

Author Richard B Mawrey QC

Consumer credit: "taking back control"?

KEY POINTS

- Consumer credit law is an example of one of those rare occasions when following Europe (the Consumer Credit Directive) has liberalised the law.
- It would have liberalised it more but for the Business Department being determined to retain every tiny fragment of the "old" UK law, with predictably unfortunate results.
- Moving all consumer credit rules into the FCA's regulatory handbook (CONC) would not have amounted to a proper implementation of the Consumer Credit Directive, which requires black-letter law, statute or statutory instrument, so only consumer credit lying outside the scope of the Directive has been teased across to the Handbook: Brexit will permit wholesale transfers from the Consumer Credit Act 1974 to CONC.
- On a withdrawal from the EU there is also the possibility of departures from existing EU consumer credit law even if the UK goes down the route of alignment.

In this article, Richard B Mawrey QC considers the impact of Brexit on consumer credit law. Will things stay pretty much the same?

One of the most over-worked slogans of the Brexit debate is "we're taking back control". It is much employed by politicians for whom "we" means the politicians and by the tabloid newspapers for whom "we" indubitably means themselves. "Control" has the right, masterful, ring about it, although it does always carry echoes of Thomas the Tank Engine and the Fat Controller.

Who of us has not wanted to say "listen up, men, I'm in control here"? The steely look, the jutting jaw, the air of purpose.

Now the one thing one must never do with any issue arising from Brexit is to ask "but what does it *mean*?" Normally such a question is met by some statement like "Brexit means Brexit" for which Theresa May was nominated for the Nobel Prize for Inanity. Those for whom consumer credit is an everyday concern – say 98% of the population over the age of 15 – might feel themselves entitled to ask what "taking back control" might mean for them. Will "freeing us from the shackles of Brussels" bring about noticeable changes to consumer credit law or will things stay pretty much the same?

Interestingly enough, although Brexiteers waxed lyrical both during the Referendum campaign and thereafter about restrictions on freedom of trade being imposed by Eurocrats and how, once out of

Europe, all this red tape will be consigned to the bonfire, the fact is that the intervention of the EU actually liberalised UK consumer credit rather than imposed harsh and unnecessary constraints.

The principal recent instruments of EU "interference" in our consumer credit law were the Consumer Credit Directive (2008/48/EEC) and, to a lesser extent, the Mortgage Credit Directive (2014/17/EU).

The Department responsible for implementing the 2008 Directive was then the Department for Business, Innovation and Skills (BIS), formerly Business, Enterprise and Regulatory Reform (BERR) and subsequently Business, Energy and Industrial Strategy (BEIS), thereby giving the lie to Lady Bracknell's assertion that:

"Three addresses always inspire confidence, even in tradesmen."

The Business Department really *hated* the Directive. This was rather odd because the wise men of Brussels had ruthlessly pirated all the best bits of Francis Bennion's masterly Consumer Credit Act 1974 and dumped it on the remaining nations of the Union, some of whom had banking systems which had barely assimilated the

reforms of the thirteenth century Lombards. Any rational person would have treated it as a complement that the EU had virtually adopted UK consumer credit law, pretty much *holus bolus* but not the Business Department. The only real failures arose from the persistent refusal of Continentals to understand the concept of hire-purchase and conditional sale.

The Department's objections were twofold. First the Directive was being imposed by Brussels and secondly the EU's draftsmen had taken the opportunity to rationalise the law and to scrape some of the more unnecessary barnacles that had attached themselves to the hull of the CCA. But the Department did not want the law rationalised and had, so to speak, become attached to their barnacles. The first policy was what the French call "*une politique de l'autruche*": ignore it and it will go away. Nothing was done for about eighteen months despite the fact that, like all Directives, the 2008 Directive had a deadline (eventually fixed for June 2010). This policy of denial, was followed by one of dithering and finally one of blind panic. The Department embarked on a lengthy period of consultation – to what end, other than putting off the evil day when laws had to be drafted, it is difficult to see. Consultation presupposes that the consuler has some sort of choice and wishes to be guided as to how to choose. Given the utterly prescriptive nature of the Directive, however, there was no element of choice: all that had to be done was to turn the Directive into UK legal terms. Eventually the Directive was implemented, though the government managed to achieve the worst of both worlds by postponing implementation for some seven and a half months to 1 February 2011 but, at the same time, allowing credit-providers to choose to "contract into" the new legislation before 1 February 2011 from dates ranging from 30 April 2010 to 26 August 2010.

That would have been bad enough, but the Department was wedded to its

barnacles. To the extent that the Directive compelled a change to UK law, it would have to be changed, but not one nanometre further. Any vestige however small of the old law that could be preserved, would be lovingly retained. Unfortunately the Directive had only imposed minimum standards not maximum standards, so that the UK could continue to regulate whole swathes of credit law which the EU had sensibly decided were not properly within the ambit of consumer credit. Thus, while the Directive expressly excluded business agreements, the Department stubbornly held on to the absurd regulation of such agreements up to the £25,000 limit. The Directive excluded secured lending but this was a step too far for the Department. The Directive imposed a ceiling of €75,000 (converted into £60,260 – ah, happy days!) but Parliament had decided in 2006 to do away with all financial ceilings (except for business agreements) and it wasn't about to re-impose them.

Accordingly every tiny fragment of the "old" law that could be retained was retained, with, predictably unfortunate results. The new rules for the content of pre-contract disclosure and, worse still, for the form and content of agreements really stuck in the Department's craw. Fancy having to abandon all those Byzantine complexities of the 2004 revision of the Consumer Credit (Agreements) Regulations 1983 with their prescribed pieces of information, their sub-headings and their rigid word order, a minuscule error in any of which could render an agreement unenforceable, and, for Heaven's sake, having to replace them with something that might make sense to the customer. One senses the horror of a Counter-reformation cardinal being confronted with the Bible being translated into the vernacular.

Clearly, the grown-up solution to the 2008 Directive would have been to go along with it. Why not adopt the £60,260 ceiling (after all, do people who borrow greater sums on unsecured terms really *merit* protection)? Why not hive off *all* secured lending to a different system of regulation (after all, regulated mortgage contracts had

already been removed from the ambit of the CCA)? Why not accept the prevailing view that being a business is one thing and being a consumer is another and never the twain shall meet? Above all, why continue with multiple forms of pre-contract disclosure and contractual requirements?

This was one of the rare occasions when following Europe would have liberalised the law and, to the extent that the Directive was compulsory (eg pre-contract disclosure and form and content of agreements) the government had to accept it, though the sound of grinding teeth as it did so was almost deafening.

As always, however, the problem was that government only listens to consumerists and never to the industry concerned. Now consumerists are doubtless worthy folk but only the naïve believe that they have any real concern for the consumer. Consumerism is, in reality, a recognisable, though perfectly legitimate, political movement of the anti-capitalist left. Though expressing a tender concern for the consumer, the attitude to the consumer is not dissimilar to that of the generals of the Great War (who also expressed a tender concern for the troops). If a Big Push is needed against the enemy, whether it is the Boche or the credit industry, major sacrifices must regrettably be made. Consumerism has made credit more cumbersome, more difficult and more expensive for the consumer but consoles itself with the thought that it is all for his own good.

The Directive provided some sort of restraint on the consumerists but one of life's truer maxims is that the better mousetrap breeds the smarter mouse. The smart mice persuaded government that the answer to consumer credit was to move it, lock stock and barrel, over to the system of financial services regulation operated by a re-badged and revitalised Financial Conduct Authority. This was a brilliant way to escape from the straitjacket of the Directive. No more – or very little more – actual black-letter legislation: after all, legislation needs Parliamentary scrutiny, sometimes even Parliamentary approval. No, much better to hand it over to the FCA which could use

its Handbook to make and unmake rules at its leisure with no Parliamentary scrutiny – indeed, come to think of it, no scrutiny from anyone else either. And so CONC (the Consumer Credit Sourcebook) was born.

The new régime pleased everyone – well, everyone that mattered. Government could regulate the consumer credit industry without interference from those pesky MPs, the FCA could expand its empire with the speed and ruthlessness of Cecil Rhodes and the consumerists had, at last, a body that could be persuaded to impose virtually limitless regulation on the capitalist credit industry. The only losers were the PBI (Great War reference – look it up), the industry, which was now regulated within an inch of its corporate life and the consumer who found that, for example, obtaining a mortgage was almost as difficult as obtaining a bishopric. What is more, the move to the FCA had transferred consumer credit away from the Business Department and into the Treasury. One may debate whether the health of business was ever really the remit of the Business Department but no-one pretends that it has ever been the remit of the Treasury.

Clearly regulation, itself unregulated, was the future. Accordingly the Treasury was much struck with the idea and on to the back end of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2014 (SI 2014/366) it tacked Pt 5. This provides for the FCA to arrange for a review of whether the repeal or provisions of the CCA would "adversely affect the appropriate degree of protection for consumers" (reg 20(1) and (2)). In particular, the FCA is to report on "which provisions of [the CCA] could be replaced by rules of guidance made by the FCA under the Financial Services and Markets Act 2000" – reg 20(5)(a).

Interestingly the FCA is to report to the Treasury before 1 April 2019. In 2014, when this provision was made, this date had little significance. The major problem facing the review was the existence of the Directives. Directives require to be implemented into the laws of the member states by some form of legislation.

Feature

Biog box

Richard B Mawrey QC is a barrister practising from Henderson Chambers, Temple, London, specialising in commercial law, financial services and credit and leasing.
Email: rmawrey@hendersonchambers.co.uk

Consequently the main provisions of the 2008 Directive had to be in black-letter law, statute or statutory instrument. Moving these rules into a regulatory Handbook would not amount to a proper implementation of the Directive. So the government could not, for example, abandon (or substantially change) the SECCI (Standard European Consumer Credit Information) or the ECCI (European Consumer Credit Information) or return to the complexities of the rules for the form and content of agreements that existed before February 2011 when the Directive was finally implemented. Thus substantial areas of the existing law were ring-fenced by the need to implement the Directive. The thinking behind the review was, therefore, to tease out all those aspects of existing consumer credit law as laid down by the CCA and its dependent statutory instruments that did not absolutely have to be in legislative form and to slide them sideways off the statute book and into the FCA Handbook.

The Mortgage Directive caught the Treasury a bit on the hop, particularly in respect of buy-to-let finance. For once the consumerists were divided. Buy-to-let finance had been taken out of the CCA by the adoption in October 2008 of CCA s 16C and this exemption had been preserved in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) Art 60D. There was thus a marked reluctance to row back from existing UK law. The other camp featured those who loathed buy-to-let on principle and felt that making it very difficult would deter individual borrowers from this form of investment. The result was a fine British compromise. Buy-to-let finance would be treated as a form of consumer finance, albeit at the cost of having to create a parallel system of regulation, mirroring FCA regulation of consumer credit, but the teeth of this would be drawn by a provision that in specified circumstances the borrower would be deemed to be borrowing in the course of a business and (as the sums would invariably be of £25,000) entitled to the business exemption. Somewhat of a score-draw, then.

But, back in 2014 when the review was set up, Brexit was simply a gleam in the bloodshot eye of Mr Nigel Farage. The Directives would be with us for the foreseeable future so that the regulators would have to tiptoe round them rather than confront them head-on. And then came the fateful day when we (or at least 52% of us) voted to leave the European Union.

Now, for legitimate and entirely understandable reasons, the future of consumer credit has not been at the forefront of the debate as to where Brexit was going to come on the Mohs Scale of Hardness. Whatever is causing the circles under Mr Davis's eyes or Monsieur Barnier's bitten fingernails it is not the future of the SECCI. But the problem will have to be faced.

Clearly if the UK were going to remain in the Single Market, then one imagines that all the existing rules would apply, including the Directives. This does not currently look like a conceivable outcome for the negotiations (other than, perhaps, for a transitional period). If we opted for "convergence" or "alignment", however, the matter is more nuanced. Consumer credit is only meaningfully trans-national at the level of authorising lenders whose base is in one member state to trade without restrictions in another member state. The question of financial services is undoubtedly one which is at the forefront of the negotiations but whether and to what extent UK banks are to retain their "passport" to trade in the EU is unlikely to turn on whether the rules relating to consumer credit are 100% aligned. There is thus the possibility of some departures from existing EU consumer credit law even if the UK goes down the route of alignment.

If, of course, the UK arrives at a hard Brexit with the country no longer in the Single Market or the Customs Union, then, as Arthur Daley used to say "the world is your lobster". Would we, however, see this as an opportunity to re-write the rules and, if so, how? One senses that there is very little stomach for returning to the law as it existed on 31 January 2011. For most

transactions the old Agreements Regulations will remain dead and buried and even the most ardent consumerist is going to prefer the SECCI and the ECCI to the old system of having to produce a prototype of the agreement as a means of pre-contract disclosure. Similarly there seems no great profit in abolishing the right of partial payment under CCA s 94 or repealing CCA s 75A so as to restrict the right of recourse against lenders to £30,000.

There is not likely to be much divergence even if the supposed "clean break" occurs. What is likely to happen, however, is that the opportunity will be taken to capitalise on the review set up in 2014 to move far more of the rules out of the CCA and its regulations and into the FCA Handbook. This will, though, cause some difficulties. The essence of the rules relating to pre-contract disclosure, the form and content of agreements, the need for and the form and content of statements and notices and the termination of agreements is that compliance is bolstered by serious consequences for the lender in the case of default. These surely will still require statutory force if penalties are to be visited on non-compliant lenders.

So, will Brexit turn the consumer credit world upside-down? Though assuredly "all horse-players die broke", ten will get you five that, in 2025, the law of consumer credit will look pretty much as it does in 2018. ■

Further Reading:

- ECJ interprets issues arising from the Consumer Credit Directive (2017) 5 JIBFL 310.
- Rethinking conduct regulation (2015) 7 JIBFL 413.
- LexisNexis Financial Services blog: Will the Mortgage Credit Directive benefit consumers?