

The content

Debt Advice Handbook 15th edition

Description

With living costs and unemployment rising, budgets squeezed and problem debt on the increase, no adviser should be without this essential guide to the practice and process of giving money advice in England and Wales.

Who’s this book for?
It is essential for debt advisers, welfare rights advisers, lawyers, local authority and housing association staff, social workers and union official.

What does it do?
The handbook provides the most comprehensive information needed by advisers on the key stages of money advice, including interviewing clients, establishing liability, prioritising debts, preparing a financial statement, negotiating with creditors and dealing with bailiffs. Fully indexed and cross-referenced to law, regulations and official guidance, and to court and tribunal decisions Includes tactical guidance and examples

What's new?
Fully updated to cover all recent changes to legislation, caselaw and court procedure and practice Emphasis is placed on taking due care of vulnerable clients and making sure that any payment arrangements agreed are appropriate. There is a focus on sustainable credit arrangements that do not affect a client’s abilities to pay essential living expenses and priority debts.

Properties

Author(s):
CPAG

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3. Regulated agreements

Most credit agreements you will encounter are regulated by the Consumer Credit Act 1974. Such agreements are known as 'regulated credit agreements'. There are, however, some important exceptions (see here).

An agreement must be made by the creditor with one or more 'individuals' and the credit must be given in the course of the creditor's business. If the agreement was made on or after 6 April 2007, an 'individual' does not include partnerships comprising more than three people. If a client borrows money for a business, provided it is not a limited company, this is still classed as lending to an individual.

Exempt agreements

Agreements that are not regulated (and are, therefore, exempt) include: [1]

- agreements providing credit of more than £25,000 (if made before 6 April 2008) or £15,000 (if made before 1 May 1998);

- agreements made on or after 21 March 2016 to aquire or retain property rights in land or in an existing or projected building, and where the borrower is a consumer – ie, acting outside their business, trade or profession;
- 'small agreements' not exceeding £50 – eg, vouchers;
- 'non-commercial agreements' not made in the course of business – eg, agreements between friends;
- some low-interest rate credit, including loans to employees from their employers;
- agreements involving goods or services repayable in no more than four instalments in 12 months – ie, normal trade credit, for example payable in 30 days. An agreement made on or after 18 March 2015 is exempt if the number of instalments is no more than 12. For agreements made on or after 1 February 2011, the credit must be provided without interest or other significant charges, otherwise the agreement is regulated;
- mortgages taken out to buy land or property;
- secured loans for home improvements where the same lender provided the mortgage for the purchase of the property;
- secured loans taken out on or after 21 March 2016;
- accounts involving goods or services requiring payments to be made in relation to periods not exceeding three months repayable in one instalment – eg, charge cards. For agreements made on or after 1 February 2011, there must either be no, or only 'insignificant', charges payable for the credit. 'Insignificant' is not defined;
- regulated mortgage contracts (see here) made on or after 31 October 2004, even if the amount borrowed is within the consumer credit limit;
- agreements made on or after 6 April 2008 to a 'high net worth' individual (see here);
- agreements made on or after 6 April 2008 for more than £25,000 entered into 'wholly or predominantly' for the client's business (see here).

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1 s8(3)(b) CCA 1974; arts 60C-60H RAO; *FCA Handbook*, CONC App 1.3; see also PERG 2.7.19B-J

High net worth borrowers

The 'high net worth' exemption allows individuals to opt out of Consumer Credit Act regulation. It applies if the individual's net income is at least £150,000 a year or their assets (excluding their home and pension) are at least £500,000. Since 1 February 2011, the exemption only applies to agreements that provide credit of more than £60,260 and to agreements secured on land (but see below for agreements made on or after 21 March 2016).

The individual must sign a declaration of high net worth, supported by a statement from an accountant. The rationale for this exemption (asked for by the credit industry) is that such people have the resources to obtain their own financial and legal advice and, if such exemption were not available, might seek finance involving less formality from outside the UK.

Note: this exemption does not apply to loans made on or after 21 March 2016 if the credit is for more than £60,260 to renovate property and the borrower is a consumer – ie, acting outside their business, trade or profession. [1]

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1 Sch 1 Part 2 para 4(18) MCDO

Loans for business purposes

The business-related exemption applies if someone has been granted credit of more than £25,000 'wholly or predominantly' for the purpose of their business. If the agreement contains a declaration by the borrower that it has been entered into wholly or predominantly for business purposes, it is assumed that this is the case. However, if the agreement contains no declaration or contains a declaration but the creditor either knows or reasonably suspects it is not true, the presumption does not apply, and the issue depends on the circumstances of the case. [1]

An agreement granting credit of £25,000 or less *wholly* for the client's business is an exempt agreement if it is a 'green deal' plan for energy efficiency improvements to their property under the Energy Act 2011. [2]

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1 *Wood v Capital Bridging Finance* [2015] EWCA Civ 451

2 See A Pardoe, 'A green revolution?', *Adviser* 153 and 'Deal or no deal?', *Adviser* 154

Buy-to-let mortgages

Buy-to-let mortgages are generally considered to be a business transaction and, as such, not regulated by or subject to Financial Conduct Authority (FCA) rules. However, from 21 March 2016, 'consumer buy-to-let contracts' are regulated by Part 3 of the Mortgage Credit Directive Order, which requires, for example, pre-contract illustrations, creditworthiness assessments and arrears management. [1]

To be a 'buy-to-let contract', the agreement must provide that the property secured by the mortgage cannot at any time be occupied as a dwelling by either the borrower or their relative, but is to be occupied as a dwelling on the basis of a rental agreement. A consumer buy-to-let contract is defined as: 'a buy-to-let mortgage contract which is not entered into by the borrower wholly or predominantly for the purposes of a business carried on or intended to be carried on by the borrower'. [2] The lender may presume that the borrower is acting for the purposes of their business if the agreement contains a declaration by the borrower to this effect, unless the lender has reasonable cause to suspect that this is not the case. If the borrower already owns another property that has been let on a rental basis, any further buy-to-let contract is deemed to be business lending.

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1 *FCA Handbook*, PERG 4.10B

2 Reg 4 MCDO 2015

Secured loans

On 21 March 2016, the regulation of secured loans changed. [1] Most secured loans taken out after this date are no longer regulated by the Consumer Credit Act and are therefore not regulated credit agreements. Most secured loans taken out before this date are also no longer regulated credit agreements, even though they were regulated at the time they were taken out (the technical term for such agreements is 'consumer credit back book mortgage contracts').

The provisions that apply to regulated mortgage contracts (see here) now apply to secured loans, provided:

- the borrower is an individual; *and*
- the loan is secured on property; *and*
- at least 40 per cent of the property is occupied by the borrower and/or their family.

However, the following provisions of the Consumer Credit Act 1974 have been retained for such loans made before 21 March 2016. [2]

- The requirement for an enforcement order when:
    - a creditor breaches the rules on the disclosure of information;
    - a creditor fails to supply the client with details of the terms of an authorised overdraft agreement (see here);

    - there is an improperly executed agreement;
    - there is an improperly executed guarantee;
    - the creditor fails to serve a copy of a default notice on a guarantor.
- A creditor can only enforce an agreement if it has complied with its duty:
    - to give information to a client or guarantor, if requested, under a fixed-sum agreement (see here and here);
    - to provide annual statements to a client under a fixed-sum agreement; [3]
    - to give information to a client or guarantor, if requested, under a running account agreement (see here and here); [4]
    - to give notice of the amount in arrears; [5]
    - to give notice of default sums; [6]
    - to provide a client with a settlement figure, if requested (see here); [7]
    - to provide a client with a copy of any guarantee, if requested (see here);

but only where the period of non-compliance began before 21 March 2016. The agreement remains unenforceable until the non-compliance is remedied, even if that is not until after that date.

- Where an agreement provides for the creditor, a broker or the supplier to be the agent of the client in pre-contract negotiations, rather than the agent of the creditor, the whole agreement is invalid. [8]
- Interest should not be increased on default. [9]
- The right to complete payments ahead of time (see here).
- Rebates on early settlement.
- The unfair relationship provisions. [10]

For the purpose of time orders (see here), secured loans that are regulated mortgage contracts but which would be regulated credit agreements were it not for the exemption for regulated mortgage contracts are treated as if they were regulated credit agreements. [11]

Note: the transitional provision appears to have had the effect of removing the status of irredeemable enforceability from these loans which were improperly executed before 6 April 2007 (see here). Advisers dealing with a pre-6 April 2007 consumer credit back book mortgage contract that appears to have been improperly executed and irredeemably unenforceable should get specialist advice.

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1 MCDO

2 Arts 28 and 29 MCDO

3 Arts 29(5) and (6) MCDO. It is thought that creditors are not required to provide ongoing statements post-21 March 2016.

4 s97(1) CCA 1974

5 Art 29(7) MCDO. It is thought that creditors are not required to provide ongoing notices post-21 March 2016.

6 Art 29(8) MCDO. It is thought that creditors are not required to provide ongoing notices post-21 March 2016.

7 s110 CCA 1974

8 s56(3) CCA 1974

9 s93 CCA 1974

10 Art 29 MCDO

11 s126(2) CCA 1974; *FCA Handbook*, PERG 4.17.2

The form of the agreement

Agreements made on or after 1 February 2011

The form of a regulated agreement is very important. If an agreement is not made in accordance with the Consumer Credit Act 1974, it can only be enforced with special permission of the courts. Some agreements made before 6 April 2007 are irredeemably (ie, completely) unenforceable. This means that the court does not have the power to give permission for it to be enforced.

If the agreement was signed by both parties ('executed') on or after 31 May 2005 (but see here if the agreement was made on or after 1 February 2011), the creditor must provide specified information to the client before the agreement is made. This does not apply to:

- secured loans (see here); *and*
- 'distance contracts' (see here).

The specified information includes:

- the appropriate consumer credit heading describing the nature of the agreement;
- the names and addresses of the creditor and the client(s);
- financial and related information, such as details of any goods or services, the amount of credit, the total charge for credit, rate of interest and repayment details;

- statements of consumer protection rights and remedies.

There is no prescribed format for the information, except that it must be headed **'pre-contract information**', handed to the client before the agreement is made and must be capable of being taken away to be studied. As there is no prescribed period for providing the information, the creditor can give the pre-contract information document to the client and then immediately invite them to sign the actual agreement.

If the creditor does not comply with the pre-contract information requirements, the agreement is improperly executed and the creditor needs the court's permission to enforce it.

Agreements made on or after 1 February 2011

Following the implementation of the European Commission's Consumer Credit Directive 2008, there are additional pre-contract requirements for all regulated agreements, [1] except those:

- secured on land;
- for credit of more than £60,260;
- for business lending.

Pre-contract information

With effect from 1 June 2021, the words 'Standard European Consumer Credit Information', which appeared below the main heading, must be omitted from the form referred to below. No alternative replacement wording is required.

If the agreement was made on or after 1 February 2011, more onerous pre-contract information requirements than those described above apply instead. The pre-contract information must be provided before the agreement is made. It is the creditor's responsibility to ensure that this has been done. The information must be disclosed using a form known as the pre-contract credit information form, which must be in writing and in a format that the client can take away to consider. [2]

The creditor must also inform the client:

- that it will tell them if a decision not to proceed is based on credit reference agency information; [3]
- of their right to request a copy of the draft agreement; [4]
- of the period of time for which the pre-contract information remains valid (where applicable).

Separate rules apply to:

- certain telephone contracts;
- non-telephone distance contracts;
- excluded pawnbroking agreements (see here);
- overdraft agreements.

If the creditor does not disclose the required information or it does not use the proper form and format, the agreement is improperly executed and is enforceable only with the permission of the court.

These provisions are very complex and prescriptive. For guidance on the regulations, see gov.uk/government/publications/consumer-credit-regulations-guidance-on-implementing-the-consumer-credit-directive.

Explanation and advice

If the agreement was made on or after 1 February 2011, the creditor must provide the client with an explanation and advice. [5] This applies to all regulated agreements except:

- those secured on land;
- pawnbroking agreements (but see here);
- overdrafts;
- those for credit of more than £60,260.

The client must be provided with an 'adequate explanation' of: [6]

- any features that make the agreement unsuitable for particular types of use;
- how much the client will have to pay, periodically and in total;
- any features that could have a significant adverse effect in ways the client is unlikely to foresee;
- the main consequences if the client fails to make the payments due under the agreement;
- the effects of withdrawing from the agreement, and when and how to exercise this right.

The explanation can be verbal, in writing or both. It should enable the client to reasonably assess whether they can afford the credit and the key associated risks.

In addition, if the client is taking out a payday loan, the creditor or credit broker must explain that the agreement is unsuitable to support sustained borrowing over a long period and is expensive as a means of longer-term borrowing. The creditor or credit broker must enable the client to request and obtain further information and explanation about the agreement without incurring undue cost or delay.

The creditor or credit broker can require the client to acknowledge that it has provided an explanation and that they have received any written information. It cannot require the client to acknowledge the adequacy of this.

For further information, particularly in relation to specific categories of agreement and where agreements are marketed at a distance or by electronic means, see the *Consumer Credit Sourcebook*. [7]

There are no sanctions for non-compliance with these requirements, but the client could argue that there is an unfair relationship (see here) or complain to the Financial Ombudsman Service (see here).

Assessment of creditworthiness

If the agreement was made on or after 1 February 2011, the creditor must assess the client's creditworthiness. This includes the risk that the client will not make the payments due under the agreement by their due date (the credit risk), and the risk to the client of not being able to make the repayments under the agreement or of there being a significant negative effect on their overall financial position (the affordability risk). [8] This applies to all regulated agreements except:

- those secured on land;
- pawnbroking agreements;
- authorised overdraft agreements.

The creditor must carry out an assessment before:

- making a regulated agreement; *or*
- significantly increasing the amount of credit under the agreement; *or*
- significantly increasing the credit limit under the agreement.

The creditor must assess the client's creditworthiness based on sufficient information of which it is aware at the time the assessment is carried out, on information obtained from the client, where appropriate, or, if necessary, from a credit reference agency. The creditor must consider the client's ability to make the repayments as they fall due over the life of the agreement. Repayments may be made out of the client's income, including income received either jointly with, or by, another person (eg, a member of the client's household), where it would be reasonable to expect such income to be available for repayments under the agreement, without the client having to borrow to make the repayments or fail to make any other payment they have a legal obligation to make, and without the repayments having any significant adverse effect on the client's financial situation. When considering affordability, the creditor must not take into account the existence of, or the intention to provide, or request the provision of, any guarantee or other form of security.

The creditor must take reasonable steps to determine the amount, or make a reasonable assessment, of the client's current income, including any potential reduction in the client's income during the term of the agreement which is reasonably foreseeable. The creditor may only take into account any potential increase in the client's income where there is appropriate evidence that this increase is likely to happen during the term of the agreement. The creditor must also take reasonable steps to determine the amount, or make a reasonable assessment, of the client's current 'non-discretionary expenditure'. This includes payments needed to meet priority debts and other essential expenses, together with payments the client has a legal obligation to make – eg, loan repayments or council tax. It may, therefore, be appropriate for the creditor to compare the size of the client's existing debts to their income as part of the assessment process. The creditor should also take into account any information it possesses that may indicate that the client is in, has recently experienced, or is likely to experience, financial difficulties or is particularly vulnerable – eg, has mental health or mental capacity issues. Where appropriate, the creditor may also take into account information obtained during previous dealings with the client, but should consider whether that information remains valid, having regard to the passage of time, or whether it should be updated.

In relation to high-cost short-term loans, the High Court has ruled that a lender's failure to consider repeat borrowing when making lending decisions is a breach of CONC 5.2A (creditworthiness assessment), in particular its obligation to consider both the client's ability to make the repayments under the agreement as they fall due and the potential for the client's commitments under the agreement to have a significant adverse effect on the client's financial situation. [9]

In the case of guarantor loans, as well as assessing the borrower's creditworthiness, the creditor must consider the potential for the commitments under the agreement to significantly affect the guarantor's financial situation.

For further information, see the *Consumer Credit Sourcebook*. [10]

There are no sanctions for non-compliance with these requirements, but the client could argue that there is an unfair relationship (see here) or complain to the Financial Ombudsman Service (see here). [11]

A copy of the draft agreement

If the agreement was made on or after 1 February 2011, the creditor must provide the client with a copy of the prospective agreement 'without delay' if the client requests this. [12] This applies to all regulated agreements except:

- those secured on land;

- pawnbroking agreements;
- those for credit of more than £60,260;
- those for business lending.

The creditor does not have to comply with the request if it has decided not to proceed with the transaction. Otherwise, if the creditor does not comply, it breaches its statutory duty. The breach does not create any additional rights or remedies for the client.

Once the agreement becomes an executed agreement (signed by both parties), the creditor must provide a copy to the client 'without delay', [13] except if the client has been given a copy of the draft agreement and the executed agreement is identical. If this is the case, the creditor must inform the client that:

- the agreement has been executed and the date of the agreement; *and*
- they can request a copy before the end of the 14-day 'withdrawal period' (see here).

In the case of authorised overdraft agreements, instead of a copy of the executed agreement, the client must be given a document containing the terms of the agreement. [14] With certain exceptions, this must be done before or at the time the agreement is made.

If the creditor does not comply, the agreement is improperly executed and enforceable only with the court's permission.

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1 CC(DI) Regs

2 Reg 8 CC(DI) Regs

3 s157(A1) CCA 1974

4 s55C CCA 1974

5 s55A CCA 1974. These provisions were repealed on 1 April 2014 and are now in the *FCA Handbook*, CONC. For the position before this date, see the 12th edition of this *Handbook*.

6 From 2 November 2015, see *FCA Handbook*, CONC 4.2. For the position before this date, see the 12th edition of this *Handbook*.

7 *FCA Handbook*, CONC 4.2

8 *FCA Handbook*, CONC 5.2 and 5.3 were replaced by CONC 5.2A with effect from 1 November 2018

9 *Kerrigan v Elevate Credit International (t/a Sunny)* [2020] EWHC 2169 (Comm)

10 *FCA Handbook*, CONC 5.2A

11 For a discussion on the Financial Ombudsman Service approach to complaints about unaffordable lending, see S McFadden, 'Unaffordable lending: the FOS approach', *Adviser* 157

12 s55C CCA 1974

13 s61A CCA 1974

14 s61B CCA 1974

Information that must be in the agreement

All regulated agreements (except current account overdrafts before 1 February 2011) must be made in writing, be signed by all the borrowers and contain the following information. [1] The agreement should also contain further terms, depending on when it was made (see here–here).

- The amount of credit (or the credit limit). Some creditors confuse the 'amount of credit' with the total amount of the loan. The 'amount of credit' is a technical term and is the amount borrowed minus all the 'charges for credit'. An item forming part of the charges must not be treated as credit, even if time is allowed to pay it. Some creditors get this wrong, with serious consequences. For example, in *London North Securities v Meadows*, the clients borrowed £5,750 under a secured loan, including £750 for a premium for payment protection insurance, described in the agreement as 'optional'. [2] The county court judge found that the insurance was not optional but a condition of the loan and so was a 'charges for credit' item. Therefore, the amount of credit was £5,000 and the agreement was completely unenforceable. The Court of Appeal upheld this decision, with the result that the lender could not enforce payment of the outstanding balance of the agreement and had to remove its legal charge from the Land Registry. [3] Arguably, the agreement does not need to use the phrase 'amount of credit', but this may not be the case if the agreement is ambiguous about which figure is the amount of credit. [4]
- The interest rate and whether it can vary (if it is not fixed at the start).
- A notice of cancellation in the prescribed form (if the agreement is cancellable).
- A term stating how the client must discharge their obligations to make repayments – ie, details of payments, how many, how much and how often. Many secured loans require the client to pay the creditor's legal fees in connection with drawing up of documents and require payment of these to be made immediately or deferred to the end of the loan period. Interest usually accrues on this amount and is compounded monthly, so a substantial sum is likely to be due by the end of the loan. Many agreements do not make clear the client's obligations in

relation to such deferred fees and, as a result, the whole agreement could be irredeemably (completely) unenforceable. [5]

Note: the terms listed above are 'prescribed terms' in the Consumer Credit Act 1974. If the agreement was made before 6 April 2007 and any prescribed term is missing or stated incorrectly, or if the all the borrowers have not signed the agreement, it is irredeemably unenforceable. This means that the court does not have the power to give permission for it to be enforced. So too is any security – eg, on a secured loan. [6]

The prescribed terms must be 'contained in' the document signed by the client. Whether 'application form' agreements (eg, for credit cards and store cards, which the client signs and returns and which then become the agreement [7]) comply with these requirements has been considered by the High Court. [8] It decided that it is not sufficient for a piece of paper signed by the client merely to cross-refer to the prescribed terms without a copy of those terms being supplied to the client when they sign. However, a document can comprise more than one piece of paper, and whether several pieces of paper together constitute a single document involves looking at practical considerations rather than their form. In this case, the document signed by the client referred to 'the terms and conditions attached', which were fixed by a staple and held to be one document.

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1 *FCA Handbook*, CONC 4.7 and 6.3.4R

2 *London North Securities v Meadows* [2005] EWCA Civ 956

3 *London North Securities v Meadows* [2005] EWCA Civ 956

4 See *Ocwen v Hughes and Hughes* [2004] CCLR 4 and *Central Trust v Spurway* [2005] CCLR 1

5 See *McGinn v Grangewood Securities* [2002] EWCA Civ 522 and *London North Securities v Williams*, Reading County Court, 16 May 2005, unreported (*Adviser* 112 abstracts). Even if the prescribed term is present, it is unlikely that the agreement will contain the more detailed non-prescribed repayment obligations, which will make the agreement improperly executed and enforceable with leave of the court only on such terms as it thinks fit. See *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299.

6 ss113 and 127(3) CCA 1974; Sch 6 The Consumer Credit (Agreements) Regulations 1983 No.1553

7 *HSBC Bank v Brophy* [2011] EWCA Civ 67

8 *Carey and Others v HSBC and Others* [2009] EWHC 3417 (QB)

Agreements made before 31 May 2005

In addition to the prescribed information listed on here–here, agreements made before 31 May 2005 must also contain (but see also here):

- the appropriate consumer credit heading that describes the nature of the agreement;
- the names and addresses of the client and creditor, and a signature box;
- details of any security to be provided as part of the agreement;
- a brief description of any goods supplied under the agreement;
- the cash price(s) of any goods or services;
- the amount of any deposit or part payment;
- the total charge for credit if the amount of interest is fixed at the start. This includes the total interest (if any) and also other charges payable under the transaction – eg, brokers' fees and compulsory payment protection insurance. If it is a condition of the loan that any arrears owed under a different credit agreement are paid from the advance, payment of those arrears are a 'charge for credit' item if the client was unaware that the lender would pay them. The arrears, however, are not a 'charge for credit' item if payment of them was part of the purpose of the loan in question, or the client agreed that they could be paid out of the loan;
- the annual percentage rate (APR);
- a statement about the client's rights – eg, termination rights and paying off the account early.

If one of the above non-prescribed terms is missing or incorrectly stated, the creditor can only enforce the agreement with the permission of the court.

Note: if the agreement was provided to the client before 31 May 2005, but was not executed before this date and became an executed agreement no later than 31 August 2005, it is covered by the rules on pre-31 May 2005 agreements. An agreement is 'executed' or 'made' when the last person who must sign it has done so.

Agreements made on or after 31 May 2005

In addition to the prescribed information described on here–here, agreements made on or after 31 May 2005 must also contain the non-prescribed terms listed below. They should set them out in a particular format in the following order: [1]

- the appropriate consumer credit heading that describes the nature of the agreement;
- the names and addresses of the creditor and the client(s);
- key financial information:

    - amount of credit or credit limit;
    - total amount payable, in the case of fixed interest rate agreements;
    - repayment details;
    - the APR;
- other financial information:
    - description of any goods or services;
    - cash price(s) of any goods or services;
    - advance payments (where appropriate);
    - total charge for credit;
    - details of interest rates and whether these are fixed or variable;
- key information:
    - description of any security provided;
    - list of default charges;
    - where applicable, a statement that the agreement is not cancellable;
    - examples of the amount required to settle the agreement early;
    - statements of consumer protection and remedies;
- a signature box;
- a cancellation box (where appropriate);
- if the client is purchasing optional insurance on credit under the agreement, a form of consent to taking out the insurance(s) to be signed by the client(s).

If any of the above provisions is not complied with, the creditor can only enforce the agreement with the permission of the court (but see here).

Note: if the agreement was provided to the client before 31 May 2005, but was not executed before this date and became an executed agreement no later than 31 August 2005, it is covered by the rules on pre-31 May 2005 agreements (see above). An agreement is 'executed' or 'made' when the last person who must sign it has done so.

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1 The Consumer Credit (Agreements) (Amendment) Regulations 2004 No.1482

Agreements made on or after 1 February 2011

The Consumer Credit (Agreements) Regulations 2010 apply to all regulated agreements (except for unauthorised overdrafts) made on or after 1 February 2011 except those:

- secured on land;
- for credit exceeding £60,260;
- for business lending.

The rules outlined on here and here continue to apply in the case of these agreements, unless the creditor 'opts in' to the 2010 regulations by providing pre-contract information as outlined on here.

Under these regulations, which are less prescriptive than the provisions outlined on here and here, agreements must contain specified information, but this does not need to be provided in any particular order or subdivided under particular headings. Information must be provided clearly and concisely and be easily legible and readily distinguishable from the background. There is no box in which the client signs the agreement; the client signs in the space provided.

If the creditor or broker does not comply, the agreement is improperly executed and enforceable only with the court's permission.

Improperly executed agreements made on or after 6 April 2007

From 6 April 2007, the courts have discretion to allow agreements made on or after this date to be enforced even if:

- there is no agreement signed by all the borrowers; *or*
- the agreement does not contain a prescribed term or it is incorrect; *or*
- in the case of a cancellable agreement, the creditor has failed to comply with the provisions on cancellation notices.

Note: these changes are not retrospective, so the courts cannot allow an improperly executed agreement made before 6 April 2007 to be enforced if the above requirements are not complied with. [1]

The court must decide whether or not to allow the agreement to be enforced and, if so, on what terms. The court can refuse to make an enforcement order if it considers it 'just' to do so (eg, if the client would not have entered into the agreement had the agreement been properly executed) or can attach certain conditions. See here for more information on this.

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1 For a summary of pre-6 April 2007 unenforceability arguments, see A Leakey and B Say, 'Unenforceable agreements', *Adviser* 117, and for a discussion of the position post-6 April 2007, see G Skipwith, 'Consultancy Corner 1', *Adviser* 124

Electronic communication

Electronic communications can be used to conclude regulated agreements and send notices and other documents. Documents can only be transmitted electronically if the client has agreed to this. Creditors can also make provision for clients to sign agreements electronically. [1]

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1 The Consumer Credit Act 1974 (Electronic Communications) Order 2004, No.3236. See also *Bassano v Toft and Others* [2014] EWHC 377 (QB), in which clicking the 'I accept' button that generated a document in which the words 'I accept' then appeared in the designated space on the form was held to be sufficient.

The right to cancel: cooling-off period

Distance contracts
Secondary contracts
Agreements made on or after 1 February 2011

A regulated agreement made before 1 February 2011 can be cancelled if it was signed somewhere other than at the trade premises of the creditor or supplier of goods and following face-to-face negotiations with the creditor or supplier (including their agents or employees). Telephone calls do not count as face to face.

If the agreement was made on or after 1 February 2011 and it is for credit of £60,260 or less, see here.

Note: there is no right to cancel an agreement secured on land.

A copy of the agreement must be given to the client at the point of signing (whether or not it is cancellable). Unless the creditor has already signed it or signs at the same time, another copy must be sent within seven days, [1] with a notice of cancellation rights. Otherwise, a separate notice of cancellation rights must be sent within seven days of the agreement being signed. The cooling-off period begins with the receipt of this second copy of the document/separate notice of cancellation rights.

An agreement must be cancelled within five days of the client receiving a copy of the agreement. The client must cancel in writing and, if posted, it is effective immediately even if the creditor does not receive it. The client should get proof of posting or send it by recorded (signed for) delivery.

It is probably best to cancel an agreement initially by telephone, and then follow this up immediately by a letter, email or fax. It can simply state: 'I hereby give you notice that I wish to cancel the regulated credit agreement signed by me on... [date].' [2] It should be sent to the company providing the credit, with a copy to the company supplying the goods, if appropriate. Any goods already supplied under the agreement should be returned or await collection by the trader. Any deposit or advance payment for the goods must be refunded to the client.

The client can also withdraw from an agreement if, when they sign, it has not yet been signed by the creditor and it is not signed by the creditor on the same occasion so that it becomes an executed agreement. The client must communicate to the creditor that they wish to withdraw before the creditor signs it. Withdrawal has the same effect as a cancellation. [3] Withdrawal can be verbal (if time is short) or (preferably) in writing, including email. **Note:** if the agreement was made on or after 1 February 2011, there is an additional right to withdraw (see here).

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1. s63 CCA 1974
2. s69(7) CCA 1974
3. s57 CCA 1974

Distance contracts

In the case of unsecured credit agreements made on or after 1 October 2004 without face-to-face contact between the client and the creditor/intermediary, such as online, by post or on the telephone, the creditor must supply certain information to the client about their cancellation rights in good time before the agreement is entered into.

The creditor must also supply the same prescribed information to the client in writing in good time before the agreement is entered into. The client can waive this requirement in certain circumstances, but the prescribed information must then be supplied immediately after the agreement is made.

The client can cancel the distance agreement within 14 days:

- from the day after the agreement was made, if the written information referred to above was supplied on or before the date the agreement was made; *or*
- from the day after all the written information referred to above was supplied to the client, if this was not supplied before the agreement was made.

The client can give notice of cancellation:

- verbally, if the creditor has informed the client that notice may be given in this way; *or*
- by leaving the notice at the creditor's address. Notice is given on the day it is left; *or*
- by posting, emailing or faxing the creditor. Notice is given on the day it is posted or sent; *or*
- by sending it to an internet address or website that the creditor has indicated can be used to give notice of cancellation. Notice is given when it is sent.

Secondary contracts

If the credit agreement is a borrower-lender-supplier agreement (previously known as debtor-creditor-supplier agreements), cancellation of the credit agreement automatically cancels any secondary contract to be financed by the credit agreement, [1] except if the secondary contract has been carried out at the client's express request before they gave notice of cancellation – eg, if the client asked a supplier to fit double glazing, which was being financed by the credit agreement, and then gave notice of cancellation after the double glazing had been fitted. [2]

Following cancellation, the supplier must refund any sum paid by the client in relation to the contract, less a proportionate charge for any services already supplied, within 30 days. [3] No charge may be made if the supplier began to carry out the contract before the expiry of the cancellation period without the client's consent. The client must repay any money received and return any property acquired in relation to the contract within 30 days.

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1 Reg 12 FS(DM) Regs. These only apply if the client is a 'consumer' - ie, the transaction must not be for the purposes of the client's business.

2 Reg 11 FS(DM) Regs. These only apply if the client is a 'consumer' - ie, the transaction must not be for the purposes of the client's business.

3 Reg 13 FS(DM) Regs. These only apply if the client is a 'consumer' - ie, the transaction must not be for the purposes of the client's business.

Agreements made on or after 1 February 2011

If an agreement was made on or after 1 February 2011, the client can withdraw from it within 14 days without giving any reason. [1] This applies to all regulated agreements except those:

- for credit of more than £60,260;
- secured on land.

Note: the cancellation rights described on here do not apply.

Notice of withdrawal must be given before the end of the 14-day period starting with the day after the 'relevant day'. This is the latest of:

- the date the agreement was made; *or*
- the date the client was informed of their credit limit under the agreement; *or*
- the date the client either receives their copy of the executed agreement or is informed that it has been executed.

The client may give notice of withdrawal either verbally or in writing using the contact details provided in the agreement.

The client must repay any credit advanced together with interest accrued up to the date of repayment, but is not liable for any other fees or charges under the agreement. The client must repay the credit and any interest without 'undue delay' and, in any event, within 30 days. If repayment has not been made within this time, the creditor can take action to recover the money, recover possession of any goods or enforce any security.

Although a client can withdraw from a credit agreement, this does not affect any contract for the supply of goods, and they remain liable to pay for them. Ownership of goods bought with a hire purchase or conditional sale agreement passes to the client on repayment of the credit and accrued interest. [2] The client is not entitled to return the goods to the supplier, so if they withdraw from the agreement, the effect is a forced cash purchase.

The former Office of Fair Trading's view of this situation was that the creditor retains the right to repossess the goods if the credit and accrued interest is not paid within the 30-day period. It is unlikely that the client is entitled to have their deposit or part-exchanged goods returned or their amount/value set off against the amount owed. This should be explained to the client as part of the creditor's required 'adequate explanation' (see here).

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1 s66A CCA 1974

2 s66A(11) CCA 1974

Post-contract information

Annual statements
Arrears notices
Default sum notices

Default notices
Home-collected credit
Interest after judgment
Information sheets

Annual statements

Creditors of fixed-sum credit agreements must provide annual statements to borrowers. The creditor is not required to give the client a statement provided:

- there is no sum payable by the client under the agreement; *and*
- there is no sum that will or may become so payable.

On that basis, if an agreement of less than 12 months' duration took longer than 12 months to repay, the duty to provide an annual statement would be triggered.

The content and wording of the statement must comply with the Consumer Credit (Information Requirements) Regulations 2007. If a creditor does not comply with this requirement, it cannot enforce the agreement during the period of non-compliance, and the client is not liable to pay either any interest or any default sum (see here) accruing during that period. A non-compliant statement cannot be regarded as a 'statement under s77A' at all, so the period of non-compliance begins on the day following the last day on which a compliant statement could have been served. Minor errors or omissions that do not affect the substance of the required information or form of wording can be disregarded. [1]

A creditor can still enforce a running account credit agreement (where there is a separate duty to provide annual statements) during a period when it does not provide annual statements, but statements must contain warnings about the consequences of failing to make repayments or of only making the minimum repayments (which many statements already include).

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1 *JP Morgan Chase Bank v Northern Rock (Asset Management)* [2014] EWHC 291 (Ch). See also G Skipwith, 'Consultancy Corner', *Adviser* 162

Arrears notices

To avoid a situation in which the client is making either reduced or contractual payments plus a payment towards the arrears and is unaware that the debt is escalating because the creditor is adding interest or charges, creditors must inform clients when their arrears reach a certain level and that interest or charges may be accruing. This applies to arrears arising after 1 October 2008 on both new and existing agreements. There are different provisions for fixed-sum and running-account agreements.

If at least two payments have fallen due under a fixed-sum credit agreement and the account has gone into arrears by the equivalent of at least two repayments, the creditor must give the client notice of the arrears in a specified form within 14 days (the 'arrears notice'), and then at six-monthly intervals until the client has cleared the arrears, any interest on the arrears and any default sum (see here).

For running-account agreements, the notice must be given once at least two payments have fallen due and the last two payments have not been paid in full. The notice must be given no later than the end of the period when the next periodic statement is due. A further arrears notice is only triggered once the client has again failed to pay two consecutive months' payments in full.

The arrears notice must be accompanied by an information sheet about arrears produced by the FCA (see here).

If a creditor does not comply with this requirement to give the client an arrears notice, it cannot enforce the agreement during the period of non-compliance and the client is not liable to pay any interest or any default sum accruing during this period.

Once an arrears notice is served, the client can apply for a time order (eg, if they want more time to pay and/or interest or charges to be reduced or frozen in the meantime)**,** provided they have given 14 days' notice to the creditor of their intention to do so. The client's notice must be in writing, but not in any prescribed form, and must state that they intend to apply for a time order and they want to make a repayment proposal to the creditor. They must give details of that proposal. **Note:** until a default notice has been given and expired, a time order can only deal with arrears under the agreement and cannot reschedule future sums. The client can also apply for a time order after a default notice has been served or during court proceedings - no 14-day notice period is required. See here for more information on time orders.

The duty to send an arrears notice ends once the creditor has obtained a county court judgment for the sum payable under the agreement.

Default sum notices

If money, other than interest, becomes payable under an agreement due to a breach of the agreement (known as a 'default sum'), the creditor must give the client a notice in a specified form. Costs ordered by a court are not payable 'under the agreement' and do not count as a default sum.

If a creditor does not comply with this requirement, it cannot enforce the agreement during the period of non-compliance.

The creditor cannot charge any interest on the default sum until the 29th day after the notice is given. After that date, it can only charge simple interest on the default sum (although the arrears continue to accrue interest at the contractual rate, provided the creditor has given the appropriate statutory notices).

Default notices

Before the creditor can terminate the agreement, demand early payment, recover possession of any goods or land (except in the case of secured loans treated as regulated mortgage contracts – see here), or enforce any security, it must serve a 'default notice' on the client (see here).

The notice must state the client's right to terminate a hire purchase or conditional sale agreement and the procedure involved (see here). It must also contain a statement of the creditor's right to charge interest under the credit agreement after judgment. The creditor must also attach a copy of the information sheet about arrears produced by the FCA (see here).

Since 1 October 2006, default notices must give the client 14 days to comply, instead of the seven days previously required, regardless of whether the breach occurred before or after this date.

Unlike the other notices, there is no set period in which a creditor must issue a default notice.

Home-collected credit

Home-collected credit involves the client borrowing money and the creditor's representative calling at the client's home to collect the repayments (also known as 'doorstep lending'). The FCA has been concerned about the repeated use of such credit, particularly repeat borrowing and refinancing of existing loans, thereby converting what is essentially short-term borrowing into long-term borrowing. Section 49 of the Consumer Credit Act 1949 prohibits the 'soliciting' of cash loans off trade premises unless this is in response to a signed request from the client. These provisions apply to both new and existing borrowers. The FCA does not believe that written 'permission to call', given at the time of the original loan, amounts to a 'request' under section 49 covering discussion of further loans at some future date.

FCA guidance (which came into force on 19 December 2018) clarifies that any discussion in the client's home about new loans or refinancing must be initiated by the client either by a specific written request or, if made during a routine collection visit, an oral request. [1] Further, since 19 March 2019, home-collected credit firms must explain to clients the comparative costs of refinancing an existing loan compared to taking out a new loan to run alongside an existing loan, and this information must be provided in a durable medium. [2]

In 2020, the FCA published its report into relending of high-cost credit, including home-collected credit. [3] The review was completed before the coronavirus outbreak, but is particularly relevant to clients affected by the pandemic. The FCA noted, on the one hand, that relending is a significant part of the business models of high-cost credit lenders and, on the other hand, their customers are likely to be vulnerable and have poor credit histories. The FCA saw evidence that relending caused both the level of debt and the repayment amount to increase nearly every time further borrowing was taken out. The FCA was concerned that repeat borrowing could be a strong indicator of dependency on high-cost credit and of harmful levels of debt. Therefore, the FCA's expectation of high-cost lenders is not to encourage refinancing of credit agreements for customers whose commitments are not sustainable. Lenders should only refinance agreements where they reasonably believe it is not against their customers' best interests to do so. Lenders should assess affordability for repeat borrowers and comply with the FCA's creditworthiness rules, including assessing the affordability risk to the customer (see here).

The FCA was particularly concerned that some customers might be managing their financial difficulties through further borrowing. Repeat borrowing should not be used as a debt-management solution: 'When considering an application for refinancing where the firm is aware that the customer is a regular user and appears dependent on high-cost credit, we expect the firm to assess the customer's best interests. They do this by considering the customer's overall financial situation and whether forbearance or debt advice might be more appropriate than additional lending'. [4] You should consider making a complaint to the creditor for cases in which the client appears to have been encouraged or allowed to take out further credit that was unaffordable, unsustainable and in breach of the FCA's guidance; the complaint can be escalated to the Financial Ombudsman if necessary (see here).

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1 *FCA Handbook*, CONC 3.10.3G

2 *FCA Handbook,* CONC 4.2.15R(3A)

3 FCA, *Relending by high cost lenders*, 7 August 2020, available at fca.org.uk/publications/multi-firm-reviews/relending-high-cost-lenders

4 FCA, *Relending by high cost lenders*, 7 August 2020

Interest after judgment

If a client defaults on an agreement, the creditor may take court action to recover the amount owed. If the judgment is made after 1 October 2008 and the creditor wants to recover any interest on the outstanding balance due under the agreement at the rate provided for in the agreement (known as post-judgment contractual interest) from the client, it must give them notice of its intention to do so in the prescribed form. The first notice must be given after the judgment is made and further notices must be given at six-monthly intervals. The client is not liable to pay post-judgment interest for any period for which the creditor has not served the required notice(s). As this interest is payable under the terms of the agreement – as opposed to being payable under the judgment – in addition to these notices, the creditor will also have to provide the client with annual statements showing the interest accrual after judgment (see here).

It is not enough that the creditor 'wants' to claim interest after judgment. The agreement must specifically allow it to be claimed (see here). [1] The intention appears to be that if the client either refuses to pay or cannot agree with the creditor, the creditor will sue for it separately. The client can then defend the proceedings if they challenge the creditor's right to claim post-judgment interest under the contract or the amount claimed, or they can make an offer of payment through the court, if appropriate.

Until the judgment is made, the client only has a potential liability for post-judgment contractual interest and, even after the judgment is made, that liability is conditional on the creditor serving the appropriate notice(s). Therefore, a creditor cannot argue that such interest should have been provided for in the judgment.

If the client receives notice of the creditor's intention to claim post-judgment contractual interest, they should consider applying for a time order (see here) and asking the court either to freeze, or reduce the rate of, the interest or charges.

Note: the above provisions do not apply to post-judgment *statutory* interest. This can never be claimed if the judgment is about an agreement regulated by the Consumer Credit Act 1974, regardless of the amount.

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1 Regs 34 and 35 and Sch 5 CC(IR) Regs; see P Madge, 'Interesting after judgment', *Adviser* 131

Information sheets

The FCA must prepare information sheets to accompany arrears notices and default notices. [1] From 1 October 2008, lenders must include a copy of the current information sheet with each relevant notice. The legislation says that the information sheet must be 'included' in the notice, so it is arguable that the notice is invalid if it is sent out without an information sheet.

The FCA has produced an information sheet for each notice regardless of the type of agreement involved. These are two sides of A4 and are available in English and Welsh. They can be made available in large print, audio tape and Braille. They set out some of the client's key rights, such as the right to terminate the agreement, apply for a time order or complain to the Financial Ombudsman Service. They also set out the effect of a client's failure to pay, such as the effect on credit rating, additional interest and court action by the creditor. They include a list of sources of help, such as Citizens Advice and National Debtline.

The current information sheets are at fca.org.uk/firms/information-sheets-consumer-credit.

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1 s86A CCA 1974