Reforming the Consumer Credit Act 1974 consultation

Financial Ombudsman Service response

17 March 2023

The role of the Financial Ombudsman Service

The Financial Ombudsman Service was set up by Parliament under the Financial Services and Markets Act 2000 (**FSMA**) to resolve individual complaints between financial businesses and their customers – fairly and reasonably, quickly, and with minimal formality.

Our service has a wide remit that extends to all kinds of regulated financial services. We've been able to resolve complaints about consumer credit since 2007. Consumer credit complaints we receive include problems with:

- point-of-sale loans
- payday/instalment/logbook loans
- pawn broking
- home credit
- catalogue shopping/store cards
- hire purchase and conditional sale
- debt collecting/counselling/adjusting
- providing credit references.

We also receive complaints under section 75 of the Consumer Credit Act 1974 (**CCA**) about purchases made with credit cards and point of sale loans. Our website explains the types of compensation we can award and the limits that apply.

If a business and its customer can't resolve a problem themselves, we can step in to sort things out. If someone's been treated unfairly, we'll use our powers to make sure things are put right. This could mean telling the business to apologise, to take action in a particular case or to pay compensation – in a way that reflects the particular circumstances.

In resolving hundreds of thousands of complaints every year, we see the impact on people from all sorts of backgrounds and livelihoods. We're committed to sharing our insight and experience to encourage fairness and confidence in the different sectors we cover.

Although our role isn't to set regulation or to instruct firms on how they should conduct themselves, we can say what action we think a firm should take to put things right for their customer when something has gone wrong. And we feed back to firms, as well as to other stakeholders including the Financial Conduct Authority (**FCA**), when we see systemic issues causing complaints to be referred to us. Firms are also required under the FCA's DISP rules to learn from our ombudsmen's final decisions, which are legally binding if the complainant accepts them.

Why the Financial Ombudsman Service is responding to the consultation

We believe our consumer credit expertise means we can contribute in a unique and valuable way to some of the issues raised in the consultation. The nature of the consultation is, of course, a forward-looking discussion about the future shape and contents of legislation. The views we express must be read accordingly. They don't affect how our ombudsmen approach or decide cases under current consumer credit legislation, which they will continue to take into account for so long as it applies.

Summary of our response

- The Financial Ombudsman Service welcomes the government's review of the CCA. We broadly agree with the proposed principles underpinning the reform.
- We would caution against removing important consumer protections in relation to renewable energy solutions.
- We consider there are a number of existing definitions and concepts in the CCA which should be updated and clarified – including the definitions of '*credit*', '*financial accommodation*', '*debtor-creditor-supplier agreement*', the wording of section 75 and the concepts of cancellation and withdrawal.
- We think that the £25,000 upper limit for business lending should be reviewed and raised to ensure that it represents a reasonable upper limit for business lending in today's market.
- We think it's important that the form and content of pre-contractual and post-contractual information given to consumers is clear, fair and not misleading and that consumers are given the right information at the right time. We appreciate this may require moving away from the highly prescriptive rules that currently apply, but it will be important for all parties to have, at least, clear objectives for firms to meet.
- We consider that the forthcoming FCA Consumer Duty will complement, but is no substitute for, the requirements of the CCA.
- We aren't aware of any areas where consumer protection legislation, rules and/or guidance, outside of the CCA, makes for appropriate levels of consumer protections and mirrors or replicates the effects of the provisions in the CCA.
- We consider that voluntary termination under the CCA is a useful tool, which serves more than one purpose. A suitable extension of the voluntary termination regime to consumer hire agreements should be considered.
- We strongly consider that neither the existence of the regime under FSMA nor the Financial Ombudsman Service makes the unfair relationship provisions in ss.140A-C CCA unnecessary. We think it is important that the unfair relationship provisions remain.
- We agree that the government should consider the proportionality of sanctions under the CCA and ensure they relate to the harm actually, or potentially, caused.
- We agree that the standards of conduct for consumer hire agreements should be looked at, so that they become comparable to those for consumer credit agreements.

Background

Most of the complaints referred to the Financial Ombudsman Service can be resolved without the need for an ombudsman's decision, following an investigation and initial assessment. But when that isn't possible, the matter is referred to an ombudsman to determine.

The complainant can either accept or reject an ombudsman's decision. If they accept, the decision and any redress awarded becomes binding on the firm. If they reject the decision, it isn't binding. The complainant is free to pursue the case in court or elsewhere.

Our ombudsmen make decisions according to what they believe to be fair and reasonable in all the circumstances of the case. But that is not done in a vacuum. The ombudsman is required to take into account relevant law and regulation, the regulator's rules, guidance and standards, and codes of practice. Where appropriate, the ombudsman also has regard to what they consider to be good industry practice at the relevant time.

That means that in the context of complaints about consumer credit transactions, the CCA, its surrounding regulations, and FCA rules and guidance are all key resources for our service. They give detailed consumer protections that tell firms how to conduct business. Customers have important rights over matters including: what they're told; how they reach agreement; when and how they can terminate a credit agreement and whether they have rights against suppliers of goods and services that are bought using credit.

Our service also takes into account the FCA's 'Principles for Businesses'. These are FCA rules in their own right but operate at a high level by setting the overarching principles upon which firms, including those in the consumer credit field, must run their businesses and deal with their customers. When the Consumer Duty comes into effect, our ombudsmen will take it into account where it is relevant.

We currently have almost 17,000 open cases relating to consumer credit. The top product areas include hire purchase agreements relating to vehicle sales and point of sale loans. The majority of complaints about hire purchase agreements in the last quarter were about charges, fees and commission.

We have resolved almost 40,000 consumer credit complaints to date during the financial year 2022/23, which amounts to about one in five complaints resolved across all areas.

The uphold rate for consumer credit complaints in the financial year 2022/23 to date is 41%, or two in five. This is slightly higher than our average uphold rate across all products. Further complaints data is available on our website.

Our response

We set out below our response to a number of the questions asked in the consultation. We have not responded to every question.

Question 1: Do you agree with these proposed principles, and do you have views about tensions between them or relative prioritisation?

We broadly agree with the five proposed principles that will underpin the reform of consumer credit – that it should be proportionate, aligned, forward-looking, deliverable and simplified.

In addition, we believe it's important that the reformed law on consumer credit is effective and fit for purpose, meaning that protections for consumers should be fashioned to work as intended. We would suggest adding an additional principle of 'effective'.

Question 2: Noting the governments' Net-Zero targets, how can CCA reform remove barriers that may otherwise prevent lenders from being able to offer financing for renewable energy solutions, such as electric vehicles and green home improvements?

Over the years there have been many different initiatives introduced to incentivise consumers to implement renewable energy solutions. These include the Green Deal (the government's flagship initiative between 2011 and 2015 to improve the energy efficiency of buildings in Great Britain by removing the up-front cost of such measures) and, in more recent years, the drive to implement renewable energy solutions, such as solar panels. Usually these initiatives involve a consumer taking out credit in order to pay for the renewable energy solution to be installed at their home.

From the complaints we've received, we have seen examples of consumer detriment in some cases involving renewable energy solutions, where credit has been taken out by the consumer in order to pay for the renewable energy solution to be installed at their home.

For example, in some complaints relating to the Green Deal, the consumer wasn't aware that they were taking out a loan to fund the installation of the energy saving measures. They thought that the measures were free and had been funded by the government. In other cases, consumers hadn't had the scheme adequately explained to them, so they didn't properly understand how it worked.

We've seen evidence of consumers being misled in the sale of solar panel finance. Many have been told at the point of sale that the installation of the panels would save them money and would generate enough income to cover the repayments on the loan. In addition, consumers were sometimes told that they would make savings on their electricity bill once the solar panels were installed. However, in a number of cases, the benefits of the solar panel installation were misrepresented to the consumer and the monthly loan repayments ended up being much higher than the income received from the solar panels. As a result, many consumers ended up struggling to make the loan repayments.

Renewable energy technology is quite new, meaning often consumers have limited experience and understanding of it, or the means to assess its suitability. If the benefits of the technology are oversold with linked finance, both the physical and financial consequences for the purchaser can be very harmful. The majority of renewable energy solutions require installation at a consumer's home. If things go wrong, the consumer is provided with a daily physical reminder of the issue. These are expensive items intended to provide the basic necessities of heat and light, and consumers may need the full range of their existing protections against the connected lender.

We would caution against removing important consumer protections in relation to renewable energy solutions which might leave some consumers vulnerable.

From the point of view of the operation of the market as whole, the poor outcomes experienced by many consumers have resulted in much adverse media and web coverage. Diminished confidence in such green energy arrangements seems likely to have deterred some consumers. If so, there may be effective ways of restoring market confidence, but diminishing consumer protection seems more likely to hinder than help.

Case study 1

Mrs A was approached by a company (B) that supplied and installed solar panel systems. Following a meeting, Mrs A agreed to enter into a contract with B for it to supply and install a solar panel system costing £10,000 at Mrs A's home. To fund this, Mrs A also agreed to enter into a 10-year fixed sum loan agreement with a lender (C).

B told Mrs A that the solar panel system would make her electricity savings (saving her money) and generate enough income to cover the payments on the loan. Later Mrs A found this not to be the case - the electricity generated by the solar panels was not enough to cover the payments under the loan, and Mrs A struggled to meet them. Mrs A made a claim under s.75 CCA to C, saying that B had misrepresented the benefits of the solar panel system to her. C did not uphold her complaint. Mrs A complained to us.

We upheld Mrs A's complaint. We said that B had misrepresented the benefits of the solar panel system when selling it to Mrs A. We said there was no reason to think Mrs A would have taken out the solar panels had she realised they were going to cost her money. And we didn't think the documentation she was given at the time of the sale would have made the actual cost of the panels, including the loan costs, obvious to her. Because of this she entered into a contract with C that she wouldn't have done otherwise. As Mrs A wasn't unhappy with the solar panels themselves, but more the unexpected cost, we said that C should allow Mrs A to keep the solar panels, but estimate the potential income and savings to Mrs A from the solar panels over the 10 year term of the loan and rework the loan so she paid no more than this. C should also refund any overpayments Mrs A had made with 8% simple interest. In addition, we awarded Mrs A £300 for the distress and inconvenience caused.

Question 3: Are there any existing definitions or concepts in the CCA which should be updated and clarified when moved to FCA rules?

As explained, the Financial Ombudsman Service works with the CCA every day, both when deciding whether a particular complaint concerns a regulated credit agreement and falls within our jurisdiction and when resolving the complaint. We would welcome the following definitions and concepts being updated and clarified:

- *"credit"* and *"financial accommodation"* (s.9 CCA) – these definitions are key to defining the regime's scope of application. They need to be read in the light of a substantial body of case law and can be difficult to apply. We consider it would benefit the Financial Ombudsman Service and others who regularly need to apply the consumer credit regime if sharper and more user-friendly definitions could be devised.
- *"debtor-creditor-supplier agreement"* – this term is important to our work. Where such a debtor-creditor-supplier agreement exists, it can open the door to connected-lender liability under ss.56 and 75 CCA and bring related contracts into the scope of a debtor-creditor relationship under s.140A CCA, thus broadening the grounds upon which the relationship may be unfair. However, our experience is that the definition is hard to apply in practice and can work in a way that defeats reasonable consumer expectations, because:
    - The term's meaning is hard to grasp, because it is complex. It has multiple limbs and requires extensive cross-referencing between ss.11, 12, 187 CCA;

- Those sections, despite their complexity, fail to define the central concept of "arrangements" between the creditor and supplier;
- With the rapid development of new payments systems, consumers are increasingly in no position to know whether their transactions are, or are not, made under relevant "arrangements", because they don't know how these systems work;
- As the legislation is currently framed, when judging whether a payment has been made under a relevant "arrangement", it is not the consumer's reasonable understanding that matters but the creditor's "contemplation". As a result, a consumer who in good faith uses a credit card without knowing of any irregularity can find out after the event that they lack recourse against a connected lender, because it hadn't 'contemplated' the particular arrangements that permitted their payment to be taken. This seems an inappropriate outcome for a consumer-protection regime.

- *Section 75 CCA.* This is an important section for consumers and the work of the Financial Ombudsman Service. It imposes upon credit-card providers and the lenders under other types of restricted-use credit agreements liability to the debtor for the misrepresentations and breaches of contract of the business that supplies them goods/services financed by the credit agreement.

  We frequently have to resolve disputes about the applicability of s.75 in the following circumstances:

  - When a second credit card has been issued to a person, such as a spouse, who is not the "debtor", so lacks s.75 protection. Sometimes the second card holder acts as agent for the debtor, who can recover under s.75, but sometimes not (and it is not always easy to decide which). The latter situation can present a trap for the unwary, in that there exists a perception amongst the public that the authorised use of a credit card confers protection, whereas in this situation, it doesn't. We think that this can result in confusion and possible consumer detriment, particularly as it is the creditor who issues the additional cards and benefits from the lending they generate. We would suggest that anyone who is issued with a credit card, or similar means of drawing down under a restricted-use credit agreement, be given the same s.75 rights as the debtor.
  - When a consumer uses their credit card to pay for services provided to their family or friends (for instance, travel, holidays, entertainment) s.75 allows the debtor to recover their own loss only. This raises difficult questions for lenders and our service as to the extent to which the debtor suffers a loss on account of defects in the supply of something purchased by them for use by their family members or others. It would therefore be helpful if those whose damage is recoverable were defined in the CCA. For example, the scope of protection could be redefined as including, but being limited to, the damage suffered by the debtor's immediate family and dependents.
  - Section 75 has poorly defined financial limits. It doesn't apply so far as a claim relates to "*any single item to which the supplier has attached a cash price not exceeding £100 or more than £30,000*". Quite often goods and services have component parts, capable of being purchased separately but actually purchased as a package, for example home renovation works; or a price may be arrived at by reference to multiplying a unit price, such as the cost per night in a hotel; or a supplier may add additional fees, such as a booking fee, to the total cost. In all these cases, identifying the single item to which the claim relates and its cash price can be difficult and contentious. Greater clarity as to the financial limits

would be beneficial to the users and providers of credit and the Financial Ombudsman Service.

- *Credit-brokers and consumer hire*. When a credit-broker negotiates the *sale* of goods to a consumer under a restricted-use credit agreement, they do so as agent for the creditor: s.56 CCA. However, the same result doesn't apply if the credit-broker negotiates the *hire* of the goods. The hirer escapes liability for pre-contractual acts/omissions of the credit broker in a way that appears inconsistent with the position of the creditor in other credit transactions arranged in the same way**.**
- *Cancellation and withdrawal.* There are different and overlaid regimes concerning withdrawal/cancellation, which are not coherent[1], are very hard to navigate and can lead to an unfortunate position for debtors wanting to withdraw from credit agreements linked to the purchase of goods.

Question 5: Do you believe the business lending scope of the CCA should be changed?

We think that the £25,000 limit for business lending should be raised to ensure that it represents a reasonable upper limit for business lending in today's market.

Business lending and hire up to £25,000 is regulated by the CCA. However, the £25,000 threshold has been in place for over fifteen years.

We sometimes receive complaints from sole traders who have bought a vehicle on finance wholly or mainly for business purposes. But because the vehicle price is over £25,000, they're not protected under the CCA. The £25,000 threshold in these cases appears arbitrary.

Case studies 2 and 3

Mr D, a sole trader, bought a van for his business. The van cost £20,000 and Mr D used a hire purchase agreement for £20,000 to acquire it. Shortly after getting the van it broke down. Mr D complained to the finance provider that the van it supplied through the hire purchase agreement was not of satisfactory quality. The lender did not uphold Mr D's complaint so he referred his complaint to us. As the amount of credit provided through the hire purchase agreement is under the business lending limit of £25,000, the Financial Ombudsman Service has jurisdiction to consider the complaint.

Mr E, also a sole trader, bought a van for his business. The van cost £30,000 and Mr E used a hire purchase agreement for £30,000 to acquire it. Again, shortly after getting the van it broke down and Mr E complained to the finance provider that the van it supplied through the hire purchase agreement was not of satisfactory quality. The lender likewise did not uphold Mr E's complaint and he also referred his complaint to us. However, in this case, as the amount of credit provided through the hire purchase agreement is over the business lending limit of £25,000, the Financial Ombudsman Service is unable to consider the complaint.

Question 7: In what circumstances is it important that the form, content and timing of pre-contractual and post-contractual information provided to consumers is mandated and prescribed? What are the risks to providing lenders more flexibility in this area?

We think the pre-contractual requirements surrounding the provision of information, contents of regulated agreements and their proper execution are based on the assumption that consumers read complex documents and make contractual decisions with a precise understanding of their contents. It's well established this isn't how consumers tend to make

[1] See, for examples, the stringent criticism of the withdrawal regime in the leading textbook *Goode on Consumer Credit Law and Practice* from paragraph 31.282 onwards.

decisions: Government research has found that it's most effective if consumers are given short chunks of information at the right time.[2]

The National Literacy Trust has found that one in six adults in England have very poor literacy skills, meaning they're functionally illiterate and are likely to struggle to read information from unfamiliar sources or on unfamiliar topics[3].

Consumers entering into a car finance agreement, for example, are commonly confronted with a mass of information, some prescribed and some not. In practice this may be presented all at the same time and subject to a 'sign here' explanation from the salesperson. Yet the documentation is complicated and important, needing to achieve different things that may include:

- describing the vehicle and its specification.
- contracting to purchase insurance products, such as tyre protection.
- disclosing the status and remuneration of any credit-broker.
- clarifying the costs of the transaction and its components.
- forewarning/notifying post-contractual rights and obligations (in particular, withdrawal/cancellation/early termination).
- providing detailed terms and conditions.
- obtaining the consumer's formal consent to the contract and to the use of their personal data.

We do see room for improvement here, potentially moving away from the highly prescriptive rules that currently apply. Ensuring that the information given to consumers by firms is clear, fair and not misleading is key. But, if lenders are to be given more flexibility, we think there should be, at least, clear objectives for them to meet. These should help them ensure compliance and, if a dispute emerges, it will also help our ombudsmen to decide whether the firm's processes met the required standard.

Question 8: The Consumer Understanding outcome in the Consumer Duty posits that consumers should be given the information they need, at the right time, and presented in a way they can understand it. Does the implementation of this section, and the Consumer Duty more broadly, go some way to substitute the need for prescription in CCA information requirements?

We consider there's a continuing role for rules or legislation that:

- define the minimum requirements that constitute consumers' 'needs' in this context
- standardise any measures (such as 'APR') that are important for (i) assisting consumers to make comparisons across the market, (ii) deciding whether the transaction is affordable for them, or (iii) judging whether the offer is financially worthwhile.

The Consumer Duty raises, but doesn't answer, the crucial issue of what consumers *need* when considering and entering into a credit agreement. This can be subjective. Unless it's defined in legislation or regulation, there could be widespread disputes. To illustrate, as regards the cost of credit, does the consumer *need* to have information:

- about the total cost, over the period of the agreement? And, if so, should that cost be explained by reference to the repayments of both principal and interest, or just

[2] https://www.gov.uk/government/publications/contractual-terms-and-privacy-policies-how-to-improve-consumer-understanding.
[3] https://literacytrust.org.uk/parents-and-families/adult-literacy/.

interest?

- about the percentage rate of interest? And if so, calculated monthly, yearly, or any period that the creditor thinks relevant?
- about the cost of credit presented (and, indeed, calculated) in a uniform way which helps comparisons across the market?
- about the amount of any commissions included, or taken, from their payments?

The answers to such questions, and the overall aims in asking them, are matters of legislative policy. Is the information intended to serve only the consumer's need to understand their rights and obligations under the agreement? Or should it extend to helping them make meaningful comparisons across the market? Or help them decide whether the credit is affordable for them? Or help them work out whether a cash purchase is preferable?

If it is decided that consumers need information to (i) make comparisons across the market, (ii) decide whether the transaction is affordable for them, and/or (iii) judge whether the offer represents a worthwhile application of their financial resources, then a standardised form of presentation may be desirable or necessary. If every firm were free to adopt their own measures, consumers would be confronted with a variety of unfamiliar and/or incompatible metrics for similar credit products. The results could be more confusing than informative.

If standardised metrics are imposed, we would question whether the present key metric of APR is the most appropriate measure to be given so much importance in consumer information. It might mean more to consumers to highlight another measure/comparison, such as the total cost to the consumer compared to the sum received by them. Further research here would be useful.

Setting ground rules will help firms know where they stand and should help prevent the application of the Consumer Duty in this arena becoming unduly subjective.

Although such matters might be left to regulation, these are issues of principle that do require policy decisions, and (given their importance) it may be that Parliament would wish to decide what principles should apply. Having said that, the Financial Ombudsman Service would be content if they were covered either in legislation or regulation.

Question 10: Are there any areas where, in your view, consumer protection legislation, rules and/or guidance, outside of the CCA, makes for appropriate levels of consumer protections and mirrors or replicates the effects of the provisions in the CCA?

No. We note that paragraph 4.20 of the Consultation Paper sets out a number of remedies available to consumers, including under consumer protection legislation, such as:

- seeking redress through the Financial Ombudsman Service;
- challenging unfair contract terms under the Consumer Rights Act 2015;
- seeking redress through the courts under the Consumer Protection from Unfair Trading Regulations 2008;
- taking a private right of action against a firm under section 138D FSMA;
- the general powers of the courts.

We agree with the view expressed by the FCA at paragraph 5.16 of its final report of its review into the retained provisions of the Consumer Credit Act (**Retained Provision Report**[4]) "that these additional rights and protections, either individually or together, would

[4] https://www.fca.org.uk/publication/corporate/review-of-retained-provisions-of-the-consumer-credit-act-final-report.pdf

not be sufficient to maintain an appropriate degree of consumer protection if the relevant CCA provisions were repealed".

We agree and endorse the reasoning of the FCA set out at paragraphs 5.17 to 5.21 of its Retained Provisions Report.

We consider that the implementation of the forthcoming FCA Consumer Duty, will complement – but not mirror or replicate – the provisions of the CCA.

We agree with the FCA's view at paragraph 4.38 of its Retained Provisions Report and "do not think that the protection provided by FCA regulation overlaps unduly with that provided by the CCA, or negates the need for CCA rights and protections. They can co-exist and complement each other."

Question 11: If other consumer protection legislation, rules and/or guidance, outside of the CCA, falls short of replicating the effect of the provisions in the CCA, where do these gaps exist and how significant are they?

While the Financial Ombudsman Service hasn't surveyed all non-CCA legislation to find out where important CCA protections aren't replicated elsewhere, we do agree with the points made in paragraph 4.19 of the Consultation Paper. This lists a number of CCA provisions affording valued and much-used rights and protections. We don't believe that these are replicated elsewhere in legislation.

Another key piece of legislation is ss.140A-140C CCA. Those sections allow the court to intervene in cases where it finds an unfair debtor-creditor relationship. Section 140A prescribes matters the court is to take into account, including pre-contractual behaviour and the terms of any related agreements. The protections under ss.140A-140C aren't replicated in other legislation and our ombudsmen have regard to them in many situations, such as where the combination of the credit agreement with a related agreement creates an unfair relationship between a complainant and respondent. Our answer to question 17 elaborates on this.

Question 12: The FCA's Consumer Duty mandates a consumer support outcome. Do you have any views on how the Consumer Duty interacts with the rights and protections provided to consumers in the specific consumer credit regulatory regime, which currently consists of the CCA and FCA rules?

We see an important role for both the high-level Consumer Duty and more detailed rules. The latter can provide concrete standards of conduct and establish the norms that inform firms' (and our) decisions. The former provides over-arching principles that mean firms must abide by the spirit of the regulatory rules, rather than adopting a box-ticking approach or 'gaming' their compliance.

Doing away with detailed rules opens the question: what are the expected standards? Doing so essentially delegates answering that question to firms, consumers and those (including our ombudsmen) who resolve individual disputes. If the balance tips too far in that direction, uncertainty could result, helping no-one. So, from the perspective of our service, it's helpful to have some detailed rules, at least on the key points of conduct, as well as over-arching principles such as the Consumer Duty.

Question 16: What is your view on the usefulness of the right to voluntary termination and its role in protecting consumers? Are there improvements that could be made to the functioning of this right?

Voluntary termination is a useful tool that serves more than one purpose. First, it helps some people whose circumstances have changed, making their existng credit agreement unaffordable. Voluntary termination gives people in that situation an escape route after they've paid half the instalments, mitigating hardship.

Second, it introduces a greater degree of consumer control into what can be a multi-year and expensive financial commitment. We think that the right to voluntary termination is useful and protects all consumers, not just those in financial difficulty.

However, with the expansion of the vehicle finance market, we see lots of disputes about the early exit from such finance agreements. We often see cases where financers add charges for excess milage, as well as 'value added products' such as guaranteed asset protection insurance, whose costs are financed by credit that can't be terminated early without full repayment. This creates uncertainty and confusion and can leave consumers paying more than they anticipated to exit early. It significantly undermines the benefits of the simple, universal rule contained in ss. 99 and 100 CCA.

Another market shift that's undermined the effectiveness of ss 99 and 100 is that lenders are increasingly contracting for large balloon repayments to be made at the end of the agreement. The effect is that by the time the half-way point of the agreement has been reached, no right to voluntary termination has arisen, because half the total payments have not been met. This delay in the point in time at which they can terminate can be a trap for consumers, if they're not aware of the effect of the balloon payment on their termination rights.

There's also a general lack of regulation around the terms of early voluntary surrender of the goods. In other words, an exit, normally at an early stage of the agreement, where the consumer wishes to return the goods but can't do so under the CCA's voluntary termination provisions. Some financers allow it, others don't, and the terms of early surrender can be hard for a consumer to know or predict. Equally, a consumer who can no longer afford an agreement – and who needs to surrender soon after entering the agreement – is in no better position than one who could afford to continue but wishes not to.

In general, given the widespread use of vehicle finance and the relatively high transaction value, more regulation about the cost of early exit and a regulatory forbearance regime might be considered. It could be worth adapting the 50% rule to increase the opportunities for early termination on terms that are fair to both parties.

Case study 4

Ms F had a hire purchase agreement for a car. She decided to hand back the car early and exercise her right to voluntarily terminate the hire purchase agreement. After the car was returned, the finance provider said she needed to pay an excess mileage charge as she had exceeded the mileage allowance for the period up to the return of the car. Ms F complained to the finance provider saying that she had paid more than half of the total amount payable under the hire purchase agreement, so she should not be required to pay anything more. The finance provider did not agree, and Ms F then referred her complaint to us.

We upheld Ms F's complaint. First, we found that ss.99 and 100 CCA would not prevent an excess mileage charge being applied in all cases and careful consideration would need to be given to the contractual terms of the agreement between Ms F and the finance provider. We noted that the termination rights notice within the hire purchase agreement clearly and prominently set out the monetary amount Ms F was required to pay to voluntarily terminate her agreement. This represented an agreement between Ms F and the finance provider as to the maximum sum payable on voluntary termination. After considering the other contractual terms of the hire purchase agreement we did not consider any of the other contractual terms qualified or negated this term of the agreement, nor provided for an excess mileage charge to be added to this amount.

We also found that Ms F's agreement didn't adequately explain whether or not the excess mileage charge would be payable on voluntary termination and the agreement included conflicting language relating to the sum payable upon voluntary termination and whether excess mileage charges might be payable. And Ms F's agreement failed to clearly set out

the potential impact excess mileage might have on voluntary termination, which could be significant.

For both these reasons we upheld Ms F's complaint and told the finance provider that it could not apply the charge for excess mileage.

Question 17: To what extent do the FSMA and FOS regimes make the unfair relationship provisions unnecessary? If these provisions are to be kept in legislation, with other rights and protections moving to FCA rules, does this create more complexity and confusion for lenders and borrowers and what will the effect on innovation in the sector be?

Neither the FSMA nor FOS regime makes ss.140A-140C CCA unnecessary.

The FSMA contains no similar or overlapping provisions to ss.140A-140C CCA. The Supreme Court's decision in *Plevin v Paragon Personal Finance* [2014] UKSC 61 decided that the unfair relationship regime is concerned with wider questions than strict regulatory compliance. In that case, the applicable regulatory rules didn't require disclosure by the creditor that 72% of an insurance premium went towards commissions, yet under s.140A the creditor's non-disclosure of that fact could nonetheless create an unfair relationship between itself and the borrower. This illustrates that the unfair relationship regime has significant value to add precisely because it isn't only concerned with regulatory compliance under the FSMA – it focuses on essential unfairness in credit relationships, however that unfairness may have been created.

At the Financial Ombudsman Service, our ombudsmen are required to take a number of factors into account when deciding what's fair and reasonable – including relevant law[5]. Accordingly, if the complaint arises from circumstances that could amount to an unfair relationship under s.140A, the ombudsman must have regard to ss.140A-140C and the case law surrounding those sections. In many cases, this is fundamental to the ombudsman's decision about upholding a complaint and the redress to award.

So, the unfair relationship provisions at ss.140A-140C are not an alternative to the Financial Ombudsman Service. On the contrary, they complement it in an important way, because they constitute relevant law that ombudsmen must take into account and thus inform and affect how ombudsmen make decisions.

We agree with paragraphs 4.29 – 4.31 of the Consultation Paper. These set out the important differences between the unfair relationship provisions and the Financial Ombudsman Service. Although the Financial Ombudsman Service lacks the reach of the courts, because of our jurisdictional limitations and the limits on the amount and types of redress we can award, the Financial Ombudsman Service's ability, by taking into account ss.140A-140C, to decide whether a firm has participated in an unfair relationship with a complainant means that consumers are afforded greater access to justice in this field than if they had to pursue the relevant case in court as a claim under s.140A-140C.

Embarking on litigation is expensive and uncertain and these are hurdles for consumers. This makes our service invaluable to those who feel they have been drawn into an unfair credit relationship. So, the Financial Ombudsman Service provides real access to justice, outside the courts, precisely because ss.140A-140C exist in legislation and are therefore taken into account.

The provisions contained in ss.140A-140C aren't directed towards regulating firms' conduct of business; they're a mechanism for providing recourse to debtors when something has gone wrong. So, in our view, they don't naturally belong in the FCA Handbook. Moreover,

[5] DISP 3.6.4R.

their application goes wider than regulated firms. Leaving ss.140A-140C in primary legislation will not, in our view, create complexity or confusion but avoid it.

Nor do we see any reason why the retention of these provisions should affect innovation in a negative way. On the contrary, they are a valuable means of addressing the consequences of really poor lending practice, wherever it may be found.

Question 19: Do you agree that the government should consider the proportionality of sanctions and ensure that they are relative to the consumer harm caused/potentially caused?

Yes, we agree. Doing this would enhance the alignment between the consumer credit legislation and FSMA, under which the Financial Ombudsman Service is constituted.

When our ombudsmen look at complaints they make a decision according to what they consider fair and reasonable in all the circumstances of the case. That's an obligation enshrined in primary legislation: see s.228(2) FSMA. It's not part of the Financial Ombudsman Service's remit to penalise firms, nor to deter breaches, and accordingly our powers to award redress are limited to compensating the complainant's damage.

This means that the decisions and awards of the Financial Ombudsman Service, including those that rest most on the CCA, are geared towards compensating complainant harm, rather than penalising firms or deterring misconduct. Accordingly, amendments of the type being considered would align the consumer credit legislation to the statutory regime under which our service already decides complaints about consumer credit. We consider this would add to the coherence of the financial system as a whole.

Question 23: What is your view on the merits in increasing the standards of conduct for consumer hire agreements to make them comparable to those for consumer credit?

We agree that this should be considered.

Our experience from investigating complaints is that many consumers don't easily understand the differences in regulatory approach between hire, hire purchase and a credit sale, and often believe that their rights are the same under each. This can cause difficulties in the motor finance market where vehicle finance products with similar names (*personal contract purchase* and *personal contract hire*) are offered to consumers as largely equivalent products, and yet have different terms and levels of regulatory protection.

At a more detailed level, as mentioned in response to question 3, there appears to be a lacuna with the imputation of responsibility achieved by s.56 CCA when credit brokers arrange a consumer hire transaction. That's currently outside s.56, so the hirer escapes liability for pre-contractual acts/omissions of the credit broker in a way that appears inconsistent with the position of the creditor in other credit transactions that are arranged in the same way.

A suitable extension of the voluntary termination regime currently applicable to hire purchase and conditional sale transactions to consumer hire agreements should also be considered. Voluntary termination, where it applies, offers significant benefits to consumers (see our response to question 16). We consider it likely that much the same benefits could be enjoyed in the consumer hire sector if the regime were extended.