75

Sections 56 and 75 are well known consumer rights which provide a level of consumer protection not replicated in the FCA Handbook. However, their evolution beyond their original intents has created examples of disproportionate connected lender liability. A proportionate response to maintain an appropriate level of customer protection while supporting a dynamic market would be to introduce a cap on liability to match the borrowing amount, and a requirement for a borrower to approach a supplier first.

We also support simplification of the application of Section 75 and would be supportive of this being extended in cases where the debtor creditor supplier chain is broken (for example, where a customer has made a payment through PayPal).

Sanctions

The existing CCA sanctions regime pre-dated the more modern and more effective FSMA regime. If writing the CCA for the first time today, the concept of these sanctions wouldn't surface in consultation because they are neither proportionate nor reasonable. Keeping sanctions risks defeats the policy objectives set out in the consultation paper, and run contrary to the FCA's promotion of outcomes based regulation. They prohibit firms from truly being able to embrace more appropriate

forms of regulation like the Consumer Duty due to the prescriptive nature of consumer credit regulation. We are supportive of reform in this area, and do not support continuance of sanctions in any form given the broader and more effective interventionist range of powers the FCA has.

Consultation Questions

Objectives and principles underpinning CCA reform

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

Barclays is encouraged by, and supportive of, the proposed Principles for reform. Underpinning each response to the questions lies the importance of adhering to these principles. We advocate that these should not just be principles for HMT, but should be carried through the principles for the Financial Conduct Authority (FCA) when considering consumer credit reform.

Barclays considers the Forward-looking principle particularly important. As identified in the Consultation Paper, the fast changing nature of financial services and consumer credit, and the increased competition which drives innovation in this space, requires an agile regulatory framework to deliver appropriate consumer protection and to respond as the industry continues to develop. As highlighted in the Woolard Review[1], the Buy Now Pay Later (BNPL) market benefits from carefully structuring its product to meet outdated exemptions (see also our response to Question 3). The new regulatory framework will need to be able to flex to adequately prevent this example of exploitation at the risk of consumer detriment.

Barclays is supportive of the statement at paragraph 3.2 that *"the government does not envision provisions being purely replicated in FCA rules, but recast – potentially not mirroring their current composition".* It is important that the FCA is in agreement with this intention so that the opportunity to fully realise the Principles for reform (particularly to bring proportionality, simplicity and to modernise) is wholly exploited.

We consider an ambitious and fundamental approach to reform is more likely to achieve these Principles, balancing the learnings over the last 50 years, without being constrained by them. To support the execution of reform, we would be cautious about this being drip-fed through a multi-year delivery plan which would inhibit the implementation of change. That said, any transitional period would need to be long enough to enable firms a suitable amount of time to review and adapt accordingly.

We strongly encourage HMT to commit to providing consumer credit reform, and are supportive of the amendment to the Financial Services and Markets Bill tabled by Baroness Noakes[2].

2. Noting the government's Net-Zero target, 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 recognise that the UK's green transition will require most consumers to fund at least part of the required changes to their homes and lifestyles (e.g. solar panels, home insulation, ground source heat

[1] The Woolard Review - A review of change and innovation in the unsecured credit market, February 2021

[2] New clause 43, 'Regulation of consumer credit', which would give HM Treasury the powers necessary to implement the findings of its ongoing review of the Consumer Credit Act 1974, saving the need for further primary legislation.

pumps and so on). As part of this there is an important role for a range of financing options to meet the spectrum of needs and preferences.

However, historic CCA claims for solar panels and insulation are just two examples which illustrate the challenges with driving consumer uptake of and deploying financing against these technologies and interventions while supply chains are in their infancy. This is a complex area which cannot be solved by simply increasing the availability of finance.

Barclays' experience of financing green technologies illustrates the potential for disproportionate exposure for firms due to S75 and S56 in an area without a framework of regulation and supervision for product liability and misrepresentation of green technologies. While these provisions are general in nature, it appears that there are specific issues with 'green' products which trigger claims and makes uncapped liability even more disproportionate, including:

- **Green products and technologies often have no proven track-record of energy saving benefits.** While often sold on the basis of promised savings on energy bills, benefits are difficult to predict and/or guarantee at individual property level, increasing the likelihood that the consumer is left aggrieved.

- **Payback periods are long and may be difficult to evidence with data**, making it difficult to hold vendors to account for false promises (deliberate or not).

- **Sales practices, which are often without oversight in a customer's home, may place undue emphasis on benefits over risks**, which combined with a lack of skills and reputable traders increases the risk of poor outcomes.[3]

As such, a range of interventions will be needed to increase consumer trust, confidence and willingness to act to support Net Zero. This includes measures to build the supply-chain and increase green skills, better access to guidance and trusted traders, and clear long-term public policy in this area which delivers greater regulation and supervision of the sales practices used (including how any accompanying finance is sold).

Until this is achieved, the immediate reality is that lenders are deterred from participating in this market – limiting innovation in financing for green initiatives. Without such reform, lenders will continue to face disproportionate, uncapped consequential liabilities for matters that are often entirely out of their control.

To better incentivise lenders, we would advocate for green consumer financing (a concept that would have to be carefully defined) to be removed from the scope of the CCA (including Sections 75 and 56), which is not designed to support non-traditional consumer credit products. The CCA presupposes financing options fit neatly into essentially two buckets, running account credit, or fixed sum credit. This does not support financing in this area which may need to be structured very differently, including staged drawdowns, repay/re-borrow, flexible terms, aggregation of different financial services including insurance etc.

The disproportionate impact of Section 75 and our recommendations for reform in this area are further set out in relation to Question 18.

[3] To claim Barclays Greener Cashback Reward, customers are required to use a Trustmark-registered installer. However, installers with these skills are not always readily available.

Approach to reform of CCA provisions by category

Definitions

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

We consider the approach to reform should be ambitious by its design. Therefore, whilst we think there are existing definitions or concepts which should be updated and clarified as we have set out below, we think reform should not be restrained to the current drafting of terms contained in the CCA many of which are not relevant for the credit products we have today, and do not play a role in facilitating consumer protection.

Notwithstanding the above, we set out specific comments on some definitions below.

Credit Token (Section 14)	The current definition is out dated; it was written with a physical plastic card in mind and does not work for some of the digital advancements that have been made. Applying it in certain contexts today, for example Apple and Google Pay becomes artificial in such a way that it renders the definition pointless. There is also overlap with the Payment Services Regulations (PSRs), and the interaction between the respective liability provisions creates customer confusion, particularly in the context of unauthorised transactions on a current account. It is also difficult for consumers to understand this concept in the context of overdrafts.
Fixed Sum and Running Account Credit	These definitions envisage only two distinct ways of providing credit. The reality is that there are now credit products which operate as a hybrid of the two which give customers better flexibility and control over managing their finances. Having these two definitions, and having to shoe-horn a product into one of the two creates legal risk for firms with little consumer benefit.
Multiple agreement (Section 18)	This section was designed to prevent anti-avoidance through combining agreements. However, since the credit limit for the scope of the CCA has been removed, this is an unnecessary definition. Its application today only serves to create complex documentation that does not deliver consumer protection, but does creates significant compliance hurdles for firms with draconian consequences (see also comments in relation to Question18.
Give (Section 189)	This definition is inconsistent with similar terminology used in the PSRs and throughout the FCA Handbook. Case law that has developed in this area, as to the interpretation of the PSR terminology such as “make available” or “provide” cannot be applied to the term “give” creating inconsistency.
Debtor Creditor Supplier	The application of this definition envisages a standard tripartite borrower-lender-product scenario (e.g. the purchase of a sofa). However, it creates confusion when applied in newer arrangements with additional parties. For example, purchasing something through Amazon Market Place opposed to Amazon.

Modifying Agreement (Section 82(2))	Agreed variations to a regulated agreement must be documented as a 'modifying agreement' which revokes the earlier agreement. If the requirements for form and content of modifying agreements are not complied with, the agreement will be unenforceable without a court order. The modifying agreement provisions are out-of-step with the variation of any other type of agreement (P2P lenders, mortgages without enforceability sanctions) and the deemed revocation is unique to consumer credit creating significant and unnecessary complexity. Removal of this provision would allow, for example, lenders to agree a variation to an agreement to move a borrower onto a repayment plan or to tailor their agreement to suit their needs written in a way that best suits consumer understanding rather than tick box compliance driven by a sanctions based regime.

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

There are concepts in the CCA which have been defined through the courts. We think these concepts should be properly defined in the glossary when considering CCA reform, and moving provisions in to the FCA Handbook in order to give some consistency and a level of certainty in their application.

Unenforceability	The concept of unenforceability is not widely understood by consumers and is often confused with their obligation to pay. If this sanction is to be retained, which we do not support (see response to Q18) we would recommend its meaning is defined.
Buy Now Pay Later	We are supportive of the regulation of Buy Now Pay Later. We anticipate regulation in this area which we understand is subject to separate consultation will bring about a definition of what amounts of Buy Now Pay Later.
True Copy	Interpretation of what amounts to a "true copy" has been a matter that has been subject to litigation previously. If this concept is to be retained and potentially used in the FCA Handbook, we would welcome it being defined cementing the interpretation as established in Carey v HSBC Bank plc[4] .
Wholly or Predominantly	In the context of the business purposes exemption, it would be helpful to have guidance to give clarity that a facility could have multiple purposes, with further clarification and examples of "wholly or predominantly". Particularly if a sanctions based regime is retained in some form.

<u>Scope</u>

5. Do you believe the business lending scope of the CCA should be changed?

The scope of the CCA for business lending envisages a clear purpose for the facility (wholly or predominantly for the borrower's business purposes). The application of this is difficult and artificial where the borrower is, for example, a club, trust, charity or association. Further complexity is added when considering application of CONC to these types of organisation (which are treated as a

[4] [2009] EWHC 3417

consumer) under Chapter 14 of MCOB and the provisions which apply in respect of Article 3(1)(b) credit agreements. Further, application of CONC 5 and the provisions of MCOB 14 prove to be particularly difficult when looking to provide finance to a business.

The complexity, additional cost and draconian sanctions, has had the impact of discouraging lenders from participating in this market. For example, some fintechs will only lend to incorporated entities, or will only lend >£25,000 which has an impact on competition, innovation and choice. This was also recently demonstrated in the response of the industry to establishing COV-19 business support lending. The Government also set out in the Explanatory Memorandum to the Coronavirus legislation *"This is emergency legislation in response to the coronavirus crisis. It is needed to urgently remove loans made under BBLS from a highly prescriptive consumer credit regulatory regime which is currently inhibiting lenders from granting loans to small businesses."*[5].

We support the principle that some regulation of lending to small businesses and unincorporated associations is necessary to ensure the right level of consumer protection. However, we recommend a broader review of the suitability of the CCA and CONC is undertaken, which will allow development of a tailored chapter of the FCA Handbook that is subject to separate consultation.

Information Requirements

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?**

In principle, we support the conclusions of the Retained Provisions Report that the information requirements in the CCA could be replaced by FCA rules. There are multiple benefits to doing this, particularly the speed at which these requirements could be updated to ensure continuing suitability and to future proof the development of consumer credit products. However, we are cautious about the term "replacement". As we have mentioned elsewhere in this response, we are of the view that the opportunity for reform of consumer credit should be more ambitious to truly achieve the objectives of HM Treasury and the FCA as articulated by the principles for reform in the consultation paper. There should be a broader analysis of the suitability and necessity (not limited to the simplification) of the information requirements more generally before they are replicated in the FCA Handbook.

The report pre-dated the Covid pandemic, which highlighted the real difficulty firms had with being able to react to support consumers and quickly develop business support facilities like CBILS and BBLS (see also our response to Q5) in large part due to the complexity of the CCA credit agreement and information requirements.

Since the publication of the report in 2019, firms are now implementing the Consumer Duty. The four outcomes, in particular Consumer Understanding envisages the flexibility firms need to tailor their communications and documentation to their target market and is not prescriptive in the same way as the CCA. We support this "principles-based" approach to delivering a better standard of consumer protection (see also our response to Q8).

[5] https://www.legislation.gov.uk/uksi/2020/480/pdfs/uksiem_20200480_en.pdf

We would also draw attention to *what* information is required to be provided to customers. For example, concepts like APR are not easily understood by consumers. Equally, providing a copy of the credit agreement with a credit card when a card has expired is not a document we understand to be regularly engaged with by customers and offers little value. True reform would also require a look across to CONC particularly where law (some stemming from European Directives) was moved to CONC during the 2014 transition.

Form and content of information

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?

The main argument in favour of prescribing the form, content and timing of pre-contractual information is that customers then take this and shop around, comparing it with other providers. However, much of the prescribed content is too complex. There is considerable repetition through the on-boarding process which has the potential to overwhelm customers and obscure key details, see for example ss. 55, 60 and 65 CCA, and related secondary legislation. To facilitate consumer understanding, as envisaged by the Consumer Duty, it is important to consider not just *what* information is provided, but *how* it is presented and the timing of delivery.

Taking the Pre Contract Credit Information Sheet, the prescriptiveness of this means firms are restricted in how they display information and meet their obligations under the Consumer Duty. The inflexibility of it being maximum information is not suitable to the way things work in practice (for example a customer may use more than one aggregator but it can be difficult to pinpoint with 100% certainty at the point of presenting the PCCI who the credit intermediary actually is in those circumstances yet the requirement to name the credit intermediary assumes this will be known. The FCA acknowledges this tension and advises *"Where firms must communicate complex information to comply with other disclosure requirements, they should consider what additional steps they can take to support consumer understanding. For example, a layered approach can be helpful in providing context or explaining key information upfront in a simple way, signposting more detailed information that consumers may want to consider or may be helpful for reference at a later date"*[6]. However, this just means customers are given more information which they struggle to digest; more is not to be confused with better. Taking what we know about consumer behavioural biases, the more standardised information is, the more likely customers are unlikely to engage with it.

Giving firms guidance, but ultimately the flexibility to decide how best to display information, and what information needs to be brought to the attention of their target market in line with the Consumer Duty, is therefore a more effective way of ensuring the right outcomes for customers.

We support the continued requirements on the timing and trigger of sending post-contractual information to enable customers to be well informed on the consequences of any missed payment, for example. However, the level of mandated content of these is unhelpful. For example, a notice of sums in arrears for a running account credit product can be difficult for a customer to understand; it is also not particularly helpful to provide a customer with a documented statement for a running account credit product when the information they require, including minimum payment information, can be accessed and engaged with at any time through an app (we receive feedback from customers that they want to be able to "turn off" these statements)

[6] Para 8.16, https://www.fca.org.uk/publication/finalised-guidance/fg22-5.pdf

The application of the post-contractual requirements can also create adverse outcomes. For example, the CCA requires that consumers continue to receive statutory notices (such as Notices of Sums in Arrears) when they have entered into a forbearance arrangement with the lender under CONC. This can confuse and upset vulnerable customers who do not understand why the statutory notices conflict (both in substance and in tone) with what they have been told by their lender. StepChange recently[7] highlighted that the formalised language of the CCA requirements left customers with "mixed messages" which reduced the likelihood that they would seek help at an early stage. More generally, they found that CCA prescribed notices "can be confusing and unnecessary leading to contact from consumers which is not required and reduces organisational efficiency". A lender will, however, continue to send these notices even where it may not be the right thing for that customer, given the sanctions for non-compliance (see also response to Q18).

Another example is how these requirements apply to "gone aways" which is a long standing cause of complaints and debate with the Information Commissioners Office.

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?

We agree that the Consumer Duty goes some way to substituting the need for prescription in CCA information requirements. Notwithstanding this, we do think there is value in having some level of minimum prescription as to content of what should be disclosed to customers to bring some consistency across the market (for example, fees and charges, interest rates, repayment frequency). In addition, certain information such as how to complain and FOS rights is prescribed to be in particular documents but given digitisation and in essence having your lender in your pocket, it would make more sense for that type of information to be surfaced in a non-prescribed way to be determined by the firm, taking account of the Consumer Duty.

Similarly, much of the prescribed information in the CCA post contractual requirements (see for example sections 87, 88, 86A CCA, and related secondary legislation) is not helpful information that a customer in financial difficulty could easily assimilate in order to be able to take adequate prompt action. Similarly, information provided during the agreement such as statements and copies assumes that repeating the same information is beneficial to consumers. As the FCA acknowledges in their Consumer Duty Policy Statement *"increased disclosure does not always mitigate harm satisfactorily. For example, there are risks of information overload or complexity that can undermine the potential benefits of disclosure".*

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?

Recent advances in digital innovation provide a real opportunity for customer engagement and market innovation. The market is evolving and changing, with technological innovation at the forefront. The lack of flexibility and bias towards paper communication in the CCA presents a real obstacle to progress, and the lack of flexibility also prevents truly customer centric communication, in terms of content, form and channel of communication.

[7] StepChange Report "Mixed Messages: Why communications to people in financial difficulty need to offer a clearer, better route to help" September 2022

The requirements currently set out in the FCA Handbook Consumer Credit for financial promotions stem from the Consumer Credit Directive and the implementing legislation. We would recommend this is also reviewed for adequacy when considering the consumption of information in a digital world and the use of smart phones and other mobile devices.

The requirements for financial promotions in CONC Chapter 3 mean any form of advertising for consumer credit is very limited due to the need to produce a full representative example. These requirements are not designed to support engagement with material on a mobile device or smartphone. A better approach would be to have timely useful information presented throughout the journey at the right intervals to allow a customer to pause and think, digesting the information before acting. The display of representative example does not necessarily deliver this objective.

Current requirements in relation to the provision of documents or information restrict the ability to innovate and communicate in line with consumer behaviour. See for example s.176A and also, ss86, ss87, 88 and related secondary legislation, where the related form and content requirements are predicated on an A4 paper format.

Building on our responses to Question 7 and 8, we believe ultimately firms need flexibility on how and when to present information in the form of guidance that is device/channel agnostic. As envisaged by the Consumer Duty, how information is delivered, in a way that is sufficiently engaging, will vary depending on a number of factors including the target market, the sales journey, the device a consumer is using, and the complexity of the product.

Mobile phones are the primary device used for point of sale credit applications, but are also the device used by an increasingly large proportion of customers to access credit more generally. There is an opportunity to allow firms to be intuitive about how they present information depending on the medium used by customers. Adding a layer of prescribed wording and/or formatting (particularly requirements on presentation such as use of tables) will hinder firms' ability to tailor their approach in a way that could support consumer engagement with information and would have consumer outcomes at heart. Looking at the Pre-Contract Credit Information Sheet, it is very challenging to view this in any meaningful way on a smartphone.

Consumer information can be delivered in a way that engages consumers, and we believe firms are best placed to innovate in this area, whether that is through the use of video, infographics, dynamic/interactive text. It is in the interest of firms to do so, irrespective of whether this is mandated in heavily prescribed regulation. Informed and empowered customers who are able to make the right decisions for themselves at the right time are more likely to be satisfied with the outcomes they receive.

Recent advances in digital innovation provide a real opportunity for customer engagement and market innovation. The market is evolving and changing, with technological innovation at the forefront. The lack of flexibility and bias towards paper communication in the CCA presents a real obstacle to progress, and the lack of flexibility also prevents truly customer centric communication, in terms of content, form and channel of communication.

<u>Rights and Protections</u>

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?

The rights and consumer protection provisions in the CCA must be reviewed against the risks posed by credit today. Their original drafting did not envisage the forms of credit and practices that have since developed, creating an opportunity to review their adequacy and relevance before they are replicated.

Barclays recognises that Section 75 and Section 56 are well-known and popular consumer protections. However, there are examples when connected lender liability associated with these provisions leads to disproportionate outcomes for firms, which may be more likely where products and services are unregulated, untested or sold on the basis of risky or uncertain benefits. Section 75 and 56 claims are not limited to the value of the item purchased; they are often much larger than that, with wide ranging consequential losses which manifest due to circumstances outside of lender's control.

As such, we believe that reform of connected lender liability should focus on ensuring that these provisions are proportionate and forward-looking in line with principles for CCA reform set out in this Consultation. This is critical to ensure the CCA does not inhibit the supply of finance for innovation and emerging technologies which are inherently higher risk, particularly where these are important for societal progress.

Barclays believes HMT should consult on specific proposals to amend connected lender liability which ensure a fair balance of responsibility between the lender, purchaser, and supplier. One way to embed such proportionality without significantly watering down these important consumer protections could be to cap lender liability to the value of the amount borrowed.

Section 75 and its reach and interpretation has become particularly complex when applied to some forms of financing today which leads to poor consumer understanding and therefore ineffective levels of consumer protection. Many consumers believe they benefit from Section 75 protections when they make purchases through PayPal. The disintermediation of the debtor-creditor-supplier chain is not something easily understood by consumers (or even professionals in some circumstances) and is often arbitrary with no real reflection of the risks taken by either party. We would therefore be supportive of extending the remit of Section 75 where the debtor-creditor-supplier chain is broken (for example, through purchases made through PayPal) to bring better consistency and clarity to consumers making it a more effective tool for consumer protection.

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?

Both the regulatory landscape and the development and take-up of credit products has changed hugely since the CCA was introduced and in particular the development of wider consumer protection legislation. This is due both to the development of domestic and European legislation.

The requirements have in some instances been tailored to avoid technical duplication and/ or conflict with CCA but it would seem consistent with the principles identified as guiding CCA reform, if this question was approached from the starting point of legislation covering the same ground or intended to address a particular objective. Examples would include requirements relating to variation, rights to

cancel and provisions aimed at achieving fairness. Where there is overlap between different requirements this leads to a more complex picture when assessing the rights and protections offered to consumers as a whole.

We see significant overlap in areas such as the Payment Services Regulations, Unfair Terms and Consumer Protection from Unfair Trading Regulations and the Consumer Rights Act as well as in the wider FCA Handbook and the Consumer Duty. Examples include requirements around variations to existing agreements and provision of account information in relation to the Payment Services Regulations and unfair terms legislation. Cancellation and withdrawal rights are also highly complex when considering rights under CCA and wider provisions under distance selling legislation (depending upon the type of agreement and process used to sign up to it). The concepts of 'unfairness' both in relation to specific terms but also in practices and conduct is a cross-cutting theme in consumer protection legislation and is underpinned by the work of the Financial Ombudsman Service. As such, there is the potential for overlap with the CCA's Unfair Relationships test.

- *Moving some rights and protections provisions to FCA rules*

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?

The broad reach of the Consumer Duty, not limited to the consumer support outcome, has the effect of duplicating much of the consumer protection provisions in the CCA and FCA rules. Further, proper and successful implementation of the Consumer Duty should mean there is much less opportunity for potential harms needing the rights and protections in the CCA to actually arise.

For example, the guidance on unreasonable barriers and the cross-cutting rule[8] to enable and support customers to pursue their financial objectives would essentially deliver the same outcome as section 94 CCA, the right to complete payments ahead of time. Failure to allow customers to do this would likely be inconsistent with the Consumer Duty.

Similarly, firms are required to avoid causing foreseeable harm as a general cross cutting rule in the Consumer Duty. Increasing the rate of interest on any sum in arrears (as currently prohibited by section 93 CCA) would be clearly inconsistent with this cross cutting rule demonstrating the duplication of the two regimes.

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 you view on the risks and benefits of doing this?

As we have advocated throughout this response, existing rights and protections currently in the CCA should be reviewed for relevance, appropriateness, and whether they genuinely do provide consumer protection today before they are replicated in FCA rules.

Many of the rights and protections in the CCA have been subject to litigation and judicial interpretation, demonstrating the complexities and nuances these bring. A risk would be that this

[8] Para 9.20 https://www.fca.org.uk/publication/finalised-guidance/fg22-5.pdf

analysis and learning could be lost moving interpretation aware from the courts and into the FCA who will not have the same experience and legal expertise as the judiciary.

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.

Aside from section 75 CCA (as discussed above) we do not consider there to be a strong legal rationale for keeping rights and protections enshrined in legislation, and why they would not be equally effective in the FCA Handbook.

- *Three specific rights and protections provisions*

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?

Time orders are now largely redundant as an effective accessible tool for consumers to help them manage their repayments and to afford them breathing space. Incidentally, this is not a measure that is recommended by debt support agencies due to the complexity and cost involved, and the need for legal representation which is very unlikely to be provided through Legal Aid.

The obligations on lenders under CONC 7, MCOB 13 as well as the Consumer Duty and the Consumer Support outcome and cross cutting rules, require lenders to allow debtors breathing space and to treat customers fairly. As a result of firms having to comply with this, there is less need for a statutory right for a customer to be able to apply for a time order.

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 original intent of the right to voluntary termination was to help customers in financial difficulty. As set out above, given the more recent consumer protection requirements in the FCA Handbook in rules and guidance, we question whether this is still an effective right.

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?

The unfair relationships provisions in the CCA were introduced primarily to provide greater consumer protection from unfairness in consumer credit agreements. The concept of fairness underpins many elements of the FCA Handbook (PRIN and Consumer Duty, for example), and we no longer see the value in having a separate statutory right for a court to review a credit agreement for fairness.

The powers of the FCA allow the FCA to take action to address any detriment without the requirement for a consumer to go through a technical legalistic process at significant cost (as the FCA does for non-CCA activity). For example, claims management companies specialising in mis-selling often encourage individuals to use their services to bring a claim for unfair relationships under section 140 of the CCA.

However, the outcome would still be achievable (at no cost to a consumer) if they followed the FOS complaints procedure. We are concerned that behavioural biases of consumers mean they sometimes believe they have a better chance of success if they take legal action based on statutory consumer protections opposed to the same protections set out in regulation which would achieve the same outcome. The MoneySavingExpert.com supports and encourages consumers to seek redress without engaging a CMC.

Having a redress approach set out in legislation alongside the FOS regime essentially creates dual regulation. With this there is a risk of inconsistency in approach between the courts and the FOS giving inconsistent outcomes to consumers.

Sanctions

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?

When considering whether the FCA toolkit can provide appropriate consumer protection, it is important to consider the extent to which the existing CCA sanctions deliver consumer protection.

Unenforceability (sometimes subject to a court order) is a sanction that is poorly understood by consumers, often confused with the removal of their obligation to pay. This misconception has at times been perpetuated by Claims Management Companies, and led to a flood of (often unsuccessful) litigation, at the expense of consumers (in financial terms and impact on credit rating) and, in terms of court time, the public purse. Additionally, by definition, it bites at the point of enforcement, at the end of the life of a product. The sanctions under the provisions introduced by the CCA 2006 bear no relation to detriment, and do not operate as a protection from harm in many cases, as consumers can benefit when there is little or no detriment. Unenforceability is not a concept used elsewhere in regulation, for example with P2P lending or MCOB regulated lending.

We therefore do not consider there to be a need to enable unenforceability to apply to breaches of FCA rules. We are not of the view that this would represent an erosion of consumer protection (to the extent that the current provisions are effective to provide this), as the FCA's ability to regulate pro-actively facilitates earlier intervention to identify and prevent detriment. The FCA can require lenders to provide redress to compensate for any detriment suffered, and take enforcement action against firms. Lenders are already required to self-police under today's rules for material compliance breaches, soon to be bolstered by the Consumer Duty and a pro-active expectation to put things right for customers.

Keeping sanctions in any form is disproportionate in the context of the regulatory toolkit the FCA has and the need to proactively put right customer harm, as required by the Consumer Duty.

If HMT is minded to retain sanctions of some kind by exploring amending FSMA as outlined, things to be considered include:

1. FSMA being clear on what breaches and regulated activities the sanctions could be applied to in FCA rules to prevent unintended consequences;
2. This will require prescription that is clear and not open to interpretation in the FCA Handbook. It will necessitate caution in innovation without necessarily resulting in poor customer outcomes. Failure to have precise clarity on what compliant looks like (so the rules will need

to be prescriptive rather than outcomes focussed) could result in significant economic fallout if lending portfolios are deemed to be unenforceable and income as well as the capital lent is irrecoverable or needs to be repaid. Thus it will necessitate tick-box compliance which contradicts the aims of outcome focussed regulation and the Consumer Duty specifically;

3. The FCA will be both writer of the rules and arbiter of the rules, and will require substantive resource and skills to be able to be the arbiter independently of their rule making accountabilities to a standard consistent with the judiciary;
4. The FCA will be at risk of judicial review or other legal action if an impacted party considers they have not discharged their statutory duty which could be protracted and costly for all involved; and
5. The current enforcement toolkit and requirements for firms to self-police for customer harm and remedy mean this will create unnecessary cost burdens for the regulator, firms and consumers as prescribed sanctions are not required given the shift in expectations on firms will be at the highest it has ever been with the introduction of Consumer Duty.

- *Proportionality of Sanctions*

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?

We agree that it is important to consider the proportionality of sanctions, albeit we consider that sanctions should not be carried over in the reform for the reasons given above.

The sanctions under the provisions introduced by the CCA 2006 bear no relation to consumer detriment, and go far beyond their original purpose. Therefore, they do not operate as a protection from harm in many cases, as consumers can benefit when there is little or no detriment rendering them purely penal in nature.

The disproportionate application of sanctions for technical breaches that have little impact on a customer discourage new entrants from the consumer credit market. As mentioned in our response to Q2, many business lenders intentionally shape their proposition so that it is not within the scope of the CCA because of the unfair penalties it brings.

The practical impact of current sanctions:

- Lenders are required to issue backdated and historic paperwork to customers to resolve a technical breach.
- Customers may be told their debt is 'unenforceable' but be confused about what that means in practice.
- Lenders will make 'windfall' payments to some customers – even where the issue is technical and minor.
- Lenders are discouraged from innovation and developing more customer-centric journeys.

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?

Our position is that sanctions for breaches of CCA rules are no longer needed as any customer harm due to non-compliance is addressed and remediated wherever it occurs (a firm must notify the FCA of

any significant breach of a FCA rule, the CCA or subordinate legislation (SUP 15.3.11R(1)(a) and principle 11) regardless of whether a sanction would have applied.

- *Criminal Offences*

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)

In the FCA's review they concluded that, in general, the criminal offences in the CCA may no longer be necessary and their removal would be unlikely to result in a loss of appropriate consumer protection. We agree with this.

22. Are there are 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 do not consider the removal of provisions of the CCA that give rise to criminal offences would lead to the return of the practices they are designed to prevent. The sentencing for committing a criminal offence set out in the CCA is a fine and/or imprisonment. The FCA already has broad powers and the authority to levy fines should any of these practices occur. We do not consider the need for imprisonment to be retained as a sentencing option and would question when it was last exercised.

Consumer Hire

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?

Barclays has no comments in response to this question.

Small agreements

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 see why there is a minimum value threshold for regulating credit; full regulation of low value credit agreements would be disproportionate. However, BNPL has demonstrated how regular use of low value credit can still create potential harm for consumers when there is an absence of regulation.

We would recommend the FCA consults separately on specific information and conduct requirements relating to the scope and level of regulation of small agreements.

Financial Inclusion and Equality Impact assessment

Financial Literacy and Numeracy

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?

The hurdles to good communication are particularly evident in relation to the way that the CCA requires lenders to communicate with customers in financial difficulties – there is a high level of prescription as to content, medium and timing which makes it difficult to communicate clearly and

sympathetically with customers in a way that is tailored to their particular circumstances and vulnerability.

Many firms will test the readability of their terms and conditions to ensure they are a suitable reading age. The FCA references in its Finalised Guidance for firms on the fair treatment of vulnerable customers[9] the importance of firms taking vulnerable customers into account at all stages of the product and service design process, including producing easy to read materials. The FCA research that one in seven adults have literacy skills at or below those expected of a nine to 11-year-old stress the importance of firms doing so. Following implementation of Consumer Duty, and the need to test communications and the consumer understanding outcome, it will be even more important that literacy levels of a target market are taken into consideration. This CCA reform can and should support firms to provide information that is accessible for a wide range of financial literacy and numeracy levels through allowing firms the discretion to provide their information in line with the obligations under the Consumer Duty.

Financial Inclusion and Mental Health

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

We understand that concerns about money can and do have an impact on customers' mental health. The reform of the CCA can better support mental health through giving firms the autonomy to understand their customer's needs, and respond to these without being hamstrung by prescriptive rules. For example, firms may want to vary a credit agreement to help their customers better manage their repayments.

However, there is added complexity as to how these variations are agreed in order to not trigger a modifying agreement which comes with it much complexity. Instead of having a pragmatic joint discussion between lender and consumer, where both parties agree a way forward, firms have to tread carefully and articulate their agreement in such a way that it is not being documented as a bilateral agreement.

Mental health and wellbeing issues cannot be managed by a "one size fits all" policy; they can manifest in a wide variety of ways in different individuals, can be transient, and can be long term. To be able to respond to support customer's needs who may display vulnerabilities at different times through a credit product lifecycle, firms need flexibility in regulation with guidelines opposed to strict requirements and limitations.

The FCA has more developed guidance for firms and how they respond to vulnerable customers than the provisions of the CCA. Reform of consumer credit should be consistent with the spirit of the FCA Finalised Guidance for Firms on the Fair Treatment of Vulnerable Customers[10] and the Consumer Duty both of which are more intuitive in their approach and the guidance they provide for firms. In the FCA's Consumer Duty Non-Handbook Guidance, the example is given of good practice where a customer with mental health issues incurs bank charges, but the bank was able to engage in a web chat conversation with the customer, making sure they received the appropriate forbearance. If this example was in relation to a regulated consumer credit facility, this would not be possible without much more complexity and regulatory risk.

[9] https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf
[10] https://www.fca.org.uk/publication/finalised-guidance/fg21-1.pdf

Islamic Finance

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 welcome the consideration of Islamic Finance as part of the work on CCA reform. The question underlies the observation in the consultation that "Currently, Islamic finance providers experience difficulties in reconciling the differences in terminology required in a Sharia compliant credit agreement with some of the prescribed requirements for credit agreements and pre-contractual information set out in the CCA regulations. This has resulted in some Islamic finance providers removing their Sharia compliant personal loans from the market to avoid the sanctions of unenforceability applying to their loan books. "

As discussed above, the sanctions regime actively discourages firms to innovate generally or to find customer-centric solutions if in doing so it creates high levels of legal risk.

Whilst we agree that the problem relates to terminology, it is a much broader point – the CCA requirements do not envisage the structures necessary for Sharia compliance and as such the regime as a whole would place both the customer and the firm in an uncomfortable position of trying to fit within the CCA requirements as a whole. Given that the CCA does not recognise the value exchange which underpins Sharia compliant lending, lenders would need to introduce a high degree of tailoring and/or overlays of information to reassure as far as possible customers that the approach is in line with their religious beliefs. Clearly this is something which would need to be managed very sensitively and this is not just a question of the information given up-front but it must also be considered through the whole lifecycle of any product. As such, the key consideration is to look at this holistically from a customer journey perspective and if the aim is to increase the availability of consumer products which are compatible with Sharia, then it must be possible to tailor information appropriately without running undue legal risk. Consideration should also be given not just to information requirements but also to current and future regulatory initiatives which are based on an assessment of interest payment (such as persistent debt, and also the financial promotion requirements) or restrict the way in which a product can be priced (fee charging for overdrafts for example) so that is CONC, in addition to statute. To be clear, we would not advocate for a different regime for this type of consumer lending but, simply, one regime which covers the same activity but which is appropriately inclusive.

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 are aware that, on the whole, customers find an APR a useful tool for a basic comparison in advertising albeit they may not fully understand it. It may be possible, with appropriate input from other stakeholders with expertise in Sharia requirements to find a mechanism for presenting equivalent information which would similarly allow customers to compare costs. Stepping back, the purpose of allowing customer to compare is to ensure that they can 'shop around' and find the most suitable product at the best price. If, as set out in the response to the question above, lenders are

discouraged from providing products to consumers due to sanctions in the first place, then clearly the opportunities for choice are greatly diminished.

Public Sector Equality Duty

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

We are not aware of any implications of the policy approach on people with protected characteristics.

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

We are not aware of any implications of the policy approach on people with protected characteristics.