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Gough Square Chambers' consumer credit column: May 2026

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Lee Finch, Sabrina Goodchild, Ann-Marie O'Neil and George Spence-Jones 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 May 2026 column, Ann-Marie O'Neil examines the practical challenges that arise when applying the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*SI 2001/544*) in the context of consumer finance.

Applying RAO to consumer finance activities

This month's column examines the practical challenges that arise when applying the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (*SI 2001/544*) (RAO) in the context of consumer finance. It highlights some of the most common analytical pitfalls and areas of misinterpretation that arise in practice, illustrating how the structure of the regime can give rise to error if not approached with sufficient care.

Introduction

The RAO performs a deceptively simple function within the UK regulatory perimeter: it specifies the activities and investments that are capable of constituting regulated activities under the Financial Services and Markets Act 2000 (FSMA). However, the RAO is frequently misunderstood and misapplied in practice, often with significant consequences. Errors in analysis can lead to costly retrospective remediation, needless litigation and, in some cases, flawed litigation strategies where mischaracterisations persist.

It is tempting to treat the RAO as a self-contained list of regulated activities, but that approach is incomplete. In practice, proper application requires movement between the specified activities, consideration of exclusions and exemptions and careful analysis of the RAO, connected legislation and the FCA Handbook.

Unregulated vs exempt agreements

First, a particular difficulty that arises in the consumer credit context is the distinction between "unregulated" and "exempt" agreements. This is a distinction that is frequently misunderstood, even by experienced practitioners. The terminology can be deceptively similar, but the legal consequences are fundamentally different.

An unregulated agreement is one that falls entirely outside the scope of the Consumer Credit Act 1974 (CCA) and, by extension, outside those provisions of the RAO which depend on the existence of a "credit agreement" (as defined in article 60B of the RAO). In contrast, an exempt agreement is one that satisfies the statutory definition of a credit agreement but falls outside of the definition of "regulated credit agreement" by virtue of specific exemptions. The critical point is that exemption does not necessarily alter the underlying character of the agreement; it simply disapplies elements of the regime.

This distinction has practical consequences that are often overlooked. A genuinely unregulated agreement will not engage the RAO or the CCA at all. For example, a loan to a company falls outside the definition of credit agreement because the borrower is not an individual; consequently, creditors can lend to corporate entities without worrying about regulation.

By contrast, a credit agreement which is exempt under the RAO may still engage certain obligations under the CCA. For example, the unfair relationship

provisions in the CCA apply to the vast majority of exempt agreements. In practice, the correct classification requires a disciplined, step-by-step analysis of the statutory definitions, the scope of any exemption, and the way in which those concepts are imported into the RAO framework.

For more information on regulated credit agreements and the available exemptions, see Practice note, Regulated credit agreements and consumer credit regime.

"Business purposes" test

Second, a common pitfall is the "business purposes exemption" found within article 60C of the RAO. This provision exempts certain credit agreements where the credit is provided wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by the debtor.

The exemption is further qualified by a monetary threshold that requires the credit to exceed a certain amount, which is often overlooked. For example, a creditor who ordinarily enters exempt agreements by lending below the threshold may inadvertently engage the regulatory regime by assisting one of their clients by offering a larger loan. The relevant amount has changed over various iterations of the regime, so needs careful application.

Further complications arise when seeking to identify what constitutes "for business purposes". Particular difficulty arises in borderline or mixed-purpose cases where borrowing may serve both personal and commercial ends. For example, where a professional borrows money to buy in to a partnership. Small factual differences such as how the transaction is structured, how it is documented, and how it operates in reality can therefore be key.

Some of these difficulties can be, if not overcome, then mitigated by having the borrower sign a business purposes declaration. However, even if a declaration is completed, it does not automatically determine whether the debtor was acting "by way of business" for RAO purposes. It is a strong indicator, but not determinative. The correct analysis still requires a substance-over-form assessment, taking into account factors such as the nature, scale, and commerciality of the activity. This is why reliance on the declaration alone is a common pitfall: it simplifies the analysis, but does not replace it. While it may be a pitfall not to use the declaration, it is also a mistake to place too much reliance on the declaration.

The result is that the identification of a "business purpose" is inherently case-specific. It requires a careful analysis of the relevant statutory provision, informed by guidance and analogy, and tested against the factual matrix of the transaction. This lack of a bright-line rule inevitably introduces a degree of uncertainty, particularly in contentious matters, where parties may advance competing characterisations of the same arrangement. As such, the concept generates dispute in practice, not because it is obscure in principle, but because its application depends so heavily on the facts of the individual case.

"By way of business" test

Finally, complexity arises in the application of the "by way of business" test to lending arrangements. Unlike the "business purposes" analysis, which focuses on the position of the debtor, this question asks whether the creditor is carrying on the "specified activity" of consumer credit lending by way of business within the meaning of section 22 of FSMA.

A specified activity only becomes a regulated activity if the party engaged in it (for our purposes, a lender) is doing so by way of business. If they are, then the regulatory regime is engaged and FCA permission required. It follows that while a bank lending an individual £100 is subject to the full regulatory regime, an individual lending £100 to a family member is not ordinarily. The complexity arises in the grey areas between these extremes and creates a recurring point of uncertainty. At what stage does private lending activity cross the threshold into regulated activity carried on by way of business?

In practice, resolving this question requires reference to external sources. FCA perimeter guidance in PERG provides a non-exhaustive set of indicators, including the degree of continuity or regularity, the scale of the activity, the existence of a commercial element, and the level of organisation or system involved. These factors are not determinative, but they assist in building a holistic picture.

Judicial guidance also plays an important role. In *Jackson v Ayles and Others [2021] EWHC 995 (Ch)*, the High Court considered whether an individual who had advanced a series of loans to property developers was acting by way of business. The court emphasised that the assessment is fact-sensitive and must consider the overall pattern of activity. Relevant factors included the number and frequency of the loans, the structured and organised nature of the lending, and the commercial objective of generating profit. Importantly, the case illustrates that lending

need not be a person's primary occupation to be regarded as a business activity; repeated and commercially motivated transactions can suffice.

The result is that the by way of business test operates as a flexible but uncertain threshold. A single or isolated loan may fall outside the regime, while a pattern of lending (particularly where it is profit-driven) is likely to bring the creditor within scope. The absence of a bright-line rule means that each case must be assessed on its own facts, with careful attention to both the statutory framework and the guidance available. This inevitably introduces a degree of uncertainty, particularly in contentious situations where parties may seek to characterise the same activity differently.

For more information on the by way of business test, see Practice note, Carrying on regulated activities by way of business.

Conclusion

What emerges from this analysis is that the RAO is a dynamic framework that requires the practitioner to move iteratively between definitions, exclusions, exemptions, and external legislation to determine whether a consumer loan is subject to the regime, exempt or entirely unregulated. This is particularly important in borderline cases, where a formalistic reading of the legislation may yield a different result from a purposive approach aligned with consumer protection objectives.

Ultimately, the complexity of determining the basic question of whether a loan is in scope of the regime exemplifies the challenges inherent in consumer finance regulation. Understandably, this intricate regulatory landscape has long been identified as in need of reform and we wait to see whether the latest consultation will yield any change.

For information on reform of the CCA, see Practice note, Hot topics: reform of Consumer Credit Act 1974 (CCA).

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.