

Gough Square Chambers' consumer credit column: February 2022

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Ruth Bala, Lee Finch, Sabrina Goodchild and Thomas Samuels are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

In the February 2022 column, Lee Finch considers the key issues relating to the credit broking regulated activity in article 36A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*SI 2001/544*) (RAO).

Credit broking

Introduction

Since my colleagues and I started writing these columns, we have produced no fewer than six columns dealing with broker commissions, but have never addressed the activity of credit broking itself. Of course, as many readers will be aware, broker commissions are once more at the forefront of financial mis-selling litigation and it is right that we analyse the legal issues applicable to those claims and the arguments that can be advanced.

However, it is also important that we do not overlook other fundamental points including:

- What amounts to credit broking.
- The need for permission to engage in credit broking.
- The consequences of accepting introductions from unauthorised brokers.

What is credit broking?

For the purposes of financial regulation, credit broking is defined in article 36A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*SI 2001/544*) (RAO). It extends significantly beyond what might, colloquially, be considered credit broking and covers the following activities:

- Effecting an introduction of an individual, or relevant recipient of credit, who wishes to enter into a credit agreement to a person with a view to that person entering into by way of business, as lender, a regulated credit agreement (or an agreement which would be a regulated credit agreement but for the

exemptions in articles 60C, 60D, 60E, 60G and 60H of the RAO).

- Effecting an introduction of an individual, or relevant recipient of credit, who wishes to enter into a consumer hire agreement to a person with a view to that person entering into by way of business, as owner, a regulated consumer hire agreement or an agreement which would be a regulated consumer hire agreement but for the exemptions in articles 60O and 60Q of the RAO.
- Effecting an introduction of an individual, or relevant recipient of credit, who wishes to enter into a credit agreement or consumer hire agreement (as the case may be) to a person who carries on an activity of the kind specified above by way of business.
- Presenting or offering an agreement which would (if entered into) be a regulated credit agreement (or an agreement which would be a regulated credit agreement but for the exemptions in articles 60C, 60D, 60E, 60G and 60H of the RAO).
- Assisting an individual, or relevant recipient of credit, by undertaking preparatory work with a view to that person entering into a regulated credit agreement (or an agreement which would be a regulated credit agreement but for the exemptions in articles 60C, 60D, 60E, 60G and 60H of the RAO).
- Entering into a regulated credit agreement (or an agreement which would be a regulated credit agreement but for any of the exemptions in articles 60C, 60D, 60E, 60G and 60H of the RAO) on behalf of a lender.

There are a number of important points to note. Firstly, it largely does not matter if the ultimate agreement is exempt; it is often wrongly assumed that if one only

makes introductions for exempt business or high-net-worth lending then the broking will also be exempt, but this is not the case. The exception to this is credit broking in relation to the agreements exempt by article 60F of the RAO; consequently, it is not "credit broking" to introduce a prospective borrower to a buy-now-pay-later credit provider.

Secondly, credit broking includes introducing a prospective debtor to another credit broker. This avoids an obvious avoidance tactic of unauthorised brokers introducing to authorised brokers who then simply pass on the introduction to the prospective lender.

Thirdly, the scope of article 36A activity in the fifth bullet point is extensive. The act of assisting a person by carrying out preparatory work is not subject to limitation and would appear to cover any work which could potentially lead to a regulated agreement (or an agreement which would be regulated but for any of the exemptions in articles 60C, 60D, 60E, 60G and 60H of the RAO).

Finally, it should be noted that the activities only arise in relation to individuals or "relevant recipients of credit". Consequently, any of the activities can be carried out in relation to parties outside of those definitions (most notably incorporated entities) without engaging in credit broking within the meaning of the RAO.

Whilst it is clear from the forgoing that "credit broking" covers a wide array of activities, there are some important exclusions provided in articles 36B to 36G of the RAO. These include:

- An exclusion for transactions to which the broker is a party (*article 36D, RAO*). This exclusion ensures that creditors do not need a credit broking permission to assist a debtor to enter into a transaction in which they are providing the credit.
- An exclusion in respect of the activities in the bottom three bullet points above where no fee is paid (*article 36C, RAO*). Accordingly, charitable organisations can assist debtors to refinance without risk of engaging in credit broking.
- An exclusion for activities carried on by members of the legal profession (*article 36F, RAO*).

For more information on the credit broking activity, see [Practice note, Regulated activities: credit broking](#).

The need for permission

Even if one of the activities in article 36A of the RAO is being carried on and none of the exclusions apply, it does not automatically follow that FCA permission is required. Credit broking is a "specified activity" but only becomes a "regulated activity" when carried on "by way of business". (The by way of business test has been considered in a number of our columns, including most

recently in my June 2021 column.) Consequently, one individual can innocently introduce their friend to a new, low-cost lender without the need for FCA permission.

Conducting a regulated activity (that is, conducting a specified activity by way of business) without authorisation has severe consequences: it is a contravention of the "general prohibition" in section 19 of the Financial Services and Markets Act 2000 (FSMA) and is a criminal offence under section 23 of FSMA. Further, agreements made through unauthorised persons are unenforceable under section 27 of FSMA and the FCA could apply to court for injunctions and restitution orders under sections 380 and 382 of FSMA.

One crucial point to note from the forgoing is that the consequences are not limited to the credit broker acting without the necessary authorisation; the unauthorised credit broker, also "infects" the credit agreement and renders it unenforceable. A good example of this draconian consequence can be found in the facts of *Plaxedes Chickombe and Others v FCA and Clydesdale Financial Services Ltd t/a Barclays Partner Finance [2018] UKUT 0258 (TCC)* (discussed by Ruth Bala in the September 2018 column).

Territorial issues

It is also worth remembering that issues can arise in relation to the territorial scope of the credit broking activity.

Importantly, article 36A(3) of the RAO is explicit that it does not matter that the ultimate agreement is subject to the law of a country outside the UK but, on the other hand, only activity within the UK is governed by the regulatory regime (see the territorial scope of section 19 of FSMA). Consequently, a party carrying out credit broking activities in the UK in relation to loans governed by Spanish law may require authorisation. However, a party carrying out credit broking activities in Spain in relation to loans governed by UK law will not require authorisation. Difficult questions can arise in relation to where the activity is being carried out and specialist advice may be required.

Conclusion

Credit broking is one of those dangerous regulated activities that can easily be carried out by accident.

It is important to be able to identify when credit broking might arise, whether any exclusions apply and what the consequences may be (and for whom). Once credit broking has been identified, further issues often arise such as compliance with the FCA's rules relating to credit broking and, yes, that hot button topic of undisclosed commissions.

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 column](#).

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