Consumer credit: no sunset in sight?

With the revocation of remaining EU legislation on the horizon, Fred Philpott highlights the challenges & opportunities for consumer credit law

IN BRIEF

▶ The Retained EU Law (Revocation and Reform) Bill, if it becomes an Act, will repeal, revoke or reform most of the EU retained law. But this does not apply to UK consumer credit law, a significant part of which is derived from EU legislation.

The Retained EU law (Revocation and Reform) Bill has been described by Professor Michael Zander KC as one of the worst pieces of legislation he can remember in 60 years of following the law-making process ('Taking back control over retained EU law (Pt 2)', 172 *NLJ* 8007, p14).

In very basic outline, the Bill will revoke or reform all EU-derived legislation at the end of this year. This is subject to many exceptions and the ability of government to extend that provision until the tenth anniversary of the Brexit vote (ie June 2026).

Financial services, including consumer credit, are outside of these provisions because of the exception relating to the Financial Services and Markets Bill 2022–2023 (No 80). This has passed the House of Commons and is at the committee stage in the House of Lords. The financial services concerned are in Schedule 1.

Consumer credit law is, in many ways, now derived from EU legislation—in particular the Consumer Credit Directive 2008/48/EC. There are significant exceptions where UK law has opted to 'goldplate': for example, the post-contractual obligations on creditors under ss 77A and 86B of the Consumer Credit Act 1974 (CCA 1974) and the unfair relationships provisions in ss 140A-C. On the other hand, our consumer credit laws, originating from the skilful draftsperson's hand of Francis Bennion in CCA 1974, have been made unusually complex.

For practical purposes, the documentation, rights of withdrawal etc are derived from the Directive, although there is what could have been called 'retained UK law' if the Directive did not apply (eg the co-existence of the Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553) and the Consumer Credit (Agreements) Regulations 2010 (SI 2010/1014)).

The European Union (Withdrawal) Act 2018 (EU(W)A 2018) provides for savings of EU-derived domestic legislation on and after the implementation period completion date, ie after 31 December 2020, and for the incorporation of direct EU legislation (that is in effect EU regulations) which forms part of domestic law on and after that date. Section 1A(2) provides that despite the repeal of the European Communities Act 1972, domestic law made under this Act in effect before exit day continues to have effect. This was obviously necessary because, otherwise, the withdrawal of the UK from the EU without these provisions would have left the nation without any laws relating to almost every piece of legislation which affects people in their daily lives. A small number of examples are food safety, unfair commercial practices, consumer sale of goods, travel, timeshare and weights and measures. Therefore, in general terms, EU(W)A 2018 had to continue the supremacy of EU law. This included consumer credit.

EU law as regards consumer credit suffered from all the problems of vested-interests, multilingual issues and different backgrounds. There can be no doubt that this must all be swept away. This will be by a combination of using powers under the proposed Financial Services and Markets Bill 2022-23, with regard to the HM Treasury Report of December 2022 ('Reform of the Consumer Credit Act: consultation').

The report appears very positive. In particular, it tackles the difficult boundary between statutory legislation under CCA 1974 and the powers of the Financial Conduct Authority (FCA). Post-contractual obligations are currently subject to significant and draconian sanctions for breach; it is recognised that this is something which should be addressed, but unenforceability of consumer credit agreements is something which is difficult to move to FCA domination. This is an example of the way in which the Treasury and the FCA may deal with other sanctions.

In some ways, one laments the simplicity of the Moneylenders' Acts 1900 to 1927. The legislation was basic (in a few respects, though not so the complex interest rate provisions: see *Askinex Ltd v Green* [1969] 1 QB 272), but at least it was simple. The Hire Purchase Act 1965 (as regards England and Wales) was relatively straightforward. CCA 1974 foreshadowed all manner of changes in the consumer credit market, not least of all with regards to credit cards. CCA 1974 was also a significant change as regards fairness, by improving on the legislation relating to unfair credit bargains under the provisions of the Moneylenders Act 1900 in relation to unconscionable bargains by introducing extortionate credit bargains (subsequently repealed and replaced (under the Consumer Credit Act 2006) by unfair relationships in ss 140A-C, CCA 1974).

The way forward

Professor Zander's article refers to 2,400 statutory instruments derived from the EU, but the National Archives 'had found' another 1,400, with 'more still to be found'.

Was it not a great 'advert' for Brexit that there are so many laws by which we are currently bound which need revoking; if they can be 'found'? Is it that some people see this body of law (thousands) and are nostalgically regretting that there should be a sunset or a Schedule 1 in the case of financial services, including consumer credit?

Some of it is good (not much); some of it is bad; the rest is in between. For example, the duo-system of Consumer Credit (Agreements) Regulations 1983 or 2010, can (almost) with a stroke of a pen (or whatever now) be dealt with by going back to the 1983 regime. Of course, this may need slight updating, and we can no doubt learn something from the proposed new Directive on consumer credit, but at least there would be one set of regulations to abide by in drafting agreements.

A particular area for reform relates to the regulation of secured and unsecured lending. Credit secured on land was excluded from the current Directive (it should be noted that there are proposals to replace this Directive, which is a reason, by itself, for rethinking UK consumer credit legislation); therefore, consumer credit secured on land will generally fall within the 1983 set of Regulations. On top of this situation, there is the Mortgage Credit Directive (2014/17/EU) which resulted in our Mortgage Credit Directive Order 2015. These are not the only provisions relating to secured consumer credit finance, because it is also necessary to consider the FCA's Mortgages and Home Finance: Conduct of Business Sourcebook. It must be possible to produce something far less complex than this.

The laws of our country will be better as regards consumer credit when both of the 2022-2023 Bills are enacted—the Retained EU Law (Revocation and Reform) Bill, and the Financial Services and Markets Bill. Business likes certainty, and putting to bed EU law which it has got used to is a small price for sovereignty. NLJ

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