

Consumer credit— which way forward?

The EU has proposed a new Consumer Credit Directive. A major question is how does the UK react? Fred Philpott investigates

IN BRIEF

► Considers how the UK might react to the EU proposal for a Directive on Consumer Credit.

On 30 June 2021 the EU issued a proposal for a Directive of the European Parliament and of the Council on Consumer Credits (2021/1071 (COD)). The question is how will the UK react to this new Directive if at all?

Background

The current Directive is 2008/48/EC, which is a maximum harmonisation Directive and was implemented by a raft of UK Regulations in 2010. The only previous EU Directive on Consumer Credit was 87/102/EEC. This was to a significant extent modelled on the UK Consumer Credit laws which began with the Consumer Credit Act 1974 (CCA 1974) and therefore little had to be changed in UK law to comply with the 1987 Directive.

The 2008 Directive was very significantly different from that of 1987 and required the UK to introduce numerous changes to consumer credit law which did not happily fit with the manner in which consumer credit had been regulated not only under CCA 1974 but its predecessors such as the Moneylenders Acts 1900 and 1927 and the Hire Purchase Act 1965.

A notable change which the UK had to implement related to the 'front-loading' of information. Before that, consumer credit legislation had generally concentrated on the agreement itself (ie the 'contract') without anything apart from advertising being in any way regulated. What was then the 'new Directive' of 2008 changed that. Although there were Disclosure of Information Regulations in 2004, the 2008 Directive widened the scope of pre-contract disclosure and added another layer called adequate explanations. All of this had, of course, to be implemented into UK law, with very little discretion.

The proposed new Directive

The fact the EU is proposing an entirely new Directive rather than amendments to the current one is indicative of the significant

changes that will be made. In very broad outline, it attempts to catch up on current technology and widen the scope of the Directive and therefore Member States' laws relating to consumer credit.

The reason for the Directive may, in some ways, be summed up by the introduction, which says: 'Digitalisation has profoundly changed the decision-making process and habits of consumers in general.'

Looking at the proposed Directive, one comes again across the fallacy (Recital (15)) as to the need for a Consumer Credit Directive across the EU. That Recital says it is: 'To facilitate the cross-border consumer credit market.'

It is no longer a direct concern for the UK but over the years our consumer credit laws have been dictated by a false hope that there will be a significant cross-border consumer credit market.

If someone is looking for a mortgage on a semi-detached house in the UK it is highly unlikely that they will resort to a bank based in Frankfurt for the credit. Likewise, the possibility of a person in Greece looking for credit on a car to seek that from a finance company in the UK where a general mode would be hire-purchase or (the effective equivalent) a PCP is unrealistic. Apart from anything else hire-purchase is not a recognised concept in continental Europe. In reality there is little consumer credit cross-border market even within continental Europe where the land borders meet. One may ask, therefore, what is the point of a Consumer Credit Directive at all? Not that that now concerns us.

The proposed new Directive changes

The extent to which the new Directive can be viewed can be illustrated by some examples.

- The exemption for small agreements under €200 will be lifted.
- The upper threshold for regulation will be increased to €100,000.
- Leasing agreements will be involved.
- Interest-free schemes including buy now pay later will be included.
- An agreement over three months without a significant charge will be included.

- Crowd funding will be brought into regulation.

Indeed, crowd funding and the significant increase in the scope of the proposed Directive are one of the main features together with the proposed buy now pay later provisions.

What will be the UK response?

Theoretically, one response is to implement the Directive as would have been done pre-Brexit. That of course is unthinkable not only because of political reasons but because it would forego us the opportunity of revisiting the need to rationalise consumer credit law.

However, simply not implementing (or maybe now the expression should be 'adopting') the Directive will leave the UK in a situation where we currently operate under a Directive of 2008 whereas our former fellow Member States act under a new Directive.

The situation is not without historical background. It would not have been acceptable, in general, for our former colonies to adopt UK laws as part of their law after they had independence. (One does see this as a stark analogy with the current situation). One therefore had many situations where our former colonies (and dominions) would have had what was in some ways effectively UK legislation but it became 'frozen' on independence. This is not saying that the former colonies were, in fact, tied to UK legislation. The British Empire had a system of a degree of self-government so that each colony had a legislative council (Legco) presided over by the Governor of the colony but, as years went on, increasingly had local people involved in the making of local laws. These were subject to the Colonial Laws Validity Act 1863 (still in force). The difference until recently is that the EU did not have any significant degree of subsidiarity in numerous areas of consumer law constantly requiring more centralisation in Brussels.

The way forward

On the basis that there could be no question of adopting the proposed Directive the UK will no doubt politely acknowledge that it exists

and its provisions will be noted when we legislate on consumer credit. It goes without saying that a business which transacts across the borders (eg if a UK financial institution operates in the EU) it will have to comply with the new Directive. However, that is of little relevance to consumers in the UK.

It could be said that this puts the UK in a dilemma ie whether to adopt some or all of that which the EU is proposing or not. Far from it; this is a huge opportunity for the UK to get away from the previous EU legislation some of which (like the adequate explanation) is of little value.

The significant changes to consumer credit regulation in 2014 envisaged a five-year review which was carried out by the Financial Conduct Authority (FCA). It can be said that this was not a particularly incisive programme as regards the outcome. In particular, for example, there was little way forward on ss 77A and 86B.

The report, dated March 2019, generally concentrated on consumer protection. In dealing with rights and protections it said (paragraph 1.20): 'However, for most provisions in this theme, our view remains that they could not be repealed without adversely affecting the appropriate degree of consumer protection. This is because it would not be possible to replicate the same level of

protection under the FCA's current rule-making powers. As such, we see merit in keeping the provisions in CCA 1974 or other legislation.'

It is noteworthy that at para 1.23 it was said that throughout the review the FCA has assumed that substantive changes to provisions implementing the CCD will not be possible at this time. The situation has, of course, changed.

The current situation

Entering into a consumer credit agreement could involve one or more regimes under:

- ▶ The Bills of Sale Acts 1878 to 1882 (the prospect of repealing these under a Goods Mortgages Act is now only a Private Members' Bill).
- ▶ The CCA.
- ▶ The Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553).
- ▶ The Consumer Credit (Agreements) Regulations 2010 (SI 2010/ 1014).
- ▶ The FCA's Consumer Credit Sourcebook.
- ▶ The FCA's Mortgage Conduct of Business Sourcebook.

It is suggested that the new freedom to approach this subject more boldly should be taken. It is untidy to have, for example, the 2010 Agreements Regulations dealing with agreements subject to the current Directive

and the 1983 Regulations dealing with other credit agreements (those outside of the Directive) including, for example, consumer hire agreements.

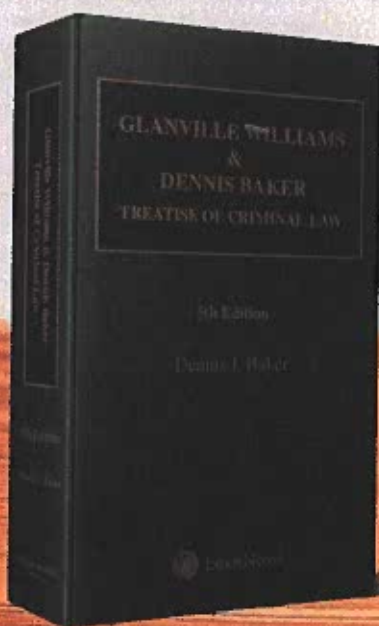
Nor is it necessarily sensible to keep a separate regime in respect of mortgages. There is no reason not to examine critically our current implementation of the Mortgage Credit Directive. The historical reason why ordinary domestic mortgages have been dealt with separately was the then government's desire not to have them regulated in 2004 by the former Department of Trade and Industry and Office of Fair Trading but by the Financial Services Authority. There is no reason not to have all consumer credit legislation in one set of Regulations.

Conclusion

It may be some in government and some civil servants have liked the situation whereby Directives were cut and pasted (even when that was not necessary in the case of directly-applicable Regulations) and simply adding some boiler-plated enforcement provisions. Now is the time for some broad and imaginative thinking as regards the future of consumer credit legislation.

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