Continuing protection for consumer credit customers.

By Richard Mawrey QC

The length of the Covid-19 crisis has prompted the Financial Conduct Authority to extend its Guidance on consumer debt.

FCA Guidance

1. It was clear from the start that lockdown would have a serious effect on consumer debtors and hirers. The Treasury and the FCA, therefore, brought in rules from 20 March 2020 onwards to mitigate the financial hardship in all areas of debt.

2. The FCA did this by introducing 'Guidance' which amounted in reality to a series of rules for lenders. The first area to be tackled was that of mortgages with Guidance being initially issued on 20 March 2020 (three days before lockdown). Then came Guidance on credit cards, overdrafts and personal loans which was issued on 9 April 2020 and came into force on 14 April 2020. Finally there was Guidance on motor vehicle finance (including credit-sale and hire), high-cost short-term credit (HCST), non-motor hire-purchase (variously described as 'Rent To Own' and 'Buy Now Pay Later' but all essentially and juridically hire-purchase or conditional sale) and pawn contracts. This was finalised on Friday 24 April and came into force on Monday 27 April 2020.

3. All three sets of Guidance were the subject of Henderson Chambers alerters and the details of the FCA's rules can be found there together with the links to the relevant FCA website pages.

Guidance not rules

4. As before, it is sensible to consider the FCA's *modus operandi*. In this instance the FCA is proceeding by Guidance rather than by rules. We must reiterate, however, that the FCA expects that its guidance will be followed to the letter and threatens regulatory action against those who might be tempted to disregard it. As the FCA puts it 'This guidance sets out our expectation that firms should provide, for a temporary period only, exceptional and immediate support to consumers facing payment difficulties due to circumstances arising out of coronavirus.' The FCA makes it clear that this guidance is based on PRIN 6, 'A firm must pay due regard to the interests of its customers and treat them fairly' and PRIN 7 'A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading'. In addition, with mortgages the FCA also relies on MCOB 2.5A.1R 'A firm must act honestly, fairly and professionally in accordance with the best interests of its customer'. This is backed by the warning that the Guidance is 'potentially relevant to enforcement cases and the FCA may take it into account when considering whether it could reasonably have been understood or predicted at the time that the conduct in question fell below the standards required by Principle 6, Principle 7 [and MCOB 2.5A.1R]'.

5. It is also necessary to keep in mind PRIN 11 which obliges offenders to self-report to the FCA.

Payment deferral

6. In all the areas in which Guidance has been issued, the core of the scheme is a three-month moratorium, referred to as a 'payment deferral'. The FCA guidance defines 'payment deferral' as follows: 'an arrangement under which a firm permits the customer to make no or reduced payments under

[the relevant type of contract] for a specified period without being considered to be in payment shortfall. A "full payment deferral" is where the firm permits the customer to make no payments. A "partial payment deferral" is where the firm permits the customer to make reduced payments of any amount'. In short, it is a postponement of repayment not a remission of the instalments: the debt remains. That is not to say that a lender might not agree to write off interest for a period but deferral as contemplated by the FCA does not go that far.

Existing Guidance

7. Although the original Guidance has been set out in detail in earlier Alerters, a summary may be useful. In essence

   a. The default position for the deferral was that it should be, initially at least, for a period of three months: it was open to lenders to agree a longer period and, in exceptional cases, a shorter one, but the fallback position was always three months.

   b. The onus was on the debtor to approach the lender and ask for a deferral rather than on the lender to suggest it: that said, lenders were obliged to tell customers that they could ask for a deferral and include details in their ordinary communications with debtors. If the debtor had a reasonable case for deferral, the creditor should negotiate with him.

   c. Unlike the position with granting credit, the lender was not obliged to be proactive or to make extensive investigations as to the financial circumstances, though it was tasked with considering what would be in the best interests of the customer.

   d. The payment deferral was just that, a deferral. No part of the debt was cancelled and interest continued to run, albeit that the lender was strictly enjoined not to use the deferral as an excuse to increase interest rates, even when those rates were tied to the amount of the outstanding balance and the capitalisation of interest would push the capital outstanding into a new and higher interest band. The requirement not to increase interest was spelt out in very tough terms in the case of HCST lending.

e. The normal forbearance rules for dealing with debtors who get into arrears (particularly those contained in CONC) were suspended in the case of deferrals granted for Covid-related reasons but continued to apply where debtors were already in difficulties before the onset of the virus.

f. The lenders could not make any charge for granting the deferral and the non-payment for deferral reasons must not be given an adverse entry in credit registers.

g. Only in exceptional cases should lenders attempt to enforce debts by legal action during the moratorium and more direct action such as repossessing mortgaged or charged properties or repossessing chattels subject to hire-purchase or hire was streng verboten.

Crisis measures are still with us

8. The original FCA guidance applied for a period of three months, during which, if the customer asked for a deferral and could substantiate hardship, a three-month holiday ought normally to be granted on request. Some debtors, however, managed to struggle on with their payments but, months into the lockdown, are now feeling the wind. For those who did agree a deferral, the three months period is coming to an end.

9. The imperative was therefore to deal with those who had not yet asked for a deferral but now needed one, those who had been granted a deferral and were still in difficulties when it was due to expire and those who had been granted a deferral but now might be in a position to resume payments.

10. The FCA updated its Guidance on mortgages at the end of May, effectively extending the moratorium and the period during which deferrals could be

requested (either new deferrals or requests to extend existing deferrals) to 31 October 2020.

11. The FCA has now turned to updating its Guidance for credit cards, HCST loans and personal loans with effect from 3 July 2020 and for the remaining categories of consumer credit with effect from 17 July 2020.

Credit Cards, Overdrafts and Personal Loans

12. Much of the updated Guidance is necessarily a restatement of the original version, particularly with spelling out the lengths to which the lender must engage with the customer and the prohibition on fees, interest rate hikes, adverse credit ratings and repossessions.

13. The new elements of the Guidance can be summarised as follows

    a. When customers are coming to the end of their three-month's deferral, the lender should contact them to discuss the future. The first question to be asked is, of course, 'can you resume payments?' Those who can resume payments (or even partial payments) are encouraged by the FCA to do so.

    b. Where payments can be resumed, the lender should negotiate a plan with the customer to cope with the missing instalments and the backlog of interest. There are obviously different ways of going about this: the customer may be able to make a lump sum catch-up payment, the missing interest may be capitalised and added to the outstanding capital, the term of the loan lengthened, the amount of the instalments varied and so forth. No one solution fits all and the parties must sort out what is best for them.

    c. Where the customer is still facing difficulties, the lender should agree a further period of total or partial deferral, the default position being, as before, three months.

d. Those with arranged overdrafts should be able to take out or continue an interest-free further overdraft of up to £500 for a further three months.

e. Where customers have not yet arranged a deferral or requested an interest-free overdraft up to £500, the time for them to do so is extended to 31 October 2020.

f. Enforcement and repossessions are definitely off the menu until at least 31 October 2020.

14. The updated Guidance can be found at:

Credit cards: https://www.fca.org.uk/publications/finalised-guidance/credit-cards-including-retail-revolving-credit-and-coronavirus-updated-temporary-guidance-firms

Overdrafts: https://www.fca.org.uk/publications/finalised-guidance/overdrafts-and-coronavirus-updated-temporary-guidance-firms

Personal loans: https://www.fca.org.uk/publications/finalised-guidance/personal-loans-and-coronavirus-updated-temporary-guidance-firms

Vehicle finance, HCST loans, other hire-purchase and pawn

15. This Guidance largely follows that for credit cards summarised above, in particular with regard to entering into discussions with the customer as the end of the first deferral approaches and negotiating a solution dependent on whether the customer can or cannot resume repayments. Again, where a deferral has not yet been requested, the customer has until 31 October 2020 to make a request and, naturally, the ban on repossessions is continued to that date.

16. There are certain pieces of Guidance particular to the types of credit covered:

a. With hire-purchase and conditional sale, when the initial deferral commenced during a promotional period, that period must be extended during deferral.

b. With pawn contracts the redemption period should be extended as part of the deferral mechanism.

c. HCST customers only get one bite of the cherry for each agreement. If a customer has had a payment freeze and is still in difficulties, the Guidance cuts out and the forbearance provisions for debtors in difficulties contained in CONC cut back in.

17. The updated guidance can be found at:

Motor finance: https://www.fca.org.uk/publications/finalised-guidance/motor-finance-agreements-and-coronavirus-updated-temporary-guidance-firms

HCST credit: https://www.fca.org.uk/publications/finalised-guidance/high-cost-short-term-credit-agreements-and-coronavirus-updated-temporary-guidance-firms

Other hire-purchase and pawn:
https://www.fca.org.uk/publications/finalised-guidance/rent-own-buy-now-pay-later-and-pawnbroking-agreements-and-coronavirus-updated-temporary-guidance

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