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Consultation Response

Which? response to HM Treasury Consultation: Reforming the Consumer Credit Act 1974 - Phase 1

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Consultation date: 19/05/2025

Submission date: 23/07/2025

Summary

Which? welcomes the opportunity to respond to the Phase 1 consultation on the reform of the Consumer Credit Act 1974 (CCA). The CCA is a cornerstone of consumer protection in the UK credit market, and while we agree that reform is necessary to modernise the regime, we have significant concerns that the current proposals risk undermining vital protections that consumers rely on.

The government has identified which CCA provisions it proposes to repeal at Phase 1, however, there is no comprehensive assessment of the corresponding levels of consumer protections if the provisions in Annex B are moved to FCA rules. We expect the FCA will address this in its consultation on changes to its Rulebook.

Our expectation for Phase 2 is that it is for for HMT to satisfy as transparently as it can why aspects of the FCA regime would deliver 'robust consumer protection' in relation to each consumer right and protection consulted on, clearly setting out the difference and similarities in relation to the level of consumer protection (pre and post CCA reform), including any loss of legal action rights for consumers, as well as any implications (whether positive or negative).

Further, to the extent the government and/or the FCA have relied on any empirical evidence, this should be clearly set out. We believe this transparency is required to have an open and robust discussion about the implications of these changes and make informed decisions.

Question 1: Do you agree with our vision for a reformed regime?

In the context of the 'proportionate' principle, the consultation states that reform will ensure 'appropriate' levels of consumer protection while balancing burdens on business. We contend that 'appropriate' must include maintaining and guaranteeing the **right** level of consumer protection.

The proposed vision fails to acknowledge that many fundamental consumer rights and protections cannot be replicated in FCA rules without effectively reducing the level of consumer protection. Consumer protection may be reduced because FCA rules are not enforceable in exactly the same way as fundamental statutory rights afforded under primary legislation under the CCA and provide different remedies/ redress, for example:

- As we discuss further below, moving CCA information requirements to FCA rules will result in the loss of corresponding sanctions and therefore court-based remedies (see our answer to Question 5) - accordingly, a balance needs to be struck between simplification and the right level of consumer protection. The FCA regime and FOS do not replicate the effects of CCA sanctions. The FOS cannot declare an agreement unenforceable, and its remedies are different from what a court can order.

- The reference to the Consumer Duty in para. 2.11 fails to acknowledge that individual consumers do not have a right of legal action for breaches of the consumer duty, unlike in relation to most breaches of the CCA. The legal significance of the CCA to protect consumers, including vulnerable consumers, is shown by the prevalence of cases in the County Court where it has over many decades been of assistance to protect individuals and help incentivise compliance with the law[1].

Question 2: Do you agree with our preferred approach to legislation?

In this regard, we note that this question is being posed in the absence of precisely knowing what the FCA rules will look like, as well as its supervisory/enforcement approach. Therefore, it is difficult to endorse an approach without knowing what it will mean in practice.

Without a comprehensive assessment of the levels of consumer protection pre and post CCA, we are concerned that the current legislative approach will weaken important consumer protection, as it seeks to use a single primary legislative

[1] See for example, 'notable cases - Consumer Credit', Joanna Connolly solicitors - https://joannaconnollysolicitors.co.uk/notable-cases/.

vehicle to repeal ‘many’ CCA provisions, with the intention of recasting them into FCA rules.

As stated in our previous response and supported by the FCA's own Retained Provisions Report (RPR), key consumer rights and protections, and the associated sanctions regime, cannot be adequately replicated in FCA rules. Moving them out of statute would eliminate court-based remedies and the automatic nature of sanctions like unenforceability, which are crucial for self-policing and empowering consumers. In its RPR, the FCA concluded that sanctions should be retained or that consideration should be given to extending the FCA’s powers in order to do so.

Therefore, we disagree with an approach that presumes ‘many’ or ‘most’ provisions should be moved to FCA rules. The starting point should be to identify which provisions *must* remain in legislation to preserve the current level of protection, including Section 75, deemed agency, rights to early settlement, individual rights of action, the ‘unfair relationships’ rules and the unenforceability sanctions. Any other approach risks a significant detrimental impact on consumers.

Question 3: Do you think the challenges in relation to the transitional provisions have been captured and what further thoughts do you have on possible appropriate transitional provisions?

The consultation correctly identifies key challenges, such as the handling of pre-existing agreements and historic non-compliance. However, the most significant challenge will be ensuring that consumers do not lose substantive rights they held when their agreements originated.

A core principle of any transitional arrangement must be that consumers' existing rights on pre-reform agreements are preserved and are afforded legal certainty. Repealing provisions could extinguish a consumer's ability to seek redress for past breaches. For example, a consumer's right to challenge an unfairly executed agreement from the pre-CCA reform period must not be removed. The legal certainty of rights embedded in the CCA is a protection in itself and must be handled with extreme care. Consumers should not under any circumstances be disadvantaged as a result of any transitional provisions.

Furthermore, there must be absolute clarity for both consumers and firms on which regime applies to which agreement and for how long (without any gaps or legal ‘grey’ areas). The process must avoid creating a two-tier system that is complex and confusing for consumers to navigate.

Question 4: Do you agree with our proposal to repeal the information provisions from the legislation and for these to be recast, as appropriate, into FCA rules?

While moving some prescriptive presentational requirements to FCA rules could foster innovation in how information is delivered, particularly on digital devices, this cannot be done wholesale without undermining fundamental protections.

As we mention above, in considering this we would have expected a comprehensive assessment on whether the FCA rules deliver the right consumer protection, as well as any implications.

Core information requirements, for example in relation to cancellation rights[2], are intrinsically linked to the CCA's powerful unenforceability sanctions. If the requirement to provide specific, essential information (e.g. in pre-contract documents, statements, and arrears notices) is removed from statute, the automatic sanction of unenforceability for breach of that requirement will be lost. The FCA cannot replicate this sanction under its current powers.

Therefore, we maintain that key core information requirements must remain mandated in legislation to ensure the corresponding sanctions are preserved. The Consumer Duty is a welcome complement, but it is not a substitute for these explicit, enforceable rights. It does not provide an individual with the automatic right to have their agreement deemed unenforceable due to a firm's failure.

Question 5: Do you agree with our conclusion that the FCA regime without sanctions provides a robust consumer protection?

We strongly disagree with this conclusion. The sanctions regime within the CCA, particularly the automatic unenforceability of agreements for certain breaches, is a crucial pillar of consumer protection and should remain in legislation.

We do not understand how the following conclusion has been reached (para. 5.4) "*...the evidence is currently insufficient to support the view that sanctions provide protections beyond that offered by FOS, FCA regime or the usual court process*". The consultation does not provide supporting reasons for this statement, for example, the evidence considered by HMT. The effectiveness of sanctions lies in their self-policing nature, together with the fact that they are statute court-based remedies whereby consumers do not need to take specific action (due to the automatic nature). We do not believe a positive case has been made for the proposed changes.

We note that firms have argued that the sanctions in the CCA are disproportionate. In our view, the starting point should have been to assess whether these concerns could have been mitigated by amending the relevant legislative provisions, rather than the proposed approach under Phase 1.

[2] Section 64 CCA.

The government's paper argues that the FCA's supervisory toolkit and the Financial Ombudsman Service (FOS) provide sufficient protection. This is incorrect for several reasons:

- **Not a Substitute:** The FCA regime and FOS do not replicate the effects of CCA sanctions. The FOS cannot declare an agreement unenforceable, and its remedies are different from what a court can order. In addition, the Government is currently proposing significant changes to the FOS jurisdiction from the perspective of consumer protection, especially in the suggestion that a firm's compliance with FCA rules should require FOS to find that the firm's conduct is 'fair and reasonable' in all the circumstances.

- **Consumer Duty:** while we welcome the aims of the Consumer Duty, we are increasingly concerned with the (premature) over-reliance on the Consumer Duty when there has been no formal or comprehensive review of its effectiveness in protecting consumers. In general, the Consumer Duty should be seen as complementing rather than replacing legislative provisions such as the CCA sanctions. Removing CCA sanctions would represent a reduction in enforceable consumer protections as a breach of the Consumer Duty cannot be enforced by individuals in courts.

- **Self-Policing:** Automatic sanctions are self-policing. They provide a powerful, built-in incentive for firms to comply without requiring action from the consumer or the regulator. This is fundamentally different from the FCA's supervisory model, which is not designed to identify and act on every individual breach.

- **Empowerment:** The sanctions regime empowers consumers with statutory, court-based remedies they can assert themselves, rather than relying solely on a regulator with finite resources. A private right of action under FSMA is not a realistic substitute, as litigation is costly, complex, and beyond the means of most individuals.

Removing these sanctions would represent a significant erosion of consumer protection, tilting the balance of power heavily in favour of firms. The Government's reasoning in this section of the consultation document is also contradictory. On the one hand (at para. 5.12) it is stated that, '*the FCA has finite resources*', and will not always be able to identify failings by firms. On the other hand (at para. 5.18), that '*The Government is also of the opinion that the risk of FCA action including redress, regulatory fines and the wider negative reputational impacts operate as strong incentives for firms to comply with requirements*'

Question 6: What are your views on the following approaches for criminal offences?

Our view is aligned with option **(b) Keeping all the criminal offences in the CCA.**

While these offences may not lead to frequent prosecutions, they serve as a powerful deterrent against particularly harmful and predatory practices, such as canvassing off trade premises and targeting minors with credit offers. The lack of prosecutions can be seen as evidence of their deterrent effect.

The FCA's RPR noted that these offences cannot be replicated in its rules. Relying solely on the general prohibition for unauthorised firms or the Consumer Duty for authorised firms would not provide the same level of specific deterrence against these socially unacceptable practices. Removing them could lead to the return of aggressive and harmful business models that the CCA was designed to stamp out. Retaining them in legislation sends a clear signal that such conduct remains unacceptable.

Question 7:

a: Has this paper captured the key issues and barriers for each of the cross-cutting themes of: Green Finance, Islamic Finance, Technology?

We do not have specific views on the Green Finance or Islamic Finance issues raised. In relation to technology, the paper acknowledges the need for flexibility for digital journeys. However, the focus must be on ensuring that information is genuinely understood, not just delivered. As our research into BNPL shows, consumers often do not engage with terms and conditions. The FCA should oversee behavioural research to find the most effective ways to present information on-screen, accounting for varying levels of financial and digital literacy.

b: Is there anything else you think needs to be considered in our Phase 2 policy work?

Yes. Phase 2 must include a commitment to strengthening, not just retaining, key consumer rights. Specifically:

- **Section 75:** The gaps in Section 75 protection must be closed. This includes extending protection to purchases made by authorised secondary cardholders and purchases made via third-party payment intermediaries where the link in the transaction chain is broken.

- **Consumer Hire:** The standards for consumer hire agreements must be raised to be comparable with consumer credit, including extending voluntary termination rights to these agreements to end consumer confusion and

disparity in protection.

- **Small Agreements:** The exemptions for 'small agreements' under £50 in Section 17 of the CCA are outdated. The evolution of products like BNPL demonstrates that considerable consumer harm can occur even at these lower levels of borrowing. While each loan may seem modest in isolation, consumers are able to take out multiple concurrent agreements with the same provider. This cumulative exposure can lead to significant financial risk.. These exemptions, for instance from creditworthiness assessments, should be removed to ensure consistent protection across all regulated credit agreements.

Question 8: Do you agree with the provisional assessment that, on balance, the Government's proposed proportionate approach to reform mitigates the negative impacts on those sharing particular protected characteristics and retain the positive equalities impacts of the products?

We do not agree with this provisional assessment. The consultation acknowledges that groups with protected characteristics, as well as those who are financially vulnerable, are more likely to be in financial difficulty. The proposed reforms, particularly the removal of automatic sanctions, risk having a disproportionately negative impact on these very groups.

These consumers are often the most in need of strong, clear, and automatic protections because they may lack the resources, confidence, or capacity to navigate complex complaints processes with the FOS or the courts. Automatic sanctions provide a safety net that operates without the consumer needing to take action. Removing this safety net in favour of a regime that places a greater onus on the individual to seek redress will likely lead to increased detriment for the most vulnerable.

While simplifying language in documents is a positive step, this benefit is far outweighed by the significant harm that would result from removing substantive, self-policing protections. The government's assessment does not adequately weigh this risk.

Question 9: Do you have any further data you can provide on the potential impacts on persons sharing any of the protected characteristics?

While we do not have additional datasets to provide for this response, we would highlight our ongoing research and consumer advice services, which consistently show the value consumers place on clear, enforceable rights. For example, since launching a Section 75 consumer guidance tool in June 2022, we received over

4,123 entries by March 2023, demonstrating how widely this statutory protection is used and valued by consumers from all demographics when seeking redress.

The FCA's own Financial Lives survey, cited in the consultation, provides clear evidence of the overlap between protected characteristics and characteristics of vulnerability, such as low financial resilience or being in poor health. Any reform that weakens the protective framework will inevitably have a greater impact on these groups. We urge HMT and the FCA to conduct further dedicated research, including consumer journey testing with vulnerable groups, before finalising any proposals that would remove existing legislative protections.

For more information please contact:

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July 2025