

# GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: FEBRUARY 2017

This document is published by Practical Law and can be found at: [uk.practicallaw.com/w-006-6088](http://uk.practicallaw.com/w-006-6088)  
Request a free trial and demonstration at: [uk.practicallaw.com/about/freetrial](http://uk.practicallaw.com/about/freetrial)

In the February column, Lee Finch considers the potential impact of Brexit on the regulation of consumer credit in the UK.

by *Lee Finch, Gough Square Chambers*

## BREXIT: IMPACT ON UK CONSUMER CREDIT REGULATION

### Introduction

As we all know, on 23 June 2016, the UK held a referendum on its membership of the EU and 51.89% of the votes cast were in favour of leaving the EU. Moreover, while the referendum was only “advisory”, it has never been in doubt that the government intend to give effect to the voters’ wishes. Whether you personally consider leaving the EU a great victory or a disastrous folly, there is no doubting that leaving the EU will have a significant impact on not just the political but also the legal landscape in the UK.

This article is not intended to express any opinion on the merits of Brexit or the various potential post-Brexit relationships that the UK may forge with the EU models, but will explain the immediate impact and potential long term impact of withdrawing from the EU on the regulation of consumer credit in the UK. It will also consider the opportunities that Brexit may present for reform in the consumer credit market.

### Current state of consumer credit regulation in the UK

Generally speaking, regulation of consumer credit in the UK is governed by the Consumer Credit Act 1974 (CCA), the Financial Services and Markets Act 2000 (FSMA) and the FCA’s Consumer Credit sourcebook (CONC). Some of the rules and requirements contained within the primary legislation, secondary legislation and the FCA’s handbook are derived from EU law, while some are domestic in origin; moreover, it is often difficult to tell which is which.

The Consumer Credit Directive (2008/48/EC) (CCD) was adopted on 23 April 2008 and was implemented in the UK via a series of regulations that came into force on 1 February 2011. The CCD is a maximum harmonisation directive and therefore generally precludes the UK from adopting or retaining different national law provisions within the harmonised areas. Much (but not all) of the CCD was aligned with existing UK law and, accordingly, the UK’s approach was to adjust the existing regime to ensure compliance with the CCD rather than start afresh and build a new regime around the CCD’s approach to consumer credit. This approach has led to various complications and anomalies.

The UK regulatory landscape was further complicated by the Mortgage Credit Directive (2014/17/EU) (MCD), which was implemented into the UK by the Mortgage Credit Directive Order 2015 (SI 2015/910) and changes to the FCA’s Handbook (see *Article, Gough Square Chambers’ consumer column: December 2015*).

For an overview of the UK implementation of the CCD and the MCD, see *Practice notes, Consumer Credit Directive: UK implementation* and *UK implementation of Mortgage Credit Directive (MCD)*.

#### RESOURCE INFORMATION

##### RESOURCE ID

w-006-6088

##### RESOURCE TYPE

Article

##### PUBLISHED DATE

27 February 2017

##### JURISDICTION

United Kingdom



### What immediate impact did the Brexit vote have on consumer credit rules and regulation?

While the Brexit vote had an immediate political and economic impact, legally speaking, things on 24 June 2016 were the same as they had been on 23 June 2016. This was confirmed in a statement by the FCA, which said:

“...Firms must continue to abide by their obligations under UK law, including those derived from EU law and continue with the implementation plans for legislation that is still to come into effect. Consumers’ rights and protections, including any derived from EU legislation, are unaffected by the result of the referendum and will remain unchanged unless and until the government changes the applicable legislation.”

This position will not change when Article 50 is triggered; unless and until the government amends or repeals the applicable legislation. The current law will continue to apply irrespective of the various positions taken during the Article 50 negotiations.

### What impact will Brexit have in the long term?

The ultimate impact that Brexit will have on the regulation of consumer credit in the UK will depend on the deal struck with the EU following the exit negotiations. There are three broad options for the regulation of consumer credit following the UK’s exit from the EU:

- A complete clean break where the exit agreement allows the UK to abandon European consumer credit regulation and the government commits to repealing and replacing all European derived provisions (see [Clean break](#) below).
- A middle ground where the UK is no longer bound by European consumer credit law, but commits to neither repealing nor maintaining European derived provisions (see [Middle ground](#) below).
- The retention (whether required by the exit deal or otherwise) of European requirements in UK law to ensure equivalence with the rest of the EU (see [Equivalence](#) below).

[Opportunities for reform](#) below only covers those broad options for the regulation of consumer credit, wider issues affecting financial institutions, including passporting and the position of other EU regulation both existing and pending (such as that covering unfair terms and data protection), fall outside the scope of this article.

### Opportunities for reform

#### Clean break

In the event that the deal struck with the EU does not require the retention of European consumer credit law and the government commits to repeal and replace all European derived consumer credit regulation, there seem to be two potential approaches.

Firstly, the government could attempt to wind back the clock and return the UK regulatory regime to its pre-CCD, pre-MCD state. However, it is unclear what this would look like and, with the regulatory landscape having moved on somewhat since 2010, it is unlikely that the new post-Brexit regime would directly mirror the old regime. Accordingly, a further layer of complexity would be added whereby certain credit agreements would fall under the true “old regime” dating from 1983, others would fall under the “CCD regime” dating from 2010, others would fall under the “MCD regime” dating from 2015 and others would fall under the “new old regime” dating from 2019 or whenever the legislation following Brexit arrives.

As anybody who has had the pleasure of engaging with the current labyrinthine structure of UK consumer credit regulation will tell you, a further layer of complexity is probably not a good thing. Added complexity would make the regime even less accessible to consumers and would place further burdens on current members of the consumer credit industry and potential new entrants. Although, on a personal and selfish note, you will not hear specialist consumer credit lawyers complaining about the extra work this would generate.

The second and, in my view, clearly preferable option is to start afresh and replace the existing regime with a new single Act that governs all regulated lending. In doing so, the law could be simplified significantly:

- Logical consistency could be achieved across different regulated products.
- Obsolete and unduly burdensome requirements could be removed.
- A sensible level of consumer protection (that consumers can understand) could be put in place.
- Successful elements of the CCD regime could be adopted and built upon.
- Consistent terminology that makes sense to a lay person in the 21st century could be adopted.

### **Middle ground**

In the event that the post-Brexit deal does not oblige the UK to continue to comply with European consumer credit law, including the CCD and MCD, but the government decides against wholesale reform, a gradual evolution is likely with various provisions abandoned or amended over time.

The FCA is already conducting a review of the consumer credit provisions retained in the CCA and is due to report to HM Treasury by 1 April 2019 (which if Article 50 is triggered as expected, may be the first day post withdrawal from the EU). Obviously, this is less than ideal timing. The consultation could consider EU derived provisions on the assumption that the Brexit deal will allow their amendment or abolition (when initially set up it was on the basis that compliance with EU law must be maintained) and, if anybody has a strong view on a European derived provision retained in the CCA, they should certainly not stay silent. Nevertheless, it may be that the review needs to be extended beyond 1 April 2019 or a subsequent review focusing on European derived provisions set up.

Whether through the current FCA review or otherwise, this middle ground is likely to see a gradual divergence of the UK and EU consumer credit regulatory regimes as the UK adapts, adjusts or abandons EU derived provisions as it sees fit.

Even if technical compliance with the CCD and MCD is not required, the ultimate post-separation deal may include provisions whereby the UK is required to retain equivalent provisions in certain areas. Accordingly, the UK may be free to abandon certain aspects of the CCD or MCD but may agree to, effectively, retain others.

### **Equivalence**

If the post-Brexit deal requires the UK to retain equivalence with the rest of Europe then there is little scope for wholesale reform of the UK regime. Moreover, equivalence may create further complexity and difficulty for the UK regime in the future as new directives and regulations are adopted without UK involvement.

However, if equivalence is the result, there is still much that can be done: there are a wide variety of purely domestic provisions that are in desperate need of reform.

### **Conclusion**

The Brexit vote has had no immediate impact on the regulation of consumer credit in the UK. The eventual impact of the referendum result, and the UK's consequent departure from the EU, will depend to a very large extent on the post-settlement deal reached between the UK and the EU. If the deal allows the UK to move away from the strict requirements of European law, then there is a lot to be said for starting afresh and removing the myriad complexities and contradictions that have grown up over the last 40 years.

For an overview of the potential impact of Brexit on financial services, see [Practice note, Brexit and financial services](#). For the latest updates on Brexit, see [Brexit key developments: tracker](#) and visit our [Brexit landing page](#).

### **Gough Square Chambers' consumer credit columns**

For previous consumer credit columns written by barristers at Gough Square Chambers, see [Practice note, Gough Square Chambers' consumer credit columns](#).