

eacg Commentary for BIS on Draft Regulation for Implementation of CCD

As requested, please find below comments on behalf of ea Consulting Group (eacg) regarding the draft regulations for CCD implementation recently published on the BIS website. As a general plea for EU legislation, we will always ask for consistency and proportionality in the implementation of new directives. With the CCD, we must be very mindful of the FSA's new Banking and Payment Services (BPS) conduct regime and seek to align definitions and requirements wherever feasible.

Article 2 - Scope

With regard to charge cards we agree that, irrespective of the new PSRs, different rules should not apply where the card is for business use and where the €25,000 ceiling is in practice rarely likely to be exceeded.

It is noted that BIS believes an employee is not a consumer under the CCD where a financial institution makes a loan to an employee 'which are an incident of his employment relationship' irrespective of the Article 2.6(g) exemption. For other loans, the additional provisions will ensure that the CCD applies.

Articles - Overdrafts (Articles 2(3),6,10,12 &18)

The light touch approach of BIS for ODs repayable <3 months and on demand plus all small business ODs as confirmed by these drafts regs is welcomed. In terms of consumer protection it is appropriate that all other ODs come under the full umbrella of the new regs.

The APR requirements for advertisements to comply with the CCD are noted although many will feel that this is a retrograde step in not highlighting an easy and obvious route for product rate comparisons. However, overall BIS is to be commended for its flexible approach to the provision of pre-contractual information.

Article 4 - Advertising

It is noted that the 2004 regs will continue to apply for credit adverts involving land agreements.

Similar to our own response to the CP it appears most respondents did not support the €1200 standard credit figure although it may well be appropriate for a running account where the amount of credit is not known. The new draft Advertisement Regulations appear sound. It is hoped that all readers will understand the worked example!

Draft regulation 5(6) appears workable and will avoid a proliferation of broadly very similar information. In such circumstances, the APRs are all important for product/band comparisons. It is disappointing that existing rules governing the prominence of such information must be revised for the CCD although ultimately 'caveat emptor' must apply.

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Article 5 - Pre-contractual information

The revised version of the SECCI is welcomed and we note the continuing commitment to refine the wording of the document into common day parlance.

The new >€100,000 proposal for all regulated loans (as opposed to €60,260 except where debt consolidation) offering a choice of route is a sensible approach for the provision of pre-contractual information. The exemption for pawn agreements is likely to be welcomed by such providers but as stated in our earlier CP response we have no clients in this industry to provide stakeholder feedback.

After much discussion, and largely with a consumer protection hat on, it is thought that if the information on a SECCI is modified a new document should always be produced. We do not wish to see a paper chase but this will ensure that the consumer has a complete and accurate SECCI in his/her possession. Lenders will also benefit should particulars be questioned at some time in the future - the SECCI details will be final.

Article 5.6 - Adequate Explanations

It is recognised that this is a new & very important development in consumer credit legislation.

The revised (more concise) BIS approach is to be commended and, of course, the consumer must be granted the opportunity to ask questions. The specific telephone requirements are noted especially as call centre derived business is of increasing importance. The exceptions (second charge loans, unsecured loans >€100,000, small business lending >€25,000) are considered appropriate.

Article 8 - Creditworthiness

Much concern has been raised in recent months over this matter and the BIS decision to deal with the affordability issues by guidance rather than by a prescriptive approach is a very sensible solution. Lenders will now know as a general principle that they must check the creditworthiness of their customers before lending and this should not come as too much of a surprise!

Article 9 - Database access

Good.

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Article 10 - Information

The importance of these new regulations has not been missed. Many lenders will welcome with a sigh of relief your statement that failure to comply with this provision will not affect the enforceability of any agreement!

Similar to our response to Article 5, we are of the opinion that the consumer should receive a 'final' copy of any agreement thereby updating any modified terms. The requirement for a signature from both parties is noted and you will already be aware of the arguments for and against. Your amendments to sections 62 and 63 are welcomed concerning copy agreements.

Article 11 - Information re borrowing rate

Whilst CCA will always take precedence where applicable, this section is important in light of the new PSRs and, in particular, the 2 month notification period for changes in non-reference rates detrimental to the consumer. It must be remembered that the PSRs only apply to payment accounts. All other accounts (eg loans) will be subject to the new BCOBS rulebook within the BPS (Banking & Payments Services) regime effective from 1/11/09.

Most UK retail lending is not subject to reference interest rates (eg LIBOR, ECB). The official PSD definition reads:

“reference interest rate” means the interest rate which is used as the basis for calculating any interest to be applied and which comes from a publicly available source which can be verified by both parties to a contract for payment services.

With regard to draft regulation 5(2) and changes to reference rates (eg LIBOR) these requirements should come into line with the PSRs. The PSD/PSRs offer various opt-outs to corporates but the PSRs must apply to retail consumers, micro-enterprises (<€2M t/o & 10 employees) and small trusts/charities.

The key changes (7 days to 'without delay', variation via regular statements- presumably if agreed in T &Cs) and retention of the €25,000 business lending limit are noted. On reading the draft regs it is thought that for the sake of clarity there will be a need for special provision re running accounts where amounts may not be known.

Article 13 - Open end agreements

The decision to align the proposed rules governing the termination of open end arrangements where appropriate with the PSRs is welcomed. Although the lack of specific definitions might lead to issues over interpretation on closer study the meaning of the text should be self-evident to all parties without further clarification.

As identified, the transitional provisions in section 98A(6) should avoid the necessity to produce a modifying agreement where a right to terminate exists. No other concerns have as yet arisen.

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Article 14 - Right of withdrawal

In view of the range of credit products and producer interests the mix of responses to the recent CP are not really surprising although ultimately the BIS proposals will, of course, now stand.

With hindsight, the new preferred route of applying the right of withdrawal to credit agreements <€100,000 irrespective of any debt consolidation is a sensible solution for all parties. Similarly, providing a right of withdrawal for small business CCA loans <€25,000 but not for business ODs is felt fully appropriate.

It has been noted that BIS believes is proposing that the existing provisions on cancellable agreements in CCA sections 67-73 will still apply as now for HP and credit agreements >€100,000 irrespective of the new section 73A. We believe that the right of withdrawal should apply in all cases although no legal opinion has been taken on this occasion. No other examples of cancellable agreements are known.

It is thought that section 73B(2) highlighting that the creditor cannot receive any compensation from the debtor where right of withdrawal is exercised (except for non-returnable charges paid by the lender to public administrative bodies) should be sufficient for ensuring the return of any money paid by the consumer if appropriate.

Article 15 - Linked credit agreements

Overall, fine. Sections 75 is, of course, workable and 75A will apply where the cash price is >€30,000 and the credit agreement between €160 and €60,260. It is believed that section 75A(1) will ensure that there is no overlap between 75 and 75A.

We agree that guidance on what is 'reasonable' is the appropriate way forward for consumer/supplier/creditor 'satisfaction' issues as circumstances are likely to vary from case to case.

Article 16 - Early repayment

We note that the CP proposals were broadly supported by respondents although a few issues remain outstanding (pawnbroking & partial early repayment).

In terms of a de minimus threshold for partial early repayments, where disproportionate cost to the creditor is the major consideration, it is thought that a minimum of €150 is appropriate or 10% of the outstanding debt (whichever is the smaller). These figures hopefully reflect the spirit of the new directive whilst reducing potential operational costs and ensuring that future repayments can be adjusted to any sizeable change in the normal debt reduction schedule.

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Concerning the rebate formula and payments falling due on settlement day, calculations should be based on the end of business day balance. It appears from your narrative that the rebate formula is applied differently by creditors and it may well be that existing automated processes are unable to recognise repayments due on the day.

We commented in our response to the CP regarding CCA section 96 on linked transactions that we accepted in principle a proportionate reduction in liability but thought it likely to prove far easier said than done. Other respondents appear to have anticipated the law of unintended consequences applying but despite a quick review of the likely processes involved and the IT impacts, nothing new has come to light.

We are not sure why some respondents believe that a partial early repayment will trigger a modifying agreement but no doubt you will be advised by those who do and their reasons why.

As a result of our own understanding of the new rules governing partial early repayments we do not believe that Regulation 2(4) of ESR 2004 should apply. Similarly, the new Regulations 4A(3) and 5(2)(b) and (c) are not relevant for partial early repayments and can be deleted.

We note the decision of BIS to remove the worked example from the Regulations to guidance to allow for a wider range of illustrative examples.

Article 17 - Assignment of rights

Fine.

Article 19 and Annex 1 - Calculation of the APR

As anticipated, we understand that the draft regs must be applied for the calculation of APRs for all CCA lending (except 2nd charges). We too believe that the new provisions/assumptions will not result in any significantly revised figures.

We have noted the specific comments regarding Regulation 5(3) and (4), Regulation 5(8), Regulation 5(9), Regulation 5(10) with 3(g) of the Schedule.

Overall, we very much welcome the BIS comments concerning small tolerances and the interpretation of Article 23.

In terms of the feedback requested, we believe that Regulation 4(1) is clear and does not require revision.

'The annual percentage rate of charge, being the rate which, on an annual basis, equates to the present value of all commitments, future or existing, agreed by the creditor and the debtor, shall be calculated in accordance with the mathematical formula set out in the Schedule to these Regulations.'

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Article 21 - Credit intermediaries

We have noted that responses from the industry have shed little light on the specific role differences in the UK between a CCD credit intermediary and a CCA credit broker. The BIS decision to use the CCD definition of 'credit intermediary' re Article 21 is welcomed as simplicity is always the preferred route.

With regard to a definition of 'independent' it is thought that BIS, by opting for guidance rather than legislation, will be doing well to avoid all the hotly debated regulatory issues generated by the Retail Distribution Review (RDR) on the nature of independence and consumer understanding.

I hope our various comments will be of assistance to you and your team.

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