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The *Consumer Credit Bill*

Bill 2 of 2005-06

Announced in the Queen's Speech on 17 May 2005, the *Consumer Credit Bill* was introduced into the House of Commons on 18 May 2005. It is due to be debated on Second Reading on 9 June 2005. Explanatory Notes to the Bill have also been published [Bill 2-EN].

This Bill is almost identical to the Government Bill of last Session, which received broad support but fell on dissolution. The Bill principally amends the *Consumer Credit Act 1974.* It seeks to enhance consumer rights and redress by replacing the 'extortionate' credit provisions with a wider 'unfair credit relationship' test and introducing an Alternative Dispute Resolution scheme to be run by the Financial Ombudsman Service. It also seeks to strengthen the credit licensing system and equip the Office of Fair Trading with new powers to take action against rogue lenders. Finally, it seeks to extend regulation to all consumer credit and hire transactions (with limited exceptions).

The Bill follows the publication in December 2003 of a Government White Paper, "Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century" and a three-year review on modernising the UK's consumer credit laws.

Lorraine Conway

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Summary of main points

The *Consumer Credit Act 1974* (the 'CCA 1974') is the main Act designed to regulate consumer credit in the UK. The Government has long recognised that the CCA 1974 is in need of reform. The CCA 1974 is criticised for not providing sufficient protection for consumers, restricting rights of redress, and for failing to provide regulators with sufficient powers to tackle improper or unfair conduct by businesses in a burgeoning consumer credit industry.

The Government is seeking to address these failings through changes to both primary and secondary legislation. These legislative changes spring from a three-year review of the UK's consumer credit laws, which was characterised by extensive consultations and concluded with the publication of a DTI White Paper, '*Fair, Clear and Competitive – the Consumer Credit market in the 21st Century'* in December 2003.

A series of Regulations made in June and October 2004 reformed aspects of consumer credit law and were followed by the introduction, on 16 December 2004, of the *Consumer Credit Bill* [Bill 16 of 2004-05] in the House of Commons. This Government Bill received broad support as it completed its stages in the Commons, and had its First Reading in the House of Lords before it fell on dissolution.

On 16 May 2005 the Government reintroduced the *Consumer Credit Bill* [Bill 2 of 2005-06] in almost exactly the same form as the previous Bill had left the Commons. It is due to be debated on Second Reading in the House of Commons on Thursday 9 June 2005.

The aims of the Bill which seeks to reform (not replace) the CCA 1974 are:

- To enhance consumer rights and redress - by replacing the current 'extortionate credit' test with a new broader test based on unfairness to the consumer, and by introducing an Alternative Dispute Resolution (ADR) scheme to be run by the Financial Ombudsman Service.

- To strengthen the regulation of consumer credit businesses - by creating a more targeted credit licensing regime and equipping the Office of Fair Trading (OFT) with new powers to take action against rogue lenders, including financial penalties.

- To extend regulation to all types of consumer credit and hire agreements (subject to limited exemptions) – by abolishing the financial limit that currently restricts protection under the CCA 1974 to loans of £25,000 or less.

- To provide debtors with new post-contractual information.

The Bill applies to the whole of the UK. Consumer credit is a devolved matter for Northern Ireland but, as the Northern Ireland Assembly is currently suspended, Ministers have agreed that the Bill should extend to Northern Ireland.

CONTENTS

I Outline of current provisions of the CCA 1974

The consumer credit industry is substantial and diverse. Consumer credit businesses can include banks, home credit companies, mail order companies, those providing credit for goods, credit cards, store cards, debt collectors, financial advisers and credit brokers. According to the OFT, the consumer credit market is characterized "by strong competition – the UK consumer credit market is often cited as the most developed in Europe and no single firm has more than a 10% share of the market".[1]

The CCA 1974 established the current structure of regulation governing the provision of consumer credit or the supply of goods on hire or hire purchase to 'individuals' in the UK.[2] It is a huge Act, made up of twelve parts, and is supplemented by a mass of regulations, orders and notices. Its main objective is "to provide for the small individual borrower the protection he unquestionably needs without setting up artificial barriers between one sort of credit and another."[3]

A. Regulated credit agreements

A consumer credit or hire agreement will be regulated by the CCA 1974 if:

- the borrower is an individual;
- it is for an amount not exceeding £25,000; and
- it is not an exempt agreement.

For the purposes of the CCA 1974, an 'individual' includes natural persons, unincorporated associations and partnerships of any size where the credit provided or payments for hire do not exceed a specified limit (currently £25,000).[4] The CCA 1974 does not apply to credit or hire agreements made between traders and corporate bodies such as limited companies.

There are many types of agreement which can come within the terms of a regulated consumer credit agreement under the CCA 1974. These include:

- hire purchase
- conditional sale

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1 Department of Trade and Industry, Full Regulatory Impact Assessment to the previous *Consumer Credit Bill*, [Bill 16 of 2004-05], November 2004, p.19

2 The CCA 1974 currently applies to the whole of the UK – with certain special provisions for Northern Ireland, which do not affect the substance of the statutory regime

3 *Consumer Credit*, Cmnd 4596, Report of the Committee, Lord Crowther, 1971, (s) 6.6.3 – 6.64

4 When first introduced, the CCA 1974 covered most credit agreements up to a financial limit of £5,000. This was increased to £15,000 in 1985, and increased again in 1998 to its present limit of £25,000 – each increase was to reflect inflation.

- credit sale
- personal loan
- overdraft
- loan secured by way of a second charge (land mortgage)
- credit card
- pledges
- budget accounts in shops

In certain limited circumstances, a consumer credit or consumer hire agreement can be taken outside the control of the CCA 1974 by one of the limited exemptions listed in section 16 of the Act and in the *Consumer Credit (Exempt Agreements) Order 1989* (as amended).

B. Scope of the Act

The CCA 1974 regulates all aspects of individual consumer credit or consumer hire agreements including: entry into agreements (part 5 of the Act); matters arising during the currency of the agreements (part 6); default under and the termination of agreements generally (part 7); the giving of security and pawn-broking (part 8). Most importantly, the Act provides the OFT with powers in relation to the licensing of consumer credit and hire businesses and ancillary credit businesses.

The Act contains detailed rules covering:

- the form and content of agreements;
- the advertising of credit;
- the method of calculating the Annual Percentage Rate [APR] of the total charge for credit;
- the procedures to be adopted in the event of default, termination, or early settlement;
- extortionate credit bargains;
- individuals' access to credit reference files;
- equal liability of creditors and suppliers for misrepresentation or breach of contract by the latter; and
- hire purchase transactions.

Although it is not possible to summarise the full scope of the CCA 1974 within this Paper, the following examples illustrate how the Act, through its licensing regime and other targeted regulations, seeks to protect consumers:

- for credit agreements signed away from trade premises, following face-to-face discussions, the Act gives consumers a 'cooling-off' period, allowing the borrower to cancel the credit agreement within a certain period of time;

- a creditor cannot demand early payment, try to get the goods back, or end the agreement without first serving a written notice, seven days before taking action;

- if the borrower has paid a third of the total price of the goods under a HP agreement, then the creditor cannot take the goods back without first getting a court order;

- if a credit agreement is 'extortionate', then the borrower can, on application, ask the court to look at the agreement (see below);

- in a case where the seller of the goods and the provider of credit are not the same, the borrower can make a claim against either party in the event of non-performance of the contract (e.g. in the case of a faulty good where the seller is no longer in business, the borrower can make a claim against the supplier of credit);

- certain written information must be provided to the borrower for the credit agreement to be enforceable, including the total cost of credit, the APR and the cash price for the goods.

C. Regulation of extortionate credit terms

This section provides information on the current regulation of extortionate credit terms under the CCA 1974. This is to put into context the new unfair relationship test to be introduced by the Bill, which seeks to replace the extortionate credit provisions.

Under current legislation there is no legal cap on the level of interest that can be charged on a consumer loan. It is not illegal for a lender to charge a high rate of interest. In determining the amount of APR to charge to a loan, the lender makes a commercial decision based on all the circumstances of the case. However, under sections 137-140 of the CCA 1974, a borrower can ask the court to re-examine a credit agreement if the rate of interest is extortionate.

The court's power to reopen a credit agreement can be exercised only in one of two circumstances:

(a) on application by the debtor or anyone who has provided security for the credit agreement; or

(b) at the request of the debtor or a surety in any proceedings to enforce the credit agreement, or other proceedings where the amount paid or payable under the agreement is relevant.

Under section 138(1) a credit bargain is deemed to be extortionate if it:

> (a) requires the debtor or a relative of his to make payments (whether unconditionally, or on certain contingencies) which are grossly exorbitant, or
>
> (b) otherwise grossly contravenes ordinary principles of fair trading.

In determining a case, the court is required to consider all the evidence before it including:

- prevailing interest rates at the time the bargain was made;
- the debtor's circumstances (e.g. age, experience, or the degree to which the debtor was under financial pressure at that time);
- the creditor's circumstances (e.g. the degree of accepted risk having regard to the value of any security).[5]

Under section 139(2) of the CCA 1974, if the court concludes that the credit agreement is extortionate, then it may do a number of specified things "for the purpose of relieving the debtor or a surety from payment of any sum in excess of that fairly due and reasonable." For example, the court may alter the terms of the agreement or require the creditor to repay sums already paid by the debtor.

D. Consumer credit licensing

The CCA 1974 is underpinned by the Consumer Credit Licensing System, which is administered by the OFT.[6] A licence is required for conducting business concerning the provision of credit, or the hiring of goods to the value of £25,000 or less, under a regulated agreement to an individual or non-corporate body.[7] A licence is also required to carry out certain ancillary credit businesses. Currently, a consumer credit licence can cover any of the following six categories of trading:

- consumer credit
- consumer hire
- credit brokerage
- debt adjusting and debt counselling
- debt collecting
- credit reference agencies

It is quite legal for a business to be registered under more than one category, or to vary its licence in accordance with its business, while the licence is still in force.

Licences are granted to applicants who satisfy the OFT that they are 'fit' to carry on the type of business in question. In determining whether a person is fit to hold such a licence, the OFT must take into account all relevant circumstances and, in particular, any evidence that

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5 Sections 137-140 of the CCA 1974

6 The Office of Fair Trading exercises its responsibilities under the CCA 1974 across the whole of the UK: http://www.oft.gov.uk/default.htm

7 See page 45 of this Research Paper for statutory definition of 'individual'

shows the applicant – or persons connected with that business – has been involved in any of four specific classes of activity:

- certain offences – involving fraud, dishonesty or violence;
- breach of the CCA 1974 or any other consumer protection legislation;
- discrimination; or
- business practices appearing to be deceitful, oppressive, unfair or otherwise improper – whether unlawful or not.

A licence is usually valid for five years after which time it must be renewed. However, the OFT can refuse, suspend or revoke a licence (subject to appeal).

In addition to a standard licence, issued to a particular trade and covering only that trader's business, the OFT can also issue a group licence covering 'such persons and activities as are described in the licence'. According to the OFT, "most group licences have been issued to bodies that fall into two broad categories: advisory organisations with altruistic aims and professional bodies".[8]

In deciding whether to grant a group licence, section 22(5) of the CCA 1974 requires the OFT to conclude that the public interest is better served by doing so than by obliging the persons concerned to apply separately for numerous standard licences (the public interest test). Although the Act allows the OFT to issue a group licence for any period including, if it thinks fit, an indefinite period, usual OFT policy has been to limit a licence to five years after which time it must be renewed (i.e. the same period of validity as a standard licence).[9]

The overriding aim of the licensing regime under the CCA 1974 is to ensure that, so far as possible, those operating in UK credit and hire markets have high standards of integrity.

II Failings of current legislation

The DTI has concluded that the CCA 1974 no longer provides adequate protection for all consumers.[10] Dynamic changes in the consumer credit market over the past thirty years have not been matched by changes in the legislation intended to protect consumers from abuse:

> The rights that the Act accords to consumers and the avenues it provides to them to challenge unfair conduct are restricted. Furthermore, the Act has provided regulators with insufficient powers to tackle improper or unfair conduct by consumer credit businesses.

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8 Office of fair Trading, *Review of the group licensing regime – A consultation paper*, July 2004, para 2.7

9 Ibid, para 3.5

10 Department of Trade and Industry, Full Regulatory Impact Assessment to previous *Consumer Credit Bill* [Bill 16 of 2004-05], November 2004, p.3

> The vast majority of consumer credit businesses do treat consumers fairly and reasonably and comply with their statutory obligations. These businesses resolve disputes informally and quickly and take effective steps to rectify instances of non-compliance. However, a small proportion of businesses do not, often with devastating consequences for individual consumers. The current weaknesses in the Act have allowed these unscrupulous consumer credit businesses to exploit the difficulty consumers have in obtaining redress so as to act unfairly or in breach of general standards of good conduct, and inflict considerable harm on consumers.[11]

A. Scale of the problem

1. Changing market

Since the introduction of the CCA 1974, the UK credit market has been transformed. Before the financial deregulation of the 1980s, building societies provided mortgages, banks provided consumer loans and overdrafts and supermarkets sold fruit and vegetables. Now, the market for credit has become highly developed and diversified. The number of licensed lenders, the range and complexity of credit products and the sales strategies used by creditors have developed at an unprecedented rate. This blurring of the boundaries has undoubtedly increased competition but it may also have contributed to some of the less desirable aspects of market behaviour.

Not only have finance providers changed but their sales methods have too. Mailshots offering 'guaranteed' loans and credit approved after a few clicks on an internet site are now ubiquitous. In 1974 an application for a loan probably involved an interview with a bank manager. Building societies regularly demanded that individuals saved with them for a number of years before they considered granting a mortgage. Now they battle over business with discounts and other inducements.

2. Increased level of debt

Given these developments it is not surprising that UK consumers avail themselves of the services of lenders much more now than in the past. The DTI estimates that the average level of outstanding debt per person, in real terms, has risen from £86 in 1969 to over £2,700 today. Thirty years ago, £32 million was owed on credit cards, now over £49 billion is owed. [12] Recent figures from the British Bankers' Association show that in April 2005 credit cardholders paid back a net £40 million, as payments to lenders outstripped new borrowing. This is the first time that there has not been a monthly rise

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[11] Department of Trade and Industry, Full Regulatory Impact Assessment to previous *Consumer Credit Bill* [Bill 16 of 2004-05], November 2004, p.3

[12] Department of Trade and Industry White Paper, *Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century*, Cm 6040, 8 December 2003

since May 1994, but the net repayment made only a small dent in the total figure that is currently owed on credit cards. [13]

Statistics quoted by the DTI show that personal debt levels (excluding first and second charge mortgages) have increased significantly over the past five years, with approximately £170 billion outstanding as at July 2004 (compared to approximately £70 billion in 1993).[14] The Finance & Leasing Association (FLA) estimates that its members lent a total of around £1.3 billion in direct unsecured loans to consumers.[15]

There is concern among consumer representative groups, including the National Association of Citizens Advice Bureaux (NACAB), about the level of debt in the UK and, in particular, about extortionate credit agreements.[16] Citizens Advice (England and Wales) estimates that there has been a year-on-year increase in debt problems of 3.1% since 2003, whilst Citizens Advice Scotland estimates that there has been an increase in consumer credit enquiries over the past four years of approximately 3% to 5% per year.[17]

3. Exploitative conduct

Consumer groups argue variously that there has been some exploitative conduct in the consumer credit market, to the detriment of the consumer.[18] They argue that the complexity and lack of transparency of some financial products make it difficult for consumers to pick the right product for their needs, and that loans often tie people in for the long-term and include penalties for early repayment. There is also concern that some lenders are acting irresponsibly by failing to make sure consumers can afford the cost of credit.

The Government 2003 White Paper, *Fair, Clear and Competitive – the Consumer Credit Market in the 21st Century*, refers to research commissioned by the DTI into the impact on consumers of exploitative conduct by some businesses in consumer credit transactions: conduct which is either unfair or in breach of general standards of good conduct. The DTI has also reviewed evidence of the number and nature of enquiries made by consumers to government bodies and advice providers (such as Citizens Advice). On the basis of this information, the DTI has identified the following trends:

- the number of consumer enquiries to free advice services about consumer credit is increasing; and

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13 "Threat to economy after fall in credit card debt", *Times*, 21 May 2005

14 Department of Trade and Industry, Full Regulatory Impact Assessment to previous *Consumer Credit Bill* [Bill 16 of 2004-05], November 2004, p.4

15 The Finance and Leasing Association, Monthly Statistics, available at: http://www.fla.org.uk/fla_home/press_releases/070904.htm

16 National Association of Citizens Advice Bureaux, *Daylight robbery: the CAB case for effective regulation of extortionate credit*, December 2000

17 Citizens Advice Annual Report 2003/2004, p.12

18 HM Treasury, *Promoting financial inclusion*, December 2004

- the total value of the credit that is the subject of these enquiries is increasing.

However, the difficulty of accurately quantifying consumer detriment is readily acknowledged by the DTI:

> While we cannot accurately quantify its full extent, it is considerable, and based on recent trends, increasing. A failure to reform the Act to allow for more effective consumer redress will allow the current situation to continue and potentially worsen.[19]

The DTI identified four main causes of consumer detriment, which it suggests may often be combined in a single enquiry:

> (a) unfairness in respect of any aspect of the consumer credit relationship, and most particularly in relation to:
>
> > (i) the use of misleading and unfair selling methods, including irresponsible lending;
> > (ii) the administration of the agreement (including the abuse of a lender's discretionary powers to vary terms or the manner in which they operate);
> > (iii) unfair treatment of accounts in arrears; and
> > (iv) a lack of transparency in the way fees and charges are applied to accounts;
>
> (b) the inability to seek effective redress through an accessible or efficient mechanism;
>
> (c) poor customer service; and
>
> (d) the imposition of excessive costs of credit (both in terms of interest rate charged and the amount of fees and charges applied to the account).[20]

Its conclusion is that the CCA 1974 can no longer provide adequate protection for all consumers.[21]

4. Financial exclusion and extortionate credit

Another distinct problem is that of financial exclusion. Whilst the vast majority of consumers have access to affordable and flexible credit, a significant number do not. This point was made in a recent Treasury report:

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19 Department of Trade and Industry, Full Regulatory Impact Assessment to previous *Consumer Credit Bill*, November 2004, p.31

20 Department of Trade and Industry, Full Regulatory Impact Assessment to previous *Consumer Credit Bill* [Bill 16 of 2004-05], November 2004, p.5

21 Department of Trade and Industry, Full Regulatory Impact Assessment to previous *Consumer Credit Bill* [Bill 16 of 2004-05], November 2004, p.3

> In recent decades, the majority of households have seen a dramatic rise in the availability, flexibility and affordability of credit. However, while the majority borrow using mainstream credit cards, bank loans and overdrafts at relatively low rates of interest, those on the lowest incomes often have to borrow to make ends meet, at interest rates many times that of a standard overdraft.[22]

The scale of the problem of financial exclusion was set out in a report published by a Treasury Policy Action Team in November 1999.[23] It was estimated that about 1.5 million low-income households (representing over two million adults) use no financial services. Several reasons were given for this financial exclusion:

> The reasons poor people use financial services less are complex. Outright refusal by banks or other institutions to do business with them is relatively rare. More often, the problem is mismatch between potential customers' needs and the products on offer. As providers develop new products that are more suitable for low income customers, those who live in poor neighbourhoods should benefit, as well as those in less deprived areas. Product diversity is clearly part of the answer, for all underserved markets.
>
> People in poor neighbourhoods may make little use financial services for reasons that are related to the area itself. Where crime rates are high, property insurance, both household and business, may be unaffordable. Remoteness from major commercial centres, and the withdrawal of financial service outlets from poor communities, may be factors in low income households' non-use of mainstream institutions. The development of new delivery channels can overcome this factor. There is no single solution: again, diversity is of the essence.[24]

A more recent Treasury report divided the non-mainstream credit market into the 'non-status' and 'alternative' markets.[25] Non-status lending principally involves the offer of credit products similar to those in the mainstream sector (such as personal loans and credit cards) to people with poor credit ratings who would normally find it difficult to obtain credit from traditional lending institutions. Whilst one would expect non-status loans to attract a higher rate of interest than an ordinary credit arrangement (to reflect the higher risk of default to the lender), some appear to charge punitively high rates or dual rates.[26] There is also concern that vulnerable borrowers may be inadequately informed about the terms of some loans.

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22 HM Treasury, *Promoting financial inclusion*, December 2004

23 HM Treasury Policy Action Team 14, *Financial Exclusion*, November 1999, available at website: http://www.hm-treasury.gov.uk/media/E0A85/pat14.pdf#page=69

24 Ibid, p 1

25 HM Treasury, *Promoting financial inclusion*, December 2004

26 In broad terms, a dual rate is where two interest rates are quoted in the agreement; the higher rate comes into force if the borrower defaults on the loan

The alternative credit market exists to meet the needs of low-income households requiring access to small, short-term loans, catering for people whose needs are not adequately met by mainstream credit providers. Commenting on the current state of the alternative credit sector, the Treasury report said:

> Reliance on the alternative credit market means that the most vulnerable consumers typically end up paying much more for credit. Typical alternative credit products have Annual Percentage Rates (APRs) over 100 per cent – many times the APRs of standard mainstream personal loans, overdrafts and credit cards. For example:
>
> - a typical loan from a home collected credit company for £200 might attract a charge of £94, which is repaid over 30 weeks (309 per cent APR) at £10 a week;[27]
>
> - pawnbrokers charge interest each month for the length of the loan. A loan from a pawnbroker would have a monthly interest rate of around 7-12 per cent. A loan of £200 over 4 months, at 7 per cent interest a month would equate to a charge of £56 and an APR of 110 per cent;[28] and
>
> - an example from Citizens Advice Bureau in Merseyside highlights the costs of sale and buyback. One client received £45 from selling a television/video recorder that he had bought for £500, 12 months previously. [29] The item was recoverable by him paying £56.25 within 28 days, equivalent to an APR of 1355 per cent. Due to confusion over the date on the contract, the item was sold before the client could recover it, with the resale price being £120. [30]

Treasury research data suggests that clients of the non-status or alternative credit markets are likely to be: people on low incomes, with a poor history of employment; the elderly; single parents; and those with a long-term illness or disability.[31] The DTI estimates that potentially some 9 million consumers now lack the credit rating needed to borrow mainstream products from high street lenders.[32]

In its report *Unjust Credit Transactions*, the OFT concluded that the extortionate credit provisions of the CCA 1974 were insufficient to protect consumers, particularly those

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27 *Access to credit on a low income: a study into how people on low incomes in Liverpool access and use consumer credit*, Paul A Jones, Co-operative Bank, 2001

28 *Pawnbrokers and their customers*, Sharon Collard and Elaine Kempson, The Personal Finance Research Centre, University of Bristol, October 2003

29 National Association of Citizens Advice Bureaux, *Daylight Robbery - The CAB case for effective regulation of extortionate credit*, December 2000

30 HM Treasury, *Promoting financial inclusion*, December 2004

31 Office of Fair Trading, *Left out in the cold*, 22 April 1999

32 Department of Trade and Industry, Full Regulatory Impact Assessment to previous *Consumer Credit Bill* [Bill 16 of 2004-05], November 2004, p.4

with an impaired or low credit rating who have limited sources of finance available to them.[33] Similarly, in its 2001 report, *Daylight Robbery*, the NACAB argued:

> … the solution to the problem of extortionate credit lies in effective legislation that is accessible to the consumer and improving the ability of consumers to make informed choices from a range of credit options.[34]

Statistics on the growth and levels of consumer borrowing and the distribution of unsecured debt in the UK are set-out in a Library standard note, *Consumer Borrowing*, dated 7 January 2005.[35] Information on levels of financial exclusion in the UK and the work of the Government's Social Exclusion Unit is also provided in a Library standard note, *Financial Exclusion*, dated 9 December 2004.[36]

B. Specific problems with obtaining redress

1. Limited use of extortionate credit provisions

According to the DTI, the extortionate credit provisions of the CCA 1974 (Sections 137 - 140) have not provided consumers with effective redress:

> Under the Act, a court may re-open a credit agreement to alter its terms or to set it aside where it is found to be part of an 'extortionate' credit bargain. Within the constraints imposed by issues of access to justice, this test has not served to enable consumers to seek effective redress. This means that consumers are unable and unwilling to challenge 'extortionate' conduct by lenders and means that some unscrupulous lenders may persist with exploitative practices.
>
> In the 27 years of the Act's operation, we understand that very few consumers have succeeded in having a court reopen a credit agreement on the basis that it is part of an extortionate credit bargain. There are only about 30 published court judgments that we are ware of where a court has considered the issue, although we are aware that the issue has been raised in proceedings more frequently.[37]

The DTI identified a number of factors which contribute to the limited use of the 'extortionate' test to reopen a regulated credit agreement, including:

- too narrowly focussing the test on the cost of credit rather than the fairness of all the terms of the agreement;

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33 Office of Fair Trading, *Unjust Credit Transactions*, September 1991

34 The National Association of Citizens Advice Bureaux, *Daylight Robbery – The CAB case for effective regulation of extortionate credit*, December 2000

35 Library standard note, *Consumer Borrowing*, SN/EP/2901, 7 January 2005

36 Library standard note, *Financial Exclusion*, SN/BT/3197, 9 December 2004

37 Department of Trade and Industry, Full Regulatory Impact Assessment to previous *Consumer Credit Bill*, November 2004, p.29

- the current standard of 'extortionate' is too high to deter effectively practices that are unfair or exploitative;
- the difficulty of bringing claims to court - many consumers are deterred by the expense, risk and complexity of bringing a case to court, for which legal aid is not generally available.

These factors restrict the effectiveness of the CCA 1974 for consumers by inhibiting private enforcement.[38]

2. Licensing inadequacies

A criticism of the current credit licensing regime is that while the test used by the OFT to determine whether a person is fit to hold a credit licence gives particular weight to evidence of past failings, it does not expressly take into account a trader's ability to conduct their credit business in a fit manner in the future (for example, by ensuring staff are properly trained or adequate systems have been put in place).[39]

The DTI suggests that this problem is compounded by limitations on the OFT's powers to investigate ongoing activities of the licensee:

> If a trader behaves in a way, which, although undesirable, does not breach a specific provision of the Act [CCA 1974], the OFT is powerless to gain the information it needs to consider properly whether the licence should be revoked. (Unacceptable methods of debt-collecting or sales practices which take advantage of the elderly are examples of such activities). Currently, the OFT relies, principally, on the applicants themselves or complaints from the public or local Trading Standards Departments (TSDs).[40]

One of the many consultation papers from the review of consumer credit law looked specifically at the licensing regime of the CCA 1974. It is the Government's view that the licensing system needs to be strengthened to ensure that the 'fitness' test used by the OFT takes into account an applicant's competence and preparedness to run a credit business as well as their past conduct (comparable to Financial Services Authority (FSA) procedures). It also needs to be updated so as to cover new credit activities (such as credit repair) which are not covered by current categories of licensable activity.[41]

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38 Department of Trade and Industry, Full Regulatory Impact Assessment to previous *Consumer Credit Bill* [Bill 16 of 2004-05], November 2004, p30

39 Department of Trade and Industry White Paper, *Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century*, Cm 6040, 8 December 2003

40 Ibid

41 Department of Trade and Industry, *Consultation on the licensing regime of the Consumer Credit Act 1974*, January 2003: http://www.dti.gov.uk/ccp/consultpdf/credlic.pdf

3. Lack of effective enforcement and sanctions

At present the CCA 1974 provides few flexible enforcement options or sanctions. The OFT cannot do anything other than seek to revoke, vary or suspend the licence of a non-compliant consumer credit business, and has few powers to compel consumer credit businesses to assist with its investigations. The OFT must amass a significant amount of evidence before issuing a "minded to revoke" notice (MTR).

A refusal, suspension or revocation may put the licensee out of business and, therefore, is only used in the most serious of cases. In 2001-2002, the OFT refused only 27 of 16,293 applications for a licence and 20 of 11,974 renewal applications, and revoked 19 of an estimated 205,000 active licences.[42]

The OFT has developed informal practices, such as sending warning letters to licence holders and seeking undertakings about future practices, but those actions do not carry the same weight as a statutory power. While it is now possible to use Stop Now Orders in many cases to stop the offending conduct, they cannot be relied upon to cover all cases.[43]

Commenting on the failings of the system, the DTI has said:

> This means that enforcement of a type that does not relate to the most serious conduct is generally very difficult. Likewise consumers have few options available to them beyond the complaint and ADR systems maintained by consumer credit trade bodies (which we acknowledge to be effective in specific instances). The only other option is court action, which is expensive and intimidating for many consumers.[44]

The information-gathering powers of the OFT are also deemed to be inadequate. The CCA 1974 does grant the OFT and local authority Trading Standards Departments (TSDs) investigatory powers to enter premises and inspect books and other records, but these are limited to circumstances where the enforcement authority has reasonable cause to suspect that a breach of the CCA 1974 has been committed. They do not apply in respect of unfair business practices or other matters that, while not constituting a breach of the CCA 1974, could nevertheless have a bearing on a person's fitness to hold a licence.

Other regulators already adopt a more 'hands-on' approach to managing their licensing regimes. For example, the FSA continues to monitor newly authorised members, although there is no specific probation period. According to the DTI, a continuing process of

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42 Ibid

43 Part 8 of the *Enterprise Act 2002* extends the scope of the Stop Now Order enforcement regime to include a wide range of domestic consumer protection legislation

44 Department of Trade and Industry, Full Regulatory Impact Assessment of the previous *Consumer Credit Bill* [Bill 16 of 2004-05], November 2004, p.20

fitness checking is desirable, with an enhanced system of sanctions where it is felt that the trader is not complying with his statutory obligations as a licence holder.[45]

III Review of consumer credit laws

A. In the UK – review of the CCA 1974

In its White Paper *Modern Markets: Confident Consumers*, published on 22 July 1999, the Government stated its intention to bring consumer credit legislation up to date so that it provides appropriate consumer protection.[46] A discussion document was duly published in March 2000.

A Taskforce on Tackling Over-Indebtedness was set up in October 2000. Its remit is to address concerns about consumer debt in the UK by considering ways of achieving more responsible lending and borrowing. The Taskforce has reported twice to Ministers and many of their recommendations were incorporated in the DTI's 2003 White Paper.[47]

On 1 July 2001, the DTI published a consultation document, *Tackling loan sharks and more!* The DTI sought views on:

- the effectiveness of the existing regulation of information disclosure;
- early settlement;
- unfair credit transactions;
- consumer credit licensing;
- financial limit above which agreements are not regulated under CCA 1974; and
- consumer redress.[48]

Announcing the start of this public consultation, Melanie Johnson, then the Consumer Minister, said:

> Our credit laws are 30 years old and need a radical overhaul to protect people in today's credit market. This is a top priority for the Government.
>
> There has been a worrying increase in the numbers of people falling into the debt trap, getting loans at often extortionate rates which they clearly can't afford to repay.

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45 Department of Trade and Industry, *Consultation on the licensing regime of the Consumer Credit Act 1974*, January 2003: http://www.dti.gov.uk/ccp/consultpdf/credlic.pdf

46 Department of Trade and Industry White Paper, *Modern Markets: Confident Consumers*, Cm 4410, 22 July 1999

47 Department of Trade and Industry White Paper , *Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century*, Cm 6040, 8 December 2003

48 DTI consultation document, *Tackling loan sharks and more!* 1 July 2001. A summary of responses was published by the DTI in February 2002 (see the Appendix to this Paper)

> Consumers need to know what they are letting themselves in for when they sign up for credit. The expensive catch shouldn't be hidden in microscopic text. It should be explained, up front, by the lender.
>
> We will take action to protect vulnerable consumers who are preyed on by rogue traders and make sure that consumers get clear and understandable information so they know exactly what they are getting into before they sign on the dotted line.[49]

The publication of a number of wide-ranging public consultation documents followed. A full list (eight consultation documents and two White Papers) is provided in Appendix 1 to this Research Paper.

The White Paper, *Fair Clear and Competitive - the consumer credit market in the 21st century,* was published in December 2003.[50] In this paper, the Government concluded that the CCA 1974 was becoming out of date in the context of a diverse and complex consumer credit market:

> The laws governing this market were set out a generation ago. In 1971, there was only one credit card available; now there are 1,300. 30 years ago, £32m was owed on credit cards; now it is over £49bn.
>
> The regulatory structure that was put in place then is not the same as the regulatory structure required today. As the credit market has developed, reforms have become necessary to modernise the current regime and update it for the 21st century.[51]

The White Paper outlined plans to use both secondary and primary legislation to improve the regulation of consumer credit. Commenting on this reform package, Patricia Hewitt, Secretary of State for Trade and Industry and Minister for Women and Equality, said:

> New protections will go hand in hand with a series of changes to promote a more open, competitive market, offering more choice and less restriction.
>
> This White Paper proposes a range of legislative changes relevant to the credit market of today. It will be regulated in a way that provides consumers with choice, information and protection at the right time. It also outlines our plans for a strategic approach to minimising over-indebtedness and improving financial

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49 Department of Trade and Industry press notice P/2001/398, *Johnson announces biggest overhaul of credit laws for a generation*, 25 July 2001

50 This White Paper can be viewed on the DTI website at: http://www.dti.gov.uk/ccp/topics1/pdf1/creditwp.pdf

51 Department of Trade and Industry White Paper, *Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century*, Cm 6040, 8 December 2003

> inclusion by educating consumers; providing easier access to financial advice; and ensuring access to affordable credit.[52]

On the same date, 8 December 2003, the DTI published a consultation document, *Establishing a Transparent Market*, which sought comments on those legislative changes that could be achieved through secondary legislation.[53] Subsequently, the following Statutory Instruments were laid before Parliament:

- *Consumer Credit (Disclosure of Information) Regulations 2004* – to ensure that contract terms and conditions in credit agreements are fair and written in plain English.[54]
- *Consumer Credit (Agreements) (Amendment) Regulations 2004* – to introduce one set of rules for paper and electronic communications concluding credit agreements.[55]
- *Consumer Credit (Early Settlement) Regulations 2004* – to introduce a more accurate formula for determining an early settlement figure than the Rule of 78 and details of early settlement rights to appear on the face of the credit agreement.[56]
- *Consumer Credit (Advertisements) Regulations 2004* – to ensure clearer and more understandable credit agreements.[57]
- The *Consumer Credit (Miscellaneous Amendments) Regulations 2004*.[58]
- The *Consumer Credit 1974 (Electronic Communications) Order 2004* – to enable the use of electronic communications for concluding regulated agreements and when sending notices and documents.[59]
- The *Consumer Credit (Enforcement, Default and Termination Notices) (Amendment) Regulations 2004* - to ensure that all such notices sent under the Regulations are sent in paper format.[60]

Other reforms proposed by the White Paper (relating to unfair credit relationships, consumer credit licensing, the financial limit and consumer redress), require primary legislation and are to be implemented by this *Consumer Credit Bill*.[61] The Government hopes that the reforms already introduced by the new 2004 regulations, and those to be

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52 HC Deb 8 December 2003 c 74WS

53 The consultation document can be viewed on the DTI website at: http://www.dti.gov.uk/ccp/topics1/pdf1/creditpiu.pdf Responses to the document can also be viewed at: http://www.dti.gov.uk/ccp/topics1/pdf1/creditconres.pdf

54 SI 2004 No. 1481

55 SI 2004 No. 1482

56 SI 2004 No. 1483

57 SI 2004 No. 1484

58 SI 2004 No. 2619

59 SI 2004 No. 3236

60 SI 2004 No. 3237

61 A previous *Consumer Credit Bill* [Bill 16 0f 2004-05] fell on dissolution

implemented by this Bill, will lead to higher standards of behaviour in the consumer credit market to the benefit of consumers.[62] Consumer Minister Gerry Sutcliffe has said:

> While credit is a useful tool for the majority, unfair lending and ill-informed borrowing decisions can cause real problems for some people. This Bill is an important step towards achieving our objectives of creating a fair, clear and competitive consumer credit market, and enhancing consumer protection, particularly for the most vulnerable.[63]

A joint DTI and Department for Work and Pensions Paper, *"Tackling over-indebtedness – Action Plan 2004"*, was published on 20 July 2004.[64] There has also been an inquiry by the Treasury Select Committee into the transparency of credit card charges.[65]

B. In Europe – new proposals affecting consumer credit

Figures reproduced by the DTI indicate that Britain has the most "energetic and competitive credit market in Europe" accounting for over 30% of consumer credit in the EU15 in 2002.[66]

The UK and other Member States have found the 1987 *Consumer Credit Directive* 87/102/EEC inadequate to regulate the EU credit market.[67] A major criticism of the Directive is that it sets only the minimum requirements necessary for regulation across the EU. This has allegedly led to competitive distortions in the EU credit markets, thereby restricting consumer access to buy credit in other Member States.

The European Commission has brought forward two proposals aimed at strengthening consumer protection and establishing a single market in consumer credit: a revised draft *Consumer Credit Directive* and a draft *Unfair Commercial Practices Directive*. For the UK these proposals will have an important impact on consumer credit regulation:

> A revision of existing law is an opportunity for the UK credit industry (worth 40% of the EU credit market which exceeds £500bn[68]) to expand with legal

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62 Department of Trade and Industry White Paper, *Fair, Clear and Competitive – The consumer credit market in the 21st century*, Cm 6040, 8 December 2003

63 Department of Trade and Industry press notice, *"Consumer Credit Bill"*, 19 May 2005

64 This document can be viewed on the DTI website at: http://www.dti.gov.uk/ccp/topics1/pdf1/overdebt0704.pdf

65 http://www.parliament.uk/parliamentary_committees/treasury_committee/tc050803.cfm

66 Department of Trade and Industry, *A Consultation on a Proposed European Consumer Credit Directive*, 25 February 2005, URN 05/834, http://www.dti.gov.uk/ccp/topics1/consumer_finance.htm

67 Department of Trade and Industry White Paper, *Fair, Clear and Competitive – The consumer credit market in the 21st century*, Cm 6040, 8 December 2003

68 Consumer Credit Directive Proposal – explanatory memorandum COM(2002) 443 final

> certainty and create an environment where consumers can cross borders to shop for credit with confidence.[69]

1. Draft revised *Consumer Credit Directive*

A proposal for a revised *Consumer Credit Directive* was adopted by the European Commission on 11 September 2002.[70] The aim was to harmonise and expand the EU-wide rules on consumer credit to take into account modern forms of consumer credit and to facilitate the provision of cross-border services. The proposed Directive has since undergone significant changes.

The European Parliament adopted its First Reading position on the draft *Consumer Credit Directive* on 20 April 2004. According to the DTI, the European Parliament has substantially redrafted the Directive:

> …in particular they have altered the scope of the Directive and the level of harmonisation. Whereas the Commission had proposed total harmonisation, the European Parliament prefers 'optimum harmonisation' which in effect means that Member States would retain the right to go further than the standards laid down in the Directive. However, the rules on APR would be subject to full harmonisation in order to facilitate the internal market.[71]

The European Commission accepted a number of the European Parliament's amendments, and adopted an amended proposal on 28 October 2004.[72]

On 25 February 2005, the DTI published a consultation document on the proposed European *Consumer Credit Directive*.[73] In this document the UK Government gave its support to the European Commission's objectives for:

- maximum harmonisation for data sharing, pre-contractual and contractual information and calculation of APRs;
- licensing requirements;
- overdrafts to be governed by a light touch regime, which does not go substantially further than current provisions contained in the 1987 Directive.

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69 Department of Trade and Industry White Paper, *Fair, Clear and Competitive – The Consumer credit market in the 21st century*, Cm 6040, 8 December 2003

70 COM (2001) 443 final

71 Department of Trade and Industry website, Consumer Credit Policy: http://www.dti.gov.uk/ccp/topics1/consumer_finance.htm

72 A copy of the amended proposal can be viewed on the DTI website at: http://www.dti.gov.uk/ccp/topics1/consumer_finance.htm

73 Department of Trade and Industry, *A Consultation on a Proposed European Consumer Credit Directive*, 25 February 2005, URN 05/834, http://www.dti.gov.uk/ccp/topics1/consumer_finance.htm

However, the UK Government continues to have concerns with the current draft of the Directive:

> We believe that some of the proposals place unnecessary burdens on business, reduce consumer protection and do little to create a competitive single market in consumer credit. We believe significant changes are still required to ensure the development of an effective single market in consumer credit, which enables businesses to work with legal certainty and consumers to shop confidently across Europe.
>
> Europe contains vastly different credit markets. Member States need to have the flexibility to introduce specific requirements and consumer protections in a number of key areas. Therefore, we support minimum harmonisation in most other parts of the Directive.
>
> Furthermore, the UK Government believes that the Commission should make substantial amendments to specific provisions contained in the Directive to ensure an appropriate balance between costs to business and benefits to consumers [...][74]

The consultation period ended on 22 April 2005.

It has been suggested that the parallel proposals for consumer credit reform from the Government and the EU Commission may create a confused and duplicating legislative structure in the UK that places burdens on business.[75] In response the Government has said that it had to decide whether to wait for the Directive to win agreement among Member States, or to get on with work on the Bill.[76]

The Government has confirmed that it will work closely with the European Commission, other Member States and the European Parliament to ensure that the revised Directive works in the best interests of the UK.[77] In the meantime, the Government has decided to go ahead with reform of the CCA 1974; it does not believe it would be right to hold up domestic reform until the Directive is agreed.[78] It expects UK regulation to be consistent with and to complement European legislation.

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74 Department of Trade and Industry, *A Consultation on a Proposed European Consumer Credit Directive*, 25 February 2005, URN 05/834, http://www.dti.gov.uk/ccp/topics1/consumer_finance.htm

75 HC Deb 3 March 2005 c.1170

76 HC Deb 3 March c1171

77 Ibid

78 HC Deb 3 March 2005 c1170

2. Draft *Unfair Commercial Practices Directive*

On 18 June 2003, the European Commission proposed a Directive on *Unfair Commercial Practices*.[79] It is to cover all business sectors, including consumer credit.[80] This proposal followed an extensive period of consultation on the future of EU consumer protection that began with a Green Paper issued in October 2001.[81]

The proposed Directive contains a prohibition on unfair commercial practices. A practice will be deemed unfair if it is contrary to 'professional diligence' (i.e. the care and skill exercised by a trader in accordance with usual market practice) and materially distorts (or is likely to materially distort) the economic behaviour of a consumer. It highlights two principal categories of unfair commercial practices:

- misleading commercial practices (actions as well as omissions); and
- aggressive commercial practices.

In each case, the proposed Directive sets out criteria to establish whether a practice is misleading or aggressive and includes an annex containing a non-exhaustive list of examples of unfair commercial practices intended to demonstrate further application of the criteria.

The UK Government has concerns about the possible impact of this proposed Directive on highly-regulated sectors such as financial services:

> The Government is concerned about the possible impact of this cross cutting measure on already highly regulated sectors such as financial services. The Government's broad objectives in future negotiations will be to ensure that any Directive offers effective consumer protection, avoids duplication of regulation, and provides legal certainty for business, consumers and enforcement bodies. The Directive should also complement the provisions of the CCD [Consumer Credit Directive] and the UK reform process through its coverage of marketing and selling practices.[82]

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79 COM (2003) 356 final. The proposed Directive can be viewed at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/directive_prop_en.pdf

80 The draft Directive will be subject to the co-decision procedure, which means that the European Parliament and Council will decide it jointly

81 EC Commission, *Green Paper on European Union Consumer Protection*, 2 October 2001, COM(2001) 531 final, http://europa.eu.int/comm/consumers/policy/developments/fair_comm_pract/fair_comm_gr_eenpap_en.pdf

82 Department of Trade and Industry White Paper, *"Fair, Clear and Competitive – The consumer credit market in the 21st century"*, Cm 6040, 8 December 2004. See also the Government's consultation on the draft *Unfair Commercial Practices Directive*: http://www.dti.gov.uk/ccp/consultpdf/unfaircon.pdf

The DTI issued a consultation paper on the proposed Directive in July 2003.[83] A summary of the replies received and a Government response was published in March 2004.[84] According to the DTI, whilst a large majority of respondents welcomed the twin objectives of the proposed Directive (to improve consumer protection and tackle internal market barriers) many expressed concern about the potential impact on existing UK and EU regulation and the need for the Directive to set proportionate and clear rules.

The Government has stated that in negotiations it will seek to ensure that the proposed Directive is workable, provides legal certainty and avoids duplication of regulation:

> The Government welcomes the scope of the Directive which is targeted on unfair commercial practices affecting the economic interests of consumers, and does not set new rules on contract or competition law, business-to-business relations, health and safety, taste and decency, offensiveness or social responsibility. The Directive should also remain directed at 'unfair' practices rather than setting unnecessarily prescriptive rules for 'fair' practices.
>
> A prime concern for the negotiations will be to ensure that the Directive improves the UK's current consumer protection regime and does not undermine it. The Directive might legitimately require amendment to the existing UK regime and provide an opportunity for simplification and rationalisation but it should not prevent more detailed domestic regulation against unfair practices for specific economic sectors such as financial services where this is necessary. The Government will therefore be seeking amendment to the 'maximum harmonisation' approach to ensure the Directive allows Member States this flexibility. [85]

IV Main provisions of the Bill

The main aim of the *Consumer Credit Bill* is to reform the CCA 1974 under four broad headings:

A. To enhance consumer rights and redress - by replacing the current 'extortionate credit' test with a new broader test based on unfairness to the consumer, and by introducing an Alternative Dispute Resolution (ADR) scheme.

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83 Department of Trade and Industry, *The Unfair Commercial Practices Directive - Consultation on a draft EU Directive Com (2003) 356*, July 2003, http://www.dti.gov.uk/ccp/consultpdf/unfaircon.pdf

84 Department of Trade and Industry, *Consultation on an EC Directive on unfair business – to consumer commercial practices in the Internal Market – Government Response*, March 2004, http://www.dti.gov.uk/ccp/consultpdf/unfairesponse.pdf

85 Department of Trade and Industry, *Consultation on an EC Directive on unfair business – to consumer commercial practices in the Internal Market – Government Response*, March 2004, http://www.dti.gov.uk/ccp/consultpdf/unfairesponse.pdf

B. To strengthen the regulation of consumer credit businesses - by creating a more targeted credit licensing regime and equipping the OFT with new powers to take action against rogue lenders, including financial penalties.

C. To extend regulation to all types of consumer credit and hire agreements (subject to limited exemptions) – by abolishing the financial limit that currently restricts protection under the CCA 1974 to loans of £25,000 or less.

D. To provide debtors with new post-contractual information.

A. Improving Consumer rights and redress

This section should be read in conjunction with Parts I and II of this Paper.

A primary aim of the Bill is to ensure greater fairness in the creditor-debtor relationship. It does this by introducing new provisions against unfair relationships, and a new compulsory ADR scheme for the whole credit industry. According to the Government, its intention is to:

> …improve the ability of consumers to seek redress, make it easier for borrowers and consumer credit businesses to resolve disputes in a speedy, fair and proportionate manner, and act as an incentive to compliance with the procedural requirements of the Act [the CCA 1974] and the enhanced licensing regime.[86]

1. Unfair relationships

The Bill seeks to repeal the extortionate credit provisions of the CCA 1974 (sections 137-140) and replace them with a new 'unfair relationship test'.[87] This new test (i.e. that a consumer credit business should not behave unfairly) is intended to provide a single standard of conduct to all consumer credit businesses which is consistent with industry codes and Financial Services Authority (FSA) regulation.

Specifically, **clause 19** inserts into the CCA 1974 a new section 140A. This new section 140A would enable the court to make a wide range of orders if it finds that the relationship between the creditor and the debtor arising out of a consumer credit agreement is unfair to the debtor. Unlike the old extortionate credit provisions, this new 'unfair relationship' test would cover the entire consumer credit relationship, rather than be simply an assessment of the terms of the agreement and whether they allow for extortionate costs.

The types of agreement covered by this new 'unfair relationship' test are defined by new section 140C inserted into the Act by **clause 21**. Basically, any regulated agreement that

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86 Department of Trade and Industry, Full Regulatory Impact Assessment to previous *Consumer Credit Bill* [Bill 16 0f 2004-05], December 2004, p 29

87 Clauses 19-22 of the Bill

involves the provision of credit to an individual would be covered. The test would also cover the practice where the creditor enters into successive credit agreements with a debtor for the purpose, for example, of increasing the total amount of the debt or obtaining multiple fees from the debtor for setting up each loan. However, the 'unfair relationship test' would not apply to consumer credit agreements secured on land that are already regulated by the FSA under FSMA 2002.[88]

Schedule 3 to the Bill makes it clear that the new unfairness test will have some retrospective effect.[89] The position has been clarified by the DTI as follows:

> The new unfair relationships test will apply to all new credit agreements made after the date that the reforms commence and will apply to any agreements already made which continue in existence at a specified date after commencement. We will consult with consumers and industry as to when this date will be.
>
> The period between the commencement date and the specified date will be a transitional period, to allow creditors to ensure that any agreements that will continue beyond the end of the transitional period comply with the new test.
>
> The old test will continue to apply to agreements that have been completed (e.g. no party has any further obligations under the agreement because no further sums are payable) before the end of the transitional period. The new unfair relationships test will not apply to these agreements.[90]

Whether or not a regulated credit agreement is unfair to the debtor would be determined by the court with reference to all the relevant circumstances including:

- any of the terms of the agreement or of any related agreement;
- the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
- any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement). [91]

Additionally, the court could take into account any other matters it thinks relevant (including matters relating to the specific circumstances of the creditor and debtor in question).[92] If it decides in favour of the debtor, the court could do one or more of the following:

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88 Consumer credit agreements secured on land are exempt under section 16(6c) of the CCA 1974. Such agreements are regulated by the Financial Services Authority under the *Financial Services and Markets Act 2000*

89 Schedule 3 to the Bill, clauses 14-17

90 Department of Trade and Industry, *Questions and Answers on the Consumer Credit Bill*, May 2005: http://www.dti.gov.uk/ccp/creditbill/pdfs/creditbillqa.pdf

91 New section 140A(1) inserted into the CCA 1974 by clause 19 of the Bill

92 New section 140A inserted into the CCA 1974 by clause 19 of the Bill

> (a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);
>
> (b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;
>
> (c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;
>
> (d) direct the return to a surety of any property provided by him for the purposes of a security;
>
> (e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;
>
> (f) alter the terms of the agreement or of any related agreement;
>
> (g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.[93]

However, an order may only be made in connection with a regulated credit agreement in three particular circumstances:

- following an application to the court made by the debtor (or his surety);
- at the request of the debtor (or his surety) in any enforcement proceedings brought by the creditor; or
- at the request of the debtor (or his surety) in any other proceedings where the amount paid or payable under the agreement is relevant.[94]

Importantly, the new unfair relationship test reverses the normal burden of proof: as soon as the debtor (or surety) alleges in court that the credit relationship is unfair, it is up to the creditor to prove otherwise.[95] The credit industry and Members of Parliament have expressed concern about this new burden of proof as well as other aspects of the unfair relationship test.

During Report Stage and Third Reading of the previous *Consumer Credit Bill* various Members criticised the Bill's lack of detail as to what constitutes an unfair agreement and

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93 New section 140B inserted into the CCA 1974 by clause 20 of the Bill
94 New section 140B(2) inserted into the CCA 1974 by clause 20 of the Bill
95 New section 140B(11) inserted into the CCA 1974 by clause 20 of the Bill

the retrospective implementation of the test.[96] It was argued that since the Bill does not state what will constitute an unfair agreement, the courts will have to decide in each case, and lenders will not know what they are supposed to be doing retrospectively. [97] The CBI was also quoted as saying that the burden of proof placed on traders by the unfair relationship test (every creditor-debtor relationship is unfair until proved to the contrary) is extreme.[98]

In response, the Government argued that it was vital that the Bill's provisions do not limit the court's discretion in matters of unfairness:

> That would serve to do two things: narrow the range of matters that the court will consider in determining whether something is unfair, and encourage a culture of minimum compliance by businesses, which operate on the basis that if the practice is not expressly outlawed in law, it is permitted.[99]

The Joint Committee on Human Rights has considered the retrospective application of the provisions and whether they are compatible with the principle of legal certainty in Article 1 Protocol 1 of the ECHR.[100] It held that there is no general presumption that legislation does not alter the existing legal situation or existing rights:

> …the very purpose of Acts of Parliament is to alter the existing legal situation and this will often involve altering existing rights for the future.[101]

Instead, the Joint Committee concluded that the provision to apply the unfairness test retrospectively is an interference with property rights. The Government's justification for this provision is that it is essential that many consumers are not deprived of the new protection for a long period of time given that some credit agreements run for five to twenty years, and that the provision therefore strikes a fair balance between the interests of the industry and the objective to improve consumer protection.[102] The Joint Committee accepted this explanation. In its view, the retrospective application of the provisions concerning unfair credit relationships does not give rise to any significant risk of incompatibility with Article 1 Protocol 1.

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96 Originally Bill 16 of session 2004-05. This Bill fell on dissolution

97 HC Deb 3 March 2005 c 1157

98 HC Deb 13 January 2005 c 466 and HC Deb 3 March 2005 c 1172

99 HC Deb 3 March 2005 c1161

100 House of Lords and House of Commons Joint Committee on Human Rights, *Scrutiny: Seventh Progress Report*, Fifteenth Report of Session 2004-05, 23 March 2005, HL Paper 97 and HC 496

101 House of Lords and House of Commons Joint Committee on Human Rights, *Scrutiny: Seventh Progress Report*, Fifteenth Report of Session 2004-05, 23 March 2005, HL Paper 97 and HC 496. See also the House of Lords case *Wilson* [2003] UKHL 40, HRLR 33, para.192

102 Department of Trade and Industry, *Full Regulatory Impact Assessment to previous Consumer Credit Bill [Bill 16 of 2004-05]*, November 2004, this Bill fell on dissolution

There is an interaction between these provisions and Part 8 of the *Enterprise Act 2002 (EA 2002)*, which empowers the OFT to bring proceedings against a person who, as a consequence of a breach of a statutory obligation, harms the 'collective interest' of consumers. Under **clause 22** of the Bill, the OFT would be required to give advice about the interaction between the provisions on unfair relationships and Part 8 of the EA 2002.[103] For example, it may choose to publish guidance on practices that could give rise to an unfair relationship between creditors and debtors.

2. Compulsory Alternative Dispute Resolution (ADR) scheme

Clauses 59 to **61** and **schedule 2** of the Bill would provide consumers with free access to a new ADR scheme to be run by the existing Financial Ombudsman Service (FOS). The DTI hopes that for both consumers and businesses, the new ADR procedure will provide a quick, efficient and easy resolution of consumer disputes, at considerably less cost than court action.

The FOS was set up as an independent dispute resolution service under Part 16 of the *Financial Services and Markets Act 2000* (FSMA 2000). The FOS, which is free to consumers, already deals with disputes about mortgages, other loans and credit cards between consumers and firms regulated by the FSA. Under the Bill's provisions, the FOS would acquire a broad jurisdiction to determine consumer credit complaints and its decisions would be capable of enforcement by the courts.[104] Although no appeal system is provided for, its decisions are subject to judicial review.

The ADR procedure would be mandatory for all consumer credit businesses operating under a standard licence under the CCA 1974; the scheme would not apply to unlicensed credit businesses or those covered by group licences.[105] Group licensed businesses are already subject to their own professional ADR schemes. Creditors would have a legal duty to refer complaints to the FOS where a debtor requests this; debtors would not have to pay at all and would have disputes determined by an independent adjudicator.

The detailed operation of the new ADR procedure would be determined largely by rules ('consumer credit rules') to be made by the FOS after public consultation and approval by the FSA.[106] The FOS would also be allowed to specify a maximum limit for compensation that can be awarded under its consumer credit jurisdiction.[107]

Before a complaint to the FOS can be made, the complainant (either an individual or a surety) must meet the relevant eligibility criteria set by the CCA 1974 and the FOS.[108] In

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103 New section 140D inserted into the CCA 1974 by clause 22 of the Bill
104 Schedule 2 16D of the Bill
105 New section 226A(2) and (3) of the FSMA 2000 inserted by clause 59 of the Bill
106 New section 226A(7) of FSMA 2000
107 Clause 61(5) of the Bill
108 New section 226A(4) of the FSMA 2000 inserted by clause 59 of the Bill

addition, the ADR scheme would only be available once a consumer has complained to the credit business's own complaints-handling mechanism, and has exhausted all relevant avenues for redress.[109] If the complaint could be dealt with under the FOS's existing compulsory jurisdiction it would not be dealt with under its consumer credit jurisdiction. In practice, this would mean that a complaint involving an FSA authorised firm engaged in a consumer credit activity will be covered by FSA rules under section 226 of the FSMA 2000, rather than consumer credit rules under new section 226A of the same Act.[110]

The cost of establishing and running the new consumer credit jurisdiction of the FOS will be met by an annual levy to be imposed by the FOS on all relevant businesses but collected by the OFT at the same time as it collects the credit licence fee.[111] The FOS may also include a fee to cover the costs of collection. [112] There would also be a 'case fee', but the first two complaints about a particular business handled by the FOS would not incur this fee.

A contravention by a licence holder of any provision relating to the FOS's consumer credit jurisdiction may be considered by the OFT in determining that person's fitness to hold a licence. The Bill amends section 353 of the FSMA 2000 to allow the FOS to disclose information about cases and decisions to the OFT to assist the OFT to discharge its licensing functions under the CCA 1974.

The Finance and Leasing Association (FLA) has already questioned the necessity for introducing a mandatory ADR scheme. Responding to a previous DTI consultation document on the introduction of an ADR scheme, the FLA gave a number of reasons as to why it was not in favour of referring complaints immediately to a formal ADR provider:

> We, and our members, regard our complaints handling scheme as playing an important role in resolving consumer credit disputes. Consequently, we see no benefit in referring each and every consumer credit complaint directly to an Ombudsman or arbitrator, particularly one with a charging structure comparable to that of FOS. First, conciliation is an important step in the complaint resolution process. Secondly, the immediate reference of complaints to a formal ADR provider would have a directly negative cost impact upon our members, which would inevitably have a knock on effect to consumers. And finally, we believe that we can offer added value to the consumer by way of our favourable complaint resolution time (…) and the personalised service we offer. Moreover, the data we obtain in the course of operating the scheme gives us a strong feel as to how our code of practice (the Lending Code) is functioning and is how we

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[109] New schedule 2 part 3A and schedule 17 to the FSMA 2000, section 16B(1)
[110] New section 226A(f) of the FSMA 2000 inserted by clause 59 of the Bill
[111] New section 234A inserted into Part 16 of the FSMA 2000 by clause 60 of the Bill
[112] New section 234A(2) inserted into the FSMA 2000 by clause 60 of the Bill

> ensure the Code remains relevant to the industry. It helps us monitor the effectiveness of members' complaints handling. Loss of this intelligence would severely hamper the development of our Code and would be a retrograde step. [113]

The DTI acknowledges that there are already a number of informal dispute resolution schemes run by trade associations that currently provide an option other than the courts for some consumer credit disputes. However, in its view there are a number of reasons why a new mandatory ADR scheme should be introduced:

> The existing schemes are effective but they are voluntary and are not universal in their application of the Act [the CCA 1974] and consumers may be wary of taking their dispute to an industry body whom they may perceive as being 'on the side of' the business about which they are complaining. An independent ADR scheme that covers all licensed consumer credit business is desirable.[114]

The DTI believes that there are several advantages in using the FOS for ADR as opposed to establishing a new body to perform this function:

- certain consumer credit licence holders are already subject to its jurisdiction for their FSA regulated activities, such as banks and building societies;
- consumer credit firms that arrange insurance are subject to FSA regulation following the implementation of the *Insurance Mediation Directive* in January 2005;
- if a separate body were to be established for ADR, a complaint involving a consumer credit product and payment protection insurance would be split between the FOS and the new body;
- the FOS is a member of Fin-Net, the court-of-court complaints network for retail financial services.[115]

B. Improving the regulation of consumer credit businesses

This section should be read in conjunction with Parts I and II of this Paper.

The licensing system will be reformed by the Bill to bring it closer to the system of authorisation operated by the FSA under FSMA 2000. The OFT will have wider information-gathering powers to determine whether an applicant is fit to hold a credit licence. The Bill will strengthen the OFT's powers to keep "rogues" out of the market, by

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[113] Finance and Leasing Association, *FLA's response to DTI's Consultation Document on the Provision of Alternative Dispute Resolution for Disputes Arising under the Consumer Credit Act 1974*, 16 March 2004, available at: http://www.fla.org.uk/fla_home/Consultation_Papers/Responses%20to%20ADR%20Consultation.doc

[114] Department of Trade and Industry, Full Regulatory Impact Assessment to previous *Consumer Credit Bill*, [Bill 16 of 2004-05], December 2004, p 31. This Bill fell on dissolution

[115] Department of Trade and Industry White Paper, *Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century*, Cm 6040, 8 December 2003

enabling it to look forward to check that a business is competent to undertake credit business before awarding a licence. There will be a more vigorous 'fitness' test for assessing the suitability of applicants and the OFT will also have powers to ensure the ongoing fitness of licence holders. The OFT will adopt a risk-based approach to monitoring.

The Bill would also give the OFT new powers to impose sanctions and civil penalties on licence holders, and would create a new Consumer Credit Appeals Tribunal to hear appeals against decisions taken by the OFT under the CCA 1974.

1. Creating a more targeted licensing regime

a. General power

The CCA 1974 is underpinned by a credit licensing system administered by the OFT. Section 1 of the CCA 1974 currently sets out the general functions of the OFT. **Clause 62** of the Bill amends that section to impose a general duty on the OFT to monitor, as it sees fit, businesses being carried on under licences under the CCA 1974.

b. Investigatory powers

At the moment, the OFT and local authority Trading Standards Departments (TSDs) have only limited powers when trying to establish whether a trader is fit to hold a consumer credit licence.

Clauses 44 to **51** of the Bill would enhance the OFT's powers of investigation so that it could, by notice, insist on seeing any relevant information held by applicants, licensees (of both standard and group licences) and, in specified circumstances, third parties. These powers may include the requirement to produce books, documents and records, along with powers to carry out compliance visits where there is particular concern.

Licensees would also be required to notify the OFT, within 28 days of their becoming aware, of any material change in circumstances relating to their fitness to hold a licence.[116]

Clauses 47 and **48** of the Bill would also enable the OFT to enter premises (other than those used solely as a dwelling) on reasonable notice, and to apply for a warrant to enter and search when a notice requesting information has not been complied with.[117]

Failure to comply with an information requirement under the new section 36B or a request to gain access to premises under new section 36C could result in the OFT applying to the court for an enforcement order.[118]

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[116] Clause 45 of the Bill

[117] Clauses 47 and 48 of the Bill insert new sections 36C and 36D respectively into the CCA 1974

c. Applications for standard licences

Clause 28 of the Bill inserts a new section 24A into the CCA 1974. The aim of this new section is to enable the OFT to manage the standard licence application process more efficiently by requiring people to specify in applications exactly what type of business they want the licence to cover. Specifically, the applicant would be required to state whether he is applying –

(a) for the licence to cover one or more consumer credit business, consumer hire business and ancillary credit business generally (with no limitation); or

(b) for the licence only to cover one or more limited descriptions of business within any of the broad categories of consumer credit business, consumer hire business and ancillary credit business. (The OFT is to specify the descriptions of business within these broad business categories).

It would be for the applicant to define the breadth of licence he requires. The benefit is that the OFT will have to assess 'fitness' to hold a licence only in relation to specified activities within the licensable categories of business. In turn, the applicant will have to satisfy the OFT about his fitness only for the particular sector in which he wishes to operate. Commenting on the potential benefits of this reform to the credit licensing system, the DTI has said:

> Although they may be working in diverse areas of the credit market, at present, traders are assessed in much the same way. By clarifying these different categories, and the levels of risk attached to them, the OFT will be able to target its resources more effectively (for example, more questions might be asked of a specialist finance broker than a high street retailer).[119]

When determining an applicant's fitness to hold a standard credit licence, the OFT would be required under **clause 29** of the Bill to consider:

- the skills, knowledge and experience (in relation to consumer credit, consumer hire or ancillary credit business) of the applicant and anyone who will work for him under that licence; and
- the practices and procedures that will be implemented in connection with the business.[120]

This is in addition to the current requirements under the CCA 1974 for the OFT to consider evidence of past misconduct or offences.[121]

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[118] New section 36E inserted into the CCA 1974 by clause 49

[119] Department of Trade and Industry, *Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century*, Cm 6040, 8 December 2003

[120] Clause 29 of the Bill amends section 25 of the CCA 1974

[121] See Part II of this Paper

The effect of clause 29 is to broaden the 'fitness test'; the OFT would be able to look at an applicant's past track record for misconduct and other offences, and also assess his competence and his preparedness for running a credit business.[122]

If an applicant satisfies the OFT that he is fit to do everything he has applied for, he would be entitled to a licence to do that. If not, there is a power for the OFT to issue him with a more limited licence.[123] The OFT would be required under the Bill to publish guidance as to the way it will determine the fitness of a person to hold a licence.[124]

Already, under sections 30 and 31 of the CCA 1974, licences can be varied by the OFT either on application or compulsorily, whilst section 32 of the CCA 1974 gives the OFT the power to suspend or revoke licences. Under **clause 31** of the Bill, the OFT cannot extend the scope of a licence by compulsory variation.

Under **clause 32** of the Bill, if the OFT decides not to renew a particular licence, to renew a licence on different terms to the application, or to compulsorily vary or revoke or suspend a licence, the licensee would be able to apply to the OFT to defer that action, in order to allow the licensee to transfer or wind up its business or any part of it.[125] The OFT would issue a notice requiring an application for deferral by the licensee within a specified period. If the licensee wished to act on this notice, he would have to make an application for deferral within the period specified in that notice. An applicant may appeal against a refusal by the OFT to defer its licensing action.

d. New indefinite licences

Clause 34 allows the OFT to move away from its current five-yearly licence renewal process to a new system of indefinite standard licences with periodic payments to maintain the licence. The Government hopes that this reform will significantly reduce the current administrative burden on businesses and enable the OFT to target those businesses and sectors which propose the greater risk to consumers.[126]

A standard licence would be valid indefinitely unless-

a) the application for its issue requests that it have effect for a limited period only; or

b) the OFT thinks there is good reason why it should have effect for a limited period only.

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[122] FSA regulated firms are already deemed 'fit' by definition

[123] Sections 25(1) to (1AD) of the CCA 1974 as amended by clause 29 of the Bill

[124] New section 25A inserted into the CCA 1974 by clause 30 of the Bill

[125] New section 34A inserted into the CCA 1974 by clause 32 of the Bill

[126] Department of Trade and Industry White Paper, *Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century*, Cm 6040, 8 December 2003

However, group licences would have effect for a limited period only (normally renewable every five years) unless the OFT thinks there is a good reason why it should have effect indefinitely. This is to allow the OFT to oversee the activities of the group licence holder, who is responsible for ensuring that members of the group are fit to operate in the consumer credit market.

Under **clauses 35** to **37**, the current licence renewal fee is replaced with a periodic licence fee payable to the OFT. The Bill provides that periodic payments are required to keep indefinite licences in force and the consequence of non-payment is termination of the licence.[127]

The Joint Committee on Human Rights questioned whether the introduction of such a requirement in relation to licences of previously unlimited duration would interfere with the peaceful enjoyment of possessions under Article 1 Protocol 1. However, there is provision in the Bill to extend the period for payment, to allow a licensee to re-apply for a licence in the event of termination, and to control the use of licences when they are made indefinite. Therefore, the Joint Committee was satisfied that the introduction of a power to terminate otherwise indefinite licences does not give rise to any significant risk of incompatibility with Article 1 Protocol 1.

2. Sanctions

A major criticism of the current licensing system under the CCA 1974 is that it fails to provide the OFT with sufficient powers to tackle improper or unfair conduct by consumer credit businesses.

To remedy this failing, the Bill would provide the OFT with new powers to apply intermediate sanctions to tackle behaviour which causes detriment to consumers but which does not render a business 'unfit', and new powers to impose civil penalties. [128] It would also establish a Consumer Credit Appeals Tribunal.

a. New intermediate sanctions

Clause 38 inserts a new section 33A into the CCA 1974. This new section applies where the OFT is dissatisfied with any matter in connection with –

- a business being carried on, or which has been carried on, by a licensee or by an associate or a former associate of a licensee;
- a proposal to carry on a business which has been made by a licensee or by an associate or a former associate of a licensee; or

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[127] The OFT can extend payment periods in respect of indefinite licences if it believes there is good reason for doing so

[128] The use of intermediate sanctions would be in addition to the OFT's existing powers of revocation, suspension or variation of a licence

- any other conduct of such a person whether occurring before or after the person became a licensee.

Under this new section, the OFT could, by notice, impose special conditions on (or take undertakings from) licensees in order to address unfit conduct. These special conditions would be specific to a particular licence-holder, to ensure that the business is meeting its fitness requirements (for example, a training requirement). A breach of a condition could lead to the licence-holder having a financial penalty imposed by the OFT, or ultimately the revocation, suspension or variation of his licence.

In relation to group licences, **clause 39** inserts a new section 33B into the CCA 1974. This new section deals with the power of the OFT to impose special requirements (or conditions) on the so-called 'responsible person' in respect of a group licence where the OFT is dissatisfied with the way in which that person is regulating (or has regulated) the conduct of the group.

For the purposes of the Bill, a person is a 'responsible person' in relation to a group licence if he is the original applicant under it and he has responsibility (whether by virtue of an Act, an agreement or otherwise) for regulating or otherwise supervising persons who are licensees under the licence.

Again, the OFT may, by notice to the responsible person, require him to do, stop, or not do anything specified in the notice in order either to correct the matters giving rise to the OFT's concern, or to ensure that the same or similar matters do not arise in the future.

Clause 40 of the Bill inserts yet another new section, section 33C, into the CCA 1974. This new section is significant because it empowers the OFT to vary or revoke these special conditions on its own motion or on application by the licence-holder or any person named in a requirement and in some material way affected by it (for example, someone who is prevented from being employed by the person on whom the requirement is imposed, or restricted as to the activities that he may engage in as an employee).

The OFT must follow a strict procedure when imposing special conditions as an intermediate sanction. This is set out in new section 33D inserted into the Act by **clause 41** of the Bill. In essence, a decision to impose a special condition (or undertaking) or financial penalty would be subject to the same procedural safeguards as a decision to refuse, revoke or vary a credit licence. Under **clause 43** of the Bill, there would be a right of appeal for persons on whom a special condition is imposed (and affected persons) against imposition, variation or revocation of a special condition by the OFT.

The OFT would be required under the Bill to issue guidance as to how it exercises or how it proposes to exercise its powers in relation to the imposition, variation or revocation of

special conditions.[129] It would also be required to record special conditions and details of their variation in a public register.

b. New OFT powers to impose civil penalties

Clause 52 inserts new section 39A into the CCA 1974. This new section would empower the OFT to impose civil penalties on persons who do not comply with a condition imposed by the OFT under:

- new intermediate power to impose requirements on licensees (new section 33A);
- new intermediate power to impose requirements on a group licence (new section 33B); or
- new duty on licensees to notify OFT of certain changes to their circumstances (new section 36A).[130]

If a person has failed to comply with such a requirement, then the OFT may, by first issuing a penalty notice, impose a penalty of up to £50,000 per breach.[131] This is the maximum penalty that may be imposed by the OFT for every breach of condition.

A penalty notice must contain the following information:

- the OFT's reasons for deciding that a person is liable to a penalty;
- the amount of the penalty that is being imposed and how this figure was determined;
- how the payment of the penalty may be made;
- the period within which the penalty must be paid to the OFT (which should not be earlier than the end of the period during which an appeal may be brought against the imposition of the penalty); and
- an invitation to make representations in accordance with section 34 of the CCA 1974.

Before imposing a fine, the OFT must have regard to any other steps which it has taken or it might take in relation to the conduct in question. Other options available to the OFT include revocation or suspension of a licence.

In respect of a group licence, the OFT must give a general notice of the imposition of a penalty on the responsible person. This must also include the OFT's reasons for deciding

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[129] New section 33E inserted into the CCA 1974 by clause 42 of the Bill

[130] Inserted into the CCA 1974 by clauses 38, 39 and 45 of the Bill

[131] The maximum penalty may be changed by an order by the Secretary of State (approved by a resolution of both Houses of Parliament)

that the group is liable to a penalty, state the amount of the penalty to be imposed and set out the OFT's reasons for determining that amount.[132]

Anyone who has had a civil penalty imposed on him by the OFT may appeal to the new Consumer Credit Appeals Tribunal (see below).

The Joint Committee on Human Rights has considered the new powers given to the OFT by the Bill to impose civil penalties.[133] Since the use of civil penalties is surrounded by a number of procedural safeguards against the disproportionate exercise of this power, the Joint Committee accepted that it is likely that the power is compatible with Article 1 Protocol 1 of the ECHR.[134]

c. Consumer Credit Appeals Tribunal

Under the Bill, the appeals process for consumer credit and hire businesses against OFT decisions will be made more transparent than it is at present.

Clause 55 and **schedule A1** of the Bill would establish a new Consumer Credit Appeals Tribunal (CCAT) and give the Lord Chancellor the power to make its procedural rules.

If the Bill is enacted, appeals in respect of decisions taken by the OFT under the CCA 1974 will be to the new CCAT and not to the Secretary of State (as is currently the case). The time limit for claims and the form of notice of appeal would be specified in the rules of the Tribunal.

If dissatisfied with the outcome of an appeal to the Tribunal, there would be a right of appeal to the Court of Appeal of England and Wales or the equivalent courts in Northern Ireland or Scotland.[135] However, the appeal must be on a point of law against a decision of the Tribunal. If the Appeal Court considers that the decision is wrong in law it may overturn or vary the decision, substitute a decision of its own for the decision of the Tribunal or return the matter back to the Tribunal for a rehearing and decision. Ultimately, an appeal may be made from the Courts of Appeal to the House of Lords with the leave (i.e. permission) of the court or of the House of Lords.[136]

By virtue of **clause 58(5)** of the Bill, the CCAT would be covered by the *Tribunals and Inquiries Act 1992* and as a consequence would be subject to the supervision of the Council on Tribunals.

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132 New section 39B inserted into the CCA 1974 by clause 53 of the Bill

133 Clauses 44-46

134 House of Lords and House of Commons Joint Committee on Human Rights, *Scrutiny: Seventh Progress Report*, Fifteenth Report of Session 2004-05, 23 March 2005, HL Paper 97 and HC 496

135 New section 41A inserted into the CCA 1974 by clause 57 of the Bill

136 Appeals from the Court of Session lie to the House of Lords by section 40 of *Court of Session Act 1988*

d. Concerns about increased OFT powers

The credit industry and Members have expressed concern about the Bill giving too many unfettered powers to the OFT.[137]

During the Report Stage of the previous *Consumer Credit Bill* Members argued that although Parliament can control the OFT through legislation, it has little control on the OFT's day-to-day activities.[138] In response, the Government argued that a strengthened OFT role would be beneficial to the consumer:

> We need to make sure that where the industry does not behave properly, suitable regulatory powers are available to the Office of Fair Trading. We also want to make sure that consumers are fully aware of the detail of the relevant agreements.[139]

The Joint Committee on Human Rights has also considered the implications of the OFT's new powers to regulate the conduct of licensees.[140]

The Bill provides the OFT with a new, broadly drafted power to impose requirements on licensees.[141] It is exercisable where the OFT is dissatisfied with any matter in connection with a business carried on by a licensee (or associate or former associate of a licensee), a proposal to carry on a business, or any other conduct not covered by the first two. The powers are intended to enable the OFT to take more proportionate action than it is currently able to under the CCA 1974. However, the Joint Committee considers that, as drafted, the power is too wide and unfettered to satisfy the requirement under the ECHR of legal certainty and proportionality:

> The lack of specificity in relation to the conditions on which it is exercisable, the purposes for which it can be used and the definition of what may be required, in our view make it tantamount to a plenary power in the OFT to impose whatever requirements it may wish. The exercise of the power will clearly constitute an interference with licensees' peaceful enjoyment of possessions and it must therefore satisfy the requirements of legal certainty and proportionality.
>
> We welcome the Government's attempt to devise more proportionate powers for the OFT in principle, but we are concerned that the entirely unfettered scope of this power fails to satisfy the requirements of reasonable legal certainty and also gives rise to a risk of disproportionate use of the power in practice. We are therefore concerned that this provision as currently drafted, without greater

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137 HC Deb 3 March 2005 c1123
138 HC Deb 13 January 2005 c517
139 HC Deb 3 March 2005 c1125
140 House of Lords and House of Commons Joint Committee on Human Rights, *Scrutiny: Seventh Progress Report*, Fifteenth Report of Session 2004-05, 23 March 2005, HL Paper 97 and HC 496
141 clause 38, inserting new section 33A into the CCA 1974

> specificity, gives rise to a significant risk of incompatibility with Article 1 Protocol 1. We draw this matter to the attention of each House.[142]

In the Explanatory Notes to the re-introduced *Consumer Credit Bill* currently before the House of Commons, the DTI defends the powers given to the OFT against the Joint Committee's concerns:

> The powers of OFT to impose requirements on licence holders to take or refrain from taking certain action will not be used to deprive licensees of their rights under a licence, but to control the exercise of them in appropriate cases in the general interest. This means that there is no conflict with Article 1, Protocol 1 of the Convention, under which it might be asserted that these provisions interfere with licensees' peaceful enjoyment of their possessions (insofar as rights under a licence amount to 'possessions'). These powers are intended to enable OFT to take more proportionate action than it is currently able to under the Act, and persons on whom requirements have been imposed or, for example, whose employment is adversely affected may appeal to the Consumer Credit Appeals Tribunal. It is not considered that the principle of legal certainty has been breached in relation to the scope of these powers because of the safeguards which will be in place, namely the duty on the OFT to issue guidance; the duty on the OFT to give reasons; the requirement on the OFT to seek representations from persons upon whom the requirement may be imposed and other affected persons; and the right of appeal to an independent Tribunal.[143]

C. Extending statutory regulation to all types of regulated agreements

A main aim of the Bill is to widen consumer credit protection by abolishing the financial limit.

The purpose of the existing CCA 1974 is to protect consumers when entering into small-to-medium value credit or hire agreements. Currently, the CCA 1974 applies only to agreements where credit provided or the hire payments to be made do not exceed £25,000.

In its White Paper, the Government explained the reasons why it believes it is necessary to remove a financial limit to the CCA 1974:

> …more and more consumer agreements are no longer regulated due to an increase in borrowing on second-charge mortgages and unsecured loans above £25,000.

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[142] House of Lords and House of Commons Joint Committee on Human Rights, *Scrutiny: Seventh Progress Report*, Fifteenth Report of Session 2004-05, 23 March 2005, HL Paper 97 and HC 496

[143] Bill 2 – EN, para.130

> In particular, consumers are being encouraged to use secured loans to consolidate unsecured debt. This reduces consumer's monthly payments but spreads their debt over a longer period of time, resulting in higher borrowing costs. In addition, once the borrowing is secured, they run the risk of having their property repossessed in the event of default.
>
> The lack of protection is further highlighted by the fact that from 31 October 2004, the FSA will be given the power to regulate first-charge mortgages, for which there will be no financial limit. However, the FSA will not regulate second-charge mortgages, so those loans above £25,000 would therefore remain unregulated if the financial limit of the CCA is not amended.[144]

Clause 2 of the Bill would remove the financial limit: all consumer credit and consumer hire agreements would then be regulated by the CCA 1974 regardless of the amount of the credit or the amount of the hire payments, unless specifically exempted.[145]

Those consumer credit or hire agreements which would remain exempt from regulation under the CCA 1974 are:

- first-charge mortgages (of any amount), which are already regulated by the FSA under the FSMA 2000;
- certain transactions involving high net worth individuals; and
- business lending above £25,000.

a. Exemption relating to high net worth individuals

The Bill permits 'high net worth' debtors and hirers who meet specific requirements in terms of their annual income or net assets to opt out of regulation under the CCA 1974 on the making of a declaration that they agree to forgo the protection of the Act. The Government gave the following reasons for making this exemption:

> In respect of high net worth consumers, we have considered the concerns of industry that such consumers seeking large sums by way of personal borrowing would, if constrained by regulation under the Act, simply move their business to offshore financial centres with the consequences of a significant reduction in business for British consumer credit businesses.[146]

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144 Department of Trade and Industry White Paper, "*Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century"*, Cm 6040, 8 December 2003

145 Clause 2(3) of the Bill extends the application of the provisions regulating credit advertisements to advertisements offering credit regardless of the sums involved and whether the creditor requires security

146 Department of Trade and Industry, Full Regulatory Impact Assessment to previous *Consumer Credit Bill*, [Bill 16 of 2004-05], November 2004, this Bill fell on dissolution

b. Exemption relating to business lending

Clause 1 of the Bill substitutes a new, narrower, definition of 'individual' in section 189(1) of the CCA 1974. 'Individual' (i.e. those who can come under the protection of the Act) would continue to include unincorporated bodies which do not consist entirely of bodies corporate and are not partnerships, but partnerships would be included only if they consisted of two or three persons not all of whom are bodies corporate.

So, partnerships of four or more members would not be covered by the CCA 1974 in respect of future borrowing or hire transactions regardless of how much or little these transactions are worth (these partnerships will be exempt in the same way as bodies corporate for the purposes of the Act).

Clause 4 of the Bill exempts business credit and hire agreements from regulation under the CCA 1974 where the credit provided or hire payments to be made exceed £25,000.[147]

For the purposes of clause 4, a credit or hire agreement will be presumed to be wholly or predominantly for business purposes where it includes a declaration by the debtor or hirer to that effect, unless at the time the agreement was made, the creditor or owner (or any other person acting on his behalf in relation to the agreement) knows or has reasonable cause to suspect that the declaration is not true. If there is any doubt as to whether an agreement is for a business purpose, all the circumstances of the proposed transaction will be taken into account.

From this reading of clauses 1 and 4 of the Bill, it follows that business lending will be regulated by the CCA 1974 only if the lending is less than £25,000 in value and is to small businesses (i.e. sole traders, partnerships of three partners or less and other unincorporated bodies not consisting entirely of bodies corporate). [148]

c. Enforceability of regulated agreements in cases of infringement

Removing the financial limit means that more agreements could potentially be declared unenforceable when there has been infringement by the lender.

Section 127 of the CCA 1974 currently governs the enforceability of agreements and sets out the powers a court has to enforce a regulated agreement. In cases where certain requirements of the Act, relating to the form and content of an agreement, have not been followed by the lender, the court has discretion to consider whether to make an agreement enforceable.[149] However, in certain instances, the court is prevented from making an enforcement order (i.e. the agreement will be automatically unenforceable) if the

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[147] New section 16B inserted into the CCA 1974 by clause 4

[148] Clause 5(7) of the Bill provides that the Secretary of State has power by order to alter the amount of £25,000 under new section 16B. That power is subject to the affirmative resolution procedure

[149] Sections 127(1) and (2) of the CCA 1974

agreement is not properly executed (for example, the documents were not in a certain prescribed form or signed) or where the lender has failed to provide a cancellation notice in terms prescribed in the Act.[150]

In its White Paper, the Government confirmed its view that removing the financial limit could expose lenders to greater liability where agreements are held to be unenforceable:

> A more proportionate approach to enforcement will therefore be sought which will seek to balance, on the one hand, the objective of ensuring that particular attention is paid to the inclusion of certain terms in documentation signed by borrowers, and on the other, the financial consequences of unenforceability by lenders.[151]

As a result, **Clause 15** of the Bill would give the court the power to determine in its discretion whether agreements are enforceable regardless of the breach.[152]

D. Provision of new post-contractual information to consumers

According to the Government's White Paper, a contributory factor identified in relation to the escalation of consumer debt has been the lack of ongoing information that many borrowers receive concerning their credit agreement:

> This is of particular concern to consumers who fall into arrears, as they are often unaware of the consequences of charges on their account, default costs for missed payments, compound interest on the amount owed or underpayment on the accumulation of their debt.
>
> At present, although the CCA 1974 contains some duties on the lender to provide information, these are generally only triggered by a request from the consumer. There is no obligation on a lender to provide regular statements or, crucially, to inform consumers when payments have been missed.[153]

The Government has introduced new Regulations about pre-contract disclosure and early settlement to improve the quality of the information consumers receive from consumer credit businesses.[154] The Bill now requires creditors to provide various different types of post-contractual information in relation to regulated fixed-sum credit and running-account

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[150] Sections 127(3) and (4) of the CCA 1974
See also *Wilson & Others v. Secretary of State for Trade and Industry* (Appellant) [2003] UKHL 40

[151] Department of Trade and Industry White Paper, *Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century*, Cm 6040, 8 December 2003

[152] Clause 15 of the Bill repeals section 127(3) to (5) of the CCA 1974

[153] Department of Trade and Industry White Paper, *Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century*, Cm 6040, 8 December 2003

[154] *Consumer Credit (Advertisements) Regulations 2004; Consumer Credit (Agreements)(Amendment) Regulations 2004; Consumer Credit (Disclosure of Information) Regulations 2004;* and the *Consumer Credit (Early Settlement) Regulations 2004*

credit accounts: annual statements, notices of arrears, and notices when default sums are payable.

Fixed-sum credit is any facility under a personal credit agreement (other than running-account credit) whereby the debtor is enabled to receive credit (whether in one amount or in installments).[155] A fixed-sum credit agreement is for a definite amount (whether fixed at the time of the contract or determinable thereafter according to its terms), so that repayments will in due course result in the credit being discharged, and if the debtor wants fresh credit he has to negotiate a new agreement. Examples of fixed-sum credit agreements are hire-purchase, conditional sale, credit sale and fixed loan agreements (as opposed to overdraft).

Running-account credit can be defined as a facility under a personal credit agreement whereby the debtor is enabled to receive from time to time from the creditor (or a third party) cash, goods and services (or any of them) to an amount or value such that (taking into account payments made by or to the credit of the debtor) the credit limit (if any) is not at any time exceeded.[156] The most common examples of running account credit agreements are bank overdrafts, credit card accounts and store card accounts.

1. Annual statements

To ensure greater transparency for consumers, the Bill will require creditors to provide annual statements - at no direct cost to the consumer – detailing prescribed information about the account. The aim is that consumers will be kept informed of the status of their accounts throughout the life of the agreement.

If there are two or more debtors in respect of a regulated fixed-sum or running-account credit agreement, it would be permissible under the Bill for one debtor to provide a dispensing notice to the creditor so as to release the creditor from his obligation to provide a statement to him.[157] However, dispensing notices will not be effective if that would mean that no debtor will receive an annual statement under new sections 77A or 78.

a. For fixed-sum credit accounts

Clause 6 of the Bill, which inserts a new section 77A into the CCA 1974, requires consumer credit businesses to issue annual statements for all regulated fixed-sum credit accounts with a term of more than 12 months. The first statement is required within one year of the day after the date on which the agreement was made. The form and content of the annual statement is to be specified in regulations, but it is likely to include:

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[155] Section 10(2) of Part II of the CCA 1974
[156] Section 10(1) of Part II of the CCA 1974
[157] New section 78(4A)(3) inserted into the CCA 1974 by clause 7 of the Bill

- specific information detailing what has happened with the account over the previous 12 months;
- information about the consequence of failing to make payments or only making minimum payments;
- and some general information about debt advice and the resolution of any complaint.

A creditor would not be required to give the debtor an annual statement if there are no further sums payable under the agreement.[158]

If a creditor failed to provide an annual statement when required to do so, he would not be entitled to enforce the agreement during the period of his non-compliance and the debtor would not be liable to pay any interest during this period. Importantly, the debtor would also not be liable to pay any default sum that would have become payable during the period of non-compliance or would have become payable after the end of that period in connection with a breach of the agreement occurring during that period.[159]

b. For running-account credit agreements

Clause 7 of the Bill has a similar purpose to clause 6. It inserts a new section 78(4A) into the CCA 1974, which would require creditors to issue annual statements for all regulated running-account credit agreements.

2. Notice of arrears

Under the Bill the creditor will be required to send statements to the debtor more frequently if the account falls into arrears.

a. For fixed-sum credit agreements

Under new section 86B, inserted into the CCA 1974 by **clause 9** of the Bill, consumer credit and hire businesses would be required to issue an arrears notice 14 days after an account goes into arrears.[160] Thereafter the credit or hire business is required to give the debtor or hirer a notice of sums in arrears at intervals of six months until:

- he ceases to be in arrears and has paid all sums of interest or default sums that are payable; or
- a court judgment is made in relation to the sums payable under that agreement.

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[158] New section 77A(4) inserted into the CCA 1974 by clause 6 of the Bill
[159] New section 77A(6) inserted into the CCA 1974 by clause 6 of the Bill
[160] New section 86B is inserted into the CCA 1974 by clause 9 of the Bill

Clause 9 defines arrears by reference to a failure to make a specified number of contracted repayments.

The form and content of the arrears notice is to be prescribed by regulations but it is expected to include information about any fees and charges payable. The notice will also be required to attach an OFT information sheet on arrears, which will outline information about the options available to the debtor (for example, debt management options, time orders and contact details of debt advice providers).[161]

b. For running account-credit agreements

The Bill does not amend section 78(4) of the CCA 1974 in respect of the consumer credit business's duty to provide periodic settlements for running-account credit. It does, however, require the content of such running-account statements to include a new generic warning about the potential effect of making only minimum payments.

New section 86C, inserted into the CCA 1974 by **clause 10** of the Bill, would also provide that if a regulated running-account credit agreement falls into arrears a creditor must give the debtor a notice of sums in arrears, in the specified form, including an OFT arrears information sheet. Again, arrears are defined by reference to a failure to make a specified number of contracted repayments. The creditor must give the notice at a time no later than the time that he is required to give the debtor the next regular statement under section 78(4) of the 1974 Act.[162] The cost of preparing and issuing the notice must be borne by the creditor (not the debtor).

c. Failure to give notice of sums in arrears

New section 86D, inserted into the CCA 1974 by **clause 11** of the Bill, would provide that if a consumer credit or hire business fails to give an arrears notice when required to do so in respect of a regulated fixed-sum or running-account credit agreement, the business shall not be entitled to enforce the agreement during the period of non-compliance. Specifically, it provides:

- during the period of its failure to provide the notice (i.e. from the date that it was required to be given to the date on which it is eventually provided), the business is not entitled to enforce the agreement;
- the debtor or hirer is not liable to pay any interest that relates to the period of non-compliance or to any part of it; and
- the debtor or hirer is not liable to pay any default sum which becomes payable during the period of non-compliance or where the business has failed to provide a

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[161] Under new section 86(A) inserted into the CCA 1974 by clause 8 of the Bill, the OFT is required to publish information sheets for debtors and hirers about arrears and default

[162] New section 86C(2) inserted into the CCA 1974 by clause 10 of the Bill

subsequent notice to the debtor or hirer within six months of the previous notice having been provided.[163]

3. Notices when default sums are payable

a. New definition of default sum

A 'default sum' for breach of the credit agreement is defined by new section 187A, inserted into the CCA 1974 by **clause 18** of the Bill:

> 187A (1) In this Act 'default sum' means, in relation to the debtor or hirer under a regulated agreement, a sum (other than a sum of interest) which is payable by him under the agreement in connection with a breach of the agreement by him.
>
> (2) But a sum is not a default sum in relation to the debtor or hirer simply because, as a consequence of his breach of the agreement, he is required to pay it earlier than he would otherwise have had to.

By way of example, a default sum could be a charge imposed for late payment of an instalment due under the agreement or a fee imposed for exceeding a credit limit on a credit card - but it does not include interest.

b. New requirement to issue default notice

Under new section 86E, inserted into the CCA 1974 by **clause 12** of the Bill, a credit or hire business must give the debtor or hirer notice within the prescribed period when a default sum becomes payable. The Secretary of State has the power to provide that this applies only to default sums above a specific amount.

The cost of preparing and issuing this notice must be borne by the credit or hire business (not the consumer).

If the credit or hire business fails to give notice of a default sum to the debtor when required to do so, the business would not be entitled to enforce the agreement during the period of non-compliance.

c. Form and content of default notice

The form and content of a default notice is prescribed by the *Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983* (SI 1983/1561). **Clause 14** amends section 88 of the CCA 1974 to allow the Secretary of State to prescribe additional information in the default notice, including:

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[163] New section 86D inserted into the CCA 1974 by clause 11 of the Bill

- whether there is an 'interest after judgment' term in the agreement (i.e. a term in the agreement that enables the consumer credit business to continue to apply interest on the debt after a judgment has been obtained);
- where the default notice is served in relation to a hire purchase or conditional sale agreement, a clear statement referring to the debtor's or hirer's rights under section 99 of the CCA 1974 (i.e. the right to terminate hire purchase etc agreements) and the amount that the debtor would be liable for under section 100(1) of the CCA 1974; and
- when a default notice is served on a debtor it should be accompanied with a current OFT information sheet on default.

d. Consequences of serving default notice

A debtor or hirer can be required to pay interest on a default sum only once 28 days have passed since the default notice was given to him by the credit or hire business. Importantly, under **clause 13** of the Bill, a credit or hire business is prevented from compounding any interest that is applied to default charges: only simple interest is permitted.

Clause 14 of the Bill would amend section 88 of the CCA 1974 to extend from seven to 14 days the minimum period which a credit or hire business must wait between issuing a default notice and taking action in respect of breach of the agreement (such as terminating the agreement, demanding earlier payment, or recovering possession of goods).

e. New requirement to give notice of post-judgment interest

Under **clause 17** of the Bill, consumer credit or hire businesses would be required to give notice when they are charging post-judgment interest.[164] This notice, which should be given after judgment and then every six months thereafter, must include information about the rate and amount of interest charged. The debtor would not be liable to pay such interest for any period of non–compliance by the credit or hire business.

f. New provisions on 'time orders'

Section 129 of the CCA 1974 allows a debtor or hirer to apply to the court for a 'time order' to reschedule any payments they are due to make under a regulated credit agreement. This application can be made after they have received a default notice under section 87 of the CCA 1974. **Clause 16** of the Bill would amend section 129 to allow a debtor to seek a time order also when he first receives an arrears notice.[165]

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[164] Clause 17 inserts new section 130A into the CCA 1974. This section does not apply where a court has the power to order that interest at a specified rate be payable on a judgment debt.

[165] In certain circumstances the lender or hirer is required to issue a notice of arrears by new sections 86B and 86C inserted into the CCA 1974 by clauses 9 and 10 of the Bill

V Responses to the Bill

Interested groups have had a number of opportunities to give their views on Government proposals for reform of consumer credit law. They have been invited to respond to various DTI consultation documents, including documents on the reform of very specific aspects of consumer credit law (such as early settlement regulations and consumer credit advertising regulations). For a full list of these consultation papers, see the Appendix to this Paper. Their views have also been sought on Government proposals outlined in two White Papers, *Modern Markets: Confident Consumers* (1999) and *Fair, Clear and Competitive – the Consumer Credit Market in the 21st Century* (2003). In addition, interested groups have had the chance to review the provisions of the Government's previous *Consumer Credit Bill* [Bill 16 of 2004-05]. This Bill was introduced into the House of Commons on 16 December 2004, where it completed all its stages before it fell on dissolution.

The purpose of this section is to give a flavour of the views of various interested groups to the prospect of consumer credit reform. Although some of the views expressed were with specific reference to the previous rather than the current *Consumer Credit Bill*, since the provisions of the two Bills are almost identical, their views remain relevant.

A. Consumer groups

1. General views

The majority of those consumer groups who responded to the publication of the Government's white Paper *Fair, Clear and Competitive – the Consumer Credit Market in the 21st Century* regard reform of consumer credit law as an important and long-overdue measure to improve consumer rights and protection.

Both the National Consumer Council (NCC) and Citizens Advice have written to the Prime Minister and Leader of the House of Commons urging them to give high priority and parliamentary time to a Consumer Credit Bill.[166] Both organisations have long campaigned for reform of the CCA 1974, arguing that the current law is out of date and cannot react to the complex and burgeoning consumer credit industry. Commenting on the re-introduction of the *Consumer Credit Bill*, Teresa Perchard, Citizens Advice Director of Policy, said:

> The law in this area has failed to keep pace with a rapidly changing credit market, and it is low income consumers who can least afford it who have paid the price of inadequate controls.

[166] National Consumer Council press release, *Give consumer credit reforms top priority, Citizens Advice and NCC urge PM,* 9 December 2004

> This Bill gives us the once-in-a-generation opportunity to prevent more people becoming trapped in grossly unfair credit deals from which there is no escape. Credit providers who treat their customers fairly should have nothing to fear from this long-overdue reform, but abuse should no longer be able to shelter behind bad law.
>
> Consumers have waited a very long time for the law to catch up with developments in the credit market. Nothing should now be allowed to stand in the way of these reforms being put in place quickly.[167]

Citizens Advice Bureaux (CABx) are the largest providers of free independent money advice in the UK.[168] According to Citizens Advice, the charity representing the national network of CABx, the number of consumer debt problems dealt with by CABx has risen by nearly three quarters over the last seven years. CABx dealt with nearly 1.1 million debt-related issues in 2004. Consumer debt – which includes credit card debt, store-financed consumer purchases, car loans and personal loans – accounted for two thirds of this figure.[169]

Citizens Advice set out its concerns about the lack of protection provided by the current consumer credit legislation in its December 2000 report *Daylight robbery: the CAB case for effective regulation of the Consumer Credit Act*.[170] It has welcomed a Consumer Credit Bill as an important first step towards tackling extortionate credit agreements and creating a fairer consumer credit market for all consumers.[171] Specifically, Teresa Perchard, Citizens Advice Director of Policy has said:

> Too many consumers have suffered for far too long for want of effective protection from the rogues and villains in the credit market. At long last the Government is calling time on credit rip-offs. The Bill offers a real chance of relief from abusive, aggressive and unfair behaviour by lenders and debt collectors. Those firms that do treat their customers fairly should not fear these much needed reforms.[172]

The DTI has also quoted Teresa Perchard as saying:

> We strongly support key DTI proposals to reform our outdated consumer credit laws. For too long it has been too easy to get a consumer credit licence and too hard to take them away or penalise firms for bad behaviour.

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[167] Citizens Advice, *Consumer credit reform must face no further delays*, 17 May 2005

[168] The Citizens Advice service is a network of independent charities that helps people resolve their money, legal and other problems by providing information and advice

[169] Citizens Advice press notice, *Consumer credit reform must face no further delays*, 17 May 2005

[170] This report can be viewed on the Citizens Advice website at: www.citizensadvice.org.uk

[171] Citizens Advice press release, *Consumer Credit Bill calls time on credit cowboys, says Citizens Advice*, 16 December 2004

[172] Ibid

> The CAB has worked closely with the DTI on the review of consumer credit legislation and is keen to see the investment in developing policy proposals come to fruition.[173]

The NCC has been particularly concerned about high interest rate charges in the doorstep collection credit market. A recent NCC report concluded that a number of characteristics of the market, including a lack of competition, are having an adverse effect on vulnerable low-income borrowers.[174] In June 2004, the NCC submitted a 'supercomplaint' to the OFT asking it to further investigate the UK market for home-collected credit. The NCC has also been lobbying for a simple credit complaints service.[175]

Commenting on the re-introduction of the *Consumer Credit Bill*, Philip Cullum, Deputy Chief Executive at the NCC, said:

> Our 30-year old credit laws are well past their sell-by date, so the re-introduction of the *Consumer Credit Bill* is extremely welcome. It has the potential to improve the lives of millions of people who use credit. It will bring a simpler, more consumer friendly redress system and prevent credit providers lending irresponsibly and treating their customers unfairly.[176]

Which? (formerly the Consumers' Association) is said to support a consumer credit Bill because it should give consumers greater protection against unfair lending.[177] However, it is calling for a number of other measures including: credit cards to have only one way of allocating interest so that people can better compare rates; sharing of customers' full credit history between lenders to ensure responsible lending; and banning the automatic inclusion of Payment Protection Insurance in credit quotes which can increase the cost of the loan without customers realising. [178]

2. A cap on interest rates?

During the three-year review of the consumer credit laws, some consumer groups have called for a ceiling to be imposed on lenders' interest rates.[179] In response, the Government has stated that, for various reasons, it is not persuaded that this is the right course of action:

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173 Department of Trade and Industry press release, *Biggest shake up of consumer credit market in thirty years*, 16 December 2004

174 National Consumer Council, *Home credit: an investigation of the UK home credit market*, by Claire Whyley and Steve Brooker, June 2004, http://www.ncc.org.uk/moneymatters/home_credit.pdf

175 National Consumer Council, *Hassle-free credit complaints service: Alternative Dispute Resolution (ADR)*, undated, brief can be viewed at: http://www.ncc.org.uk/moneymatters/credit_ADR_brief.pdf

176 National Consumer Council news release, *Credit laws and home reversion regulation – a double success for consumers*, 17 May 2005

177 *Queen's Speech – Key Plans*, ePolitix, 23 November 2004: http://www.epolitix.com/EN/ForumBriefs/200411/e2b92153-7ada-45d9-bce1-7610fe9d938d.htm

178 Ibid

179 http://www.which.net/campaigns/personalfinance/credit/creditact.html

It has been suggested by some consumer groups that one mechanism for controlling the cost of credit is to limit the rate of interest charged. The overwhelming advantage claimed for this mechanism is its simplicity. Several other EU Member States and some of the states in the United States of America have ceilings. The UK, itself, had what was, in effect, a ceiling prior to the introduction of the CCA. The Moneylenders Acts provided that a rate in excess of 48% was prima facie excessive and the transaction harsh and unconscionable. However, the Crowther Committee concluded that, in practice, the protection accorded was largely ineffective.[180]

The Government is not yet persuaded that the introduction of an interest rate ceiling for the UK is the right approach to provide protection from excessive credit costs. While the Government acknowledges that there are some benefits from having a clear and simple-to-administer system, there are a number of problems associated with interest rate ceilings:

- The UK has a sophisticated and divers credit market. There would be many practical difficulties in introducing a capping regime that would apply to so many different types of credit arrangement.

- A high APR is not necessarily indicative of an extortionate or high-cost loan. For example, the amount of interest repayable for very short-term loans may appear relatively modest, and yet can result in a very high APR.

- Creditors could manipulate the APR by extending the minimum term over which credit can be taken. This would result in the APR being reduced, although the total interest repayable might actually increase.

- If creditors are required to reduce their rates to come within a rate ceiling, they could make the cost of credit to consumers more expensive in other ways. For example, many weekly doorstep lenders do not, at present, charge for missed or late payments, but could decide to introduce such charges.

- Rate ceilings could actually have the effect of encouraging rates to gravitate towards that ceiling.

- A rate ceiling may also result in some lenders withdrawing from the market. This, in turn, may lead to groups of consumers being denied ready access to alternative forms of credit, forcing them to resort to illegal moneylenders.

[180] *Consumer Credit*, Cmnd 4596, Report of the Committee, Lord Crowther, 1971, (s) 6.6.3 – 6.64

- EU Member States who have rate ceilings, tend to have a less diverse credit market.

> Therefore, the Government is not yet persuaded of the case for interest rate ceilings.[181]

The Government's decision not to impose a cap on interest rates has, in part, been informed by independent research it commissioned on the effect of interest rate controls in France, Germany and the USA.[182] However, the Government has said that it will keep the option of interest rate controls under review.[183]

During the Report Stage of the previous *Consumer Credit Bill* (originally Bill 16 session 2004-05) Adam Price, Member for East Carmarthen and Dinefwr, proposed including in the Bill a new interest rate ceiling clause.[184] Various Members spoke in favour of the amendment or supported including in the Bill a reserve power to permit the introduction of an interest rate ceiling at a later stage should it prove necessary. The 'debt on our doorstep' campaign, which has campaigned on the subject of an interest rate cap, was also referred to by many Members.

The accuracy of the research on which the government based its decision not to introduce an interest rate ceiling was also questioned by Adam Price MP:

> Representations were made by 'debt on our doorstep' and by Professor Udo Reifner, of the Institute for Financial Services in Hamburg. Professor Reifner was involved in the original work that led to the decision to create an interest rate ceiling in Germany. He wrote to the Department to express his concerns about the research. For example, according to him, there was no direct discussion with European consumer groups or with any of the key stakeholders that have a good overview in Germany.
>
> There is a statutory requirement in Germany to measure the interest rate ceiling's effects on financial inclusion and exclusion, but the UK Government-commissioned report made no reference to that and its conclusion was precisely the opposite of what the German Government's statutory data show, which is that after the introduction of the ceiling there was less financial exclusion than before. The 'debt on our doorstep' campaign has made an application under the Freedom of Information Act 2000 to get some of the working papers underlying the Policis report, and I believe that the deadline for the Department to answer is today. ……

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181 Department of Trade and Industry White Paper, *Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century*, Cm 6040, 8 December 2003

182 Department of Trade and Industry, "*The effect of interest rate controls in other countries*", by Policis (an independent company on behalf of the DTI), 26 August 2004:

183 Department of Trade and Industry, *Questions and Answers on the Consumer Credit Bill*, December 2004: http://www.dti.gov.uk/ccp/creditbill/pdfs/creditbillqa.pdf

184 HC Deb 3 March 2005 c 125-1

> He [the Minister] says that this is an interesting and well-intentioned debate, which should continue, and that the Government are committed to keep the matter under review. However, will he be more generous and say how they intend to keep it under review? Given the serious and well-founded concerns about the Government-commissioned research, will they commission further research, which might resolve some of the problems of the earlier research; allow a wider range of submissions; and perhaps take another look at the empirical evidence elsewhere?[185]

The Consumer Minister, Gerry Sutcliffe, defended the findings of the Government-commissioned research:

> It shows that interest rate ceilings can lead to low-income consumers using products that are not suitable for their needs. Such products also make it difficult for consumers to control their levels of borrowing. For example, …they may include late-payment charges that are not part of the advertised interest rate.[186]

He also argued that the nature of the UK credit market is different from other countries, being far more mature, and consideration must be given to the levels of credit available across the whole range of products in the UK.[187]

As the Bill progressed through the House of Commons, Gerry Sutcliffe reiterated the Government's position that an interest rate ceiling is not the right option at this time, that such a ceiling could harm the very consumers it is trying to protect and that the implementation of the new unfair relationship test is a better way to help consumers.[188] The Minister also gave his reasons for not using secondary legislation to introduce an interest rate ceiling in the future should it prove necessary:

> The reason for not going down the secondary legislation route is that we have consulted fully on this Bill all the way through. It would therefore be wrong to use secondary legislation as a vehicle, without going through further full consultation.[189]

He underlined the Government's commitment to keep open the option of an interest rate ceiling should evidence emerging from the courts and the FOS show that the new legislation is not working. On this basis the amendment was withdrawn.

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[185] HC Deb 3 March 2005 c 1129
[186] HC Deb 3 March 2005 c 1140
[187] HC Deb 3 March 2005 c 11291
[188] HC Deb 3 March 2005 c 1127
[189] HC Deb 13 January 2005 c 519

B. Business groups

Those business groups who have responded to the Government's White Paper *Fair, Clear and Competitive – the Consumer Credit Market in the 21st Century* are broadly in favour of a consumer credit Bill. Ian Mullen, Chief Executive of the British Bankers' Association (BBA) has said that the timing was right for reform:

> The existing Consumer Credit Act has served us well, but it is 30 years old and the consumer credit environment has changed dramatically during that period. The time is now right to review it.
>
> The DTI press release suggests that the Government is making broadly sensible changes. The Government clearly wishes to crack down on rogue lenders – a move which responsible lenders such as banks welcome. Banks' customers have been able to refer unresolved complaints to an Ombudsman for over a decade and it is appropriate that the same right will now apply to all credit agreements.
>
> The provisions in this Bill likely to apply to customers in financial difficulty would appear to support actions which banks have in place to ensure that help is available for this minority of customers.[190]

The Association for Payment Clearing Services (APACS) has also welcomed a new *Consumer Credit Bill*, believing that it will add to efforts on the part of the industry already under way to make the credit market more transparent. Sandra Quinn, director of corporate communications for APACS, is reported to have said:

> From what we understand the Bill is working very much with the grain of the changes in the latest draft of the Banking Code which includes the summary boxes, clearer marketing practices and warnings about over indebtedness for which the government are likely to be legislating.
>
> This is the second stage of changes coming out of the government's review of the 1974 Consumer Credit Act – the industry has already agreed to a range of changes in partnership with the government such as a single APR calculation and alterations to the form and content of credit agreements.
>
> The industry also welcomes the expected measures to crackdown on predatory lending by loan sharks. People deserve protection from some of the appalling practices seen in this unregulated market.
>
> Credit cards remain one of our most popular payment tools in the UK, with more than 30 million customers. This is one of the world's most competitive markets. The industry hopes that the Bill will further strengthen the credit card market.[191]

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[190] British Bankers' Association press release, *BBA response to Consumer Credit Bill* [Bill 16 of 2004-05], 16 December 2004, this Bill fell on dissolution

The Association of Chartered Certified Accountants is also said to support a Consumer Credit Bill on the basis that with consumer debt so high in the UK, resulting in an increasing number of bankruptcies, consumers need additional protection against unfair credit practices.[192]

However, it is reported that some lenders are concerned that the drafting of the proposed unfair relationships test, which will apply throughout the lifetime of a credit agreement, could allow borrowers to challenge mainstream products charging unexceptional interest rates. There is concern that the Bill's "open-ended unfair lending test and the ADR system could become a troublemaker's charter, which in turn could lead lenders to be overly cautious". The BAA is reportedly looking for a clean and simple test of how fairness in a credit agreement would be judged by the court. Some lenders also remain concerned about the abolition of the £25,000 financial limit exposing them to greater liability.[193]

The Confederation of British Industry (CBI) has accepted the need to update existing credit legislation but has stressed that the reform must be workable in practice. It has called for the provisions of a consumer credit Bill to be properly defined and without unintended consequences.[194]

Although the Finance and Leasing Association (FLA) supports many of the proposals outlined in the DTI's consumer credit White Paper, *Fair, Clear and competitive: the Consumer Credit Market in the 21st Century*, it has expressed concern that some proposals may have unintended consequences and may hit hardest those in most need of the benefit of reforms to the CCA 1974:

> We completely support targeted measures aimed at promoting a competitive, transparent and responsive credit market, built on responsible lending. We are, however, concerned that the proposals could easily backfire, increasing the cost of credit and creating credit deserts for consumers with little or no access to the mainstream market. There is a real threat that many of the poorest people – those who need affordable credit most – could be worst hit.
>
> The White Paper sets out a radical agenda to update and increase the protection afforded by the UK's consumer credit laws. Key focus areas, with which we agree, include fostering greater transparency in consumer finance, reducing red tape for credit adverts and improving financial literacy. We further hope that it

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[191] *Queen's Speech – Key Plans*, ePolitix, 23 November 2004: http://www.epolitix.com/EN/ForumBriefs/200411/e2b92153-7ada-45d9-bce1-7610fe9d938d.htm

[192] "Lenders seek to limit impact of *Consumer Credit Bill*", Financial Times, 24 November 2004

[193] Ibid

[194] Ibid

> will also be possible to reduce the red tape applying to the form and content of credit agreements, multiple agreements and modifying agreements.[195]

Responding to the White Paper, the FLA highlighted a number of specific concerns including:

> **Retrospection** – of early settlement changes and the unfair lending proposals (replacing "extortionate credit") to existing loans could mean that existing credit contracts could be challenged under the new measures. This poses a particular threat to securitisation and entry of new lenders to the market.
>
> **Removal of the financial limit** – whilst we welcome the proposals to retain the limit for business lending and believe a workable mechanism can be developed to distinguish between business and consumer borrowing, we are concerned that the abolition of the limit for consumer lending will cause unwarranted costs, particularly in the context of voluntary terminations.
>
> **Credit agreements** – Whilst the intended benefits of clearer information are, at face value, attractive and have our full support, we believe that the proposals set out in the White Paper and the Consultation Document will not achieve the desired aim and are unacceptable as they stand. Our detailed observations in this respect are set out in our response to the Consultation Document.
>
> **Distortion of competition** - the proposals will impact on different types of lenders and products unevenly. As an illustration, lenders offering multiple products through multiple channels (i.e. branch, telephone, internet, broker and third-party retailers) will have significantly more changes to make implementing the proposals than monoline lenders, or lenders offering one product in multiple markets.
>
> **Micro-regulation** – detailed legislative rules could stifle innovation and undermine the flexibility provided in this area by industry codes of practice. [196]

The FLA is also opposed to the introduction of a compulsory ADR scheme. [197]

Despite these reservations, the FLA generally welcomes the *Consumer Credit Bill*. Martin Hall, Director General of FLA, has said:

> [The]…Consumer Credit White Paper set out a radical agenda to review the UK's outdated consumer credit laws. It also recognised the vital contribution the credit

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[195] Finance and Leasing Association, *FLA's response to DTI's Consumer Credit White Paper, Fair, Clear and Competitive: The Consumer Credit Market in the 21st Century*, 15 March 2004, available at: http://www.fla.org.uk/fla_home/Consultation_Papers/CCA%20WHITE%20PAPER.doc

[196] Ibid

[197] Finance and Leasing Association, *FLA's response to DTI's consultation document on the provision of ADR for disputes arising under the Consumer Credit Act 1974*, 16 March 2004. This can be viewed at: http://www.fla.org.uk/fla_home/Consultation_Papers/Responses%20to%20ADR%20Consultation.doc

> industry makes to the UK economy. We are hoping the Bill successfully captures this approach.
>
> FLA will continue to support targeted measures which genuinely promote competitive, transparent and responsive markets, built on responsible lending. We shall scrutinise the Bill to make sure it doesn't have unintended consequences.[198]

However, the FLA is pressing for further reform of hire purchase law:

> [A Bill]…will give the opportunity to update key parts of the existing law in line with modern markets, modern consumers and modern business practices. The FLA would like to see changes to the law which promote a fair balanced and competitive market place which benefits both consumers and businesses. As part of this approach we will also be pressing the DTI for further reform of the out-of-date hire purchase law.[199]

The British Vehicle Rental and Leasing Association (BVRLA) is the representative trade body for companies engaged in leasing cars and commercial vehicles. It has also responded cautiously to the proposals contained in the White Paper:

> It is clear that a small minority of lenders are causing the majority of the 'socially harmful lending' to consumers. As a business representative body of the family of good lenders, we support a pragmatic 'root and branch' approach to effectively remove such lending practices.
>
> The DTI is nevertheless encouraged to utilise this review by implementing only the justifiable and necessary changes as identified and proven. In particular, a targeted and proportionate approach should be adhered to when attempting to protect the most vulnerable consumers to help ensure that an unnecessary burden is not imposed on legitimate lenders. Ultimately, we remain concerned with the unintended consequences of the proposals, which could have an undesired effect of damaging the credit market, and increase the cost of lending, which will have an adverse impact on the most vulnerable sector of society.
>
> […] With the development of an innovative consumer credit market over the past 30 years, the key aims and objectives as outlined in the White Paper are clear. However, these proposals must be translated appropriately and the DTI must ensure that it meets the new challenges of the credit market in a positive and fair manner.[200]

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198 Finance and Leasing Association, *Credit Industry Response to Biggest Shake Up of Consumer Credit Market in Thirty Years*, 16 December 2004

199 Ibid

200 British Vehicle Rental and Leasing Association, *Fair, Clear and Competitive: The consumer credit market in the 21st century – response from BVRLA*, March 2004

C. Small businesses

Under the provisions of the Bill, the CCA 1974 is able to regulate business lending only on loans of up to £25,000 to small businesses (meaning sole traders, unincorporated associations and partnerships of three or fewer members). The Federation of Small Businesses (FSB) has expressed its disappointment that the Bill does not go further. The FSB argues that the Bill should be extended to cover all lending to small businesses:

> Small businesses need similar protection afforded to consumers as entrepreneurs often use their house for security and lack specialist financial knowledge.[201]

A spokesman for the FSB is also reported to have said:

> It tends to be the case that small businesses get tied into contracts that are more onerous than those for individuals. Although we haven't seen any particular examples of small businesses being targeted by credit scams, it is happening in other areas.[202]

Commenting on its reasons for not extending the protection of the CCA 1974 to small businesses loans in excess of £25,000, the Government has said:

> Removal of the financial limit would mean that all business lending to partnerships and sole traders would be caught by the CCA. This would be likely to result in the cost and access to high-value finance for small businesses being adversely affected in the following ways:
>
> - The CCA contains a provision that allows Hire Purchase (HP) agreements to be voluntarily terminated and the goods handed back if a minimum of one half of the total sums due have been paid back. While this is relatively manageable for lower value goods, removal of the financial limit would expose HP providers of, often, bespoke equipment, to returned goods, which may then be of little or no re-sale value. Estimates suggest that in excess of 70% of business lending on HP terms is for specialist equipment above £25,000 and, therefore, currently unregulated. This represents a considerable risk to the credit provider.
>
> - The existence of cooling-off protections for agreements concluded away from trade premises could restrict the flexibility of business lending and the speed of access to finance. Concluding business transactions in this manner is common practice and such delays may result in the skewing of business lending to other forms of borrowing, which are neither regulated not appropriate.

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[201] Federation of Small Businesses press release P2004/55, *FSB applauds departments with few bills to their name – small business reaction to Queen's speech,* 23 November 2004, http://www.fsb.org.uk/news.asp?REC=2212

[202] Ibid

> Following extensive consultation, the Government believes that some business lending below £25,000 should still be regulated to protect the most vulnerable business borrowers who do not have access to mainstream lenders.
>
> […] The £25,000 limit continues to be appropriate for this purpose as it provides a reasonable upper limit for vulnerable businesses. Borrowing above this figure is likely to be secured by a charge over the assets being purchased, which will entail both a higher level of advice (including legal advice), and recourse to the underlying assets.
>
> Retention of the limit provides suitable protection for the vulnerable, small businesses but, importantly, also facilitates ease and speed of access to vital business funding above £25,000, where its use is solely for business purposes. [203]

D. Office of Fair Trading

Unsurprisingly, the reintroduction of the *Consumer Credit Bill* has been welcomed by Sir John Vickers, OFT Chairman:

> We welcome the Government's recognition of the importance of reform to consumer credit legislation through today's re-introduction of the *Consumer Credit Bill*. This will help the credit market function more effectively, benefiting borrowers and fair dealing lenders.[204]

The OFT has long called for reform to the existing CCA 1974, arguing that it is now outdated. Sir John Vickers, OFT Chairman, has said:

> Reform is necessary to ensure that credit regulation is relevant to today's growing market, enabling more effective regulation of the credit industry and greater consumer protection.[205]

In its response to the DTI's consultation on credit licensing, the OFT agreed that a wider range of penalties and other reforms are needed to ensure more effective regulation of the credit industry.[206] Penny Boys, OFT Executive Director, said:

> Consumers need protection in the market for credit, which can be a high-risk product and can be complex and difficult to understand. The licensing system

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[203] Department of Trade and Industry White Paper, *Fair, Clear and Competitive – The Consumer Credit Market in the 21st Century*, Cm 6040, 8 December 2003

[204] Office of Fair Trading press notice 87/05, *"OFT welcomes reintroduction of Consumer Credit Bill"*, 19 May 2005

[205] Office of Fair Trading press release 210/04, *OFT welcomes Consumer Credit Bill*, 16 December 2004

[206] Department of Trade and Industry, *Consultation on the licensing regime of the Consumer Credit Act 1974*, 30 January 2003

should allow the OFT to screen out unfit traders and target regulatory action where it is needed, without imposing unnecessary burdens on business. [207]

VI Further Reading

1. The *Consumer Credit Bill* [Bill 16] and its explanatory notes [Bill 16-EN] are available from the UK Parliament website:
   http://www.publications.parliament.uk/pa/cm200405/cmbills/016/2005016.htm

2. HM Treasury, *Promoting financial inclusion*, December 2004.
   http://www.dti.gov.uk/ccp/topics1/pdf1/creditpolicis1.pdf

3. Department of Trade and Industry, *The effect of interest rate controls in other countries*, report by Policis, 26 August 2004.
   http://www.dti.gov.uk/ccp/topics1/pdf1/creditpolicis1.pdf

4. Department of Trade and Industry and Department for Work and Pensions, *Tackling Over-Indebtedness Action Plan 2004*, July 2004.
   http://www.dti.gov.uk/ccp/topics1/pdf1/creditpolicis1.pdf

5. Finance and Leasing Association, *Monthly Statistics*, July 2004.
   http://www.fla.org.uk/

6. Department for Work & Pensions, *Characteristics of families in debt and the nature of indebtedness*, Kempson, McKay and Willetts, June 2004.
   http://www.dwp.gov.uk/asd/asd5/rports2003-2004/rrep211.asp

7. National Consumer Council, *Home credit: an investigation of the UK home credit market*, by Claire Whyley and Steve Brooker, June 2004.
   http://www.ncc.org.uk/moneymatters/home_credit.pdf

8. Department of Trade and Industry, *Qualitative research into consumer understanding of the form and content of credit product documents*, a report for the DTI by MORI Financial Services and Front Line Research, April 2004.
   http://www.dti.gov.uk/ccp/topics1/pdf1/creditreport0505041.pdf

9. Office of Fair Trading, *Debt consolidation: A report on an OFT study*, March 2004.
   http://www.oft.gov.uk/NR/rdonlyres/D83F41F8-A747-4CA3-8217-24195CD594CC/0/oft705.pdf

10. Department of Trade and Industry, *Fair, Clear and Competitive – The consumer credit market in the 21st century*, Cm 6040, December 2003.
    http://www.dti.gov.uk/ccp/topics1/pdf1/creditwp.pdf

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[207] Office of Fair Trading press notice PN 55/03, *OFT welcomes plans to strengthen credit licensing laws*, 8 May 2003

11. Citizens Advice, *In too deep, CAB clients' experience of debt*, Sue Edwards, May 2003. http://www.citizensadvice.org.uk/in-too-deep.pdf

12. Department of Trade and Industry, *Over-Indebtedness in Britain: A report to the Department of Trade and Industry*, Elaine Kempson, 2002. http://www.dti.gov.uk/ccp/topics1/overindebtedness.htm

13. Department of Trade and Industry, *Review of the Consumer Credit Act – progress report*, August 2002 (URN 02/1241).

14. *Report by the Task Force on Tackling Overindebtedness*, July 2001 (URN 01/1019).

15. Financial Services Authority, *In or Out? Financial Exclusion: a literature and research review*, Kempson, Whyley, Caskey and Collard, July 2000. http://www.fsa.gov.uk/pubs/consumer-research/crpr03.pdf

16. Office of Fair Trading survey, *Consumer Detriment*, April 2000. http://www.oft.gov.uk/NR/rdonlyres/DC30AD21-35C5-4881-9E60-AEDF52B9D4D5/0/oft296.pdf

17. National Association of Citizens Advice Bureaux, *Daylight Robbery - The CAB case for effective regulation of extortionate credit*, December 2000. http://www.citizensadvice.org.uk/pdf_drob.pdf

18. HM Treasury, *Access to Financial Services*, 1999.

19. Department of Trade and Industry, *Extortionate Credit in the UK*, Elaine Kempson and Claire Whyley, June 1999. http://www.dti.gov.uk/ccp/topics1/extortionate.htm

20. Office of Fair Trading, *Unjust credit transactions – a report by the Director General of Fair Trading (Sir Gordon Borrie QC) on sections 137-140 of the Consumer Credit Act 1974*, OFT 046, 1991.

21. Crowther Committee: *Consumer Credit – Report of the Committee*, Cmnd 4596, March 1971.

22. British Standards Institute, *Consumer Effectiveness Project*, available at: http://www.bsi-global.com/All+About+Stanards/Consumers/research.xalter

23. Further information about the Government's Over-Indebtedness Strategy can be viewed on the DTI website at: http://www.dti.gov.uk/ccp/topics1/overindebtedness.htm

24. Information about the OFT's credit campaign can be viewed at: http://www.oft.gov.uk/Consumer/Credit/default.htm

Appendix: Consultations

The DTI has undertaken the following formal consultation exercises as part of its review of the UK consumer credit laws:

1. DTI, *Tackling Loan Sharks and More! Modernising the Consumer Credit Act 1974*, July 2001, (CA 005/01) (URN 01/1057): http://www.dti.gov.uk/ccp/consultpdf/loanshark.htm#intro

   This document considered the effectiveness of the CCA 1974 and priorities for reform. The consultation period ended on 3 October 2001 with the DTI receiving 107 responses.

2. DTI, C*onsultation document on the financial limit and exempt agreements of the Consumer Credit Act 1974*, (CA 005/002), March 2002, (URN 02/857): http://www2.dti.gov.uk/ccp/consultpdf/loanshark2.pdf

   This document considered removing the £25,000 financial limit in the CCA 1974 and reviewing the status of some exempt agreements. The consultation period ended on 21 June 2002 with the DTI receiving 55 responses. A summary of responses to this consultation was published in November 2002: http://www2.dti.gov.uk/ccp/consultpdf/finlimitssumm.pdf

3. DTI, C*onsultation document on the early settlement of consumer credit agreements under the Consumer Credit Act 1974*, August 2002, (CCP 02/02) (URN 02/1240): http://www.dti.gov.uk/ccp/topics1/pdf1/earlycredit.pdf

   This consultation period ended on 22 November 2002 with the DTI receiving 38 responses.

4. DTI, C*onsultation document on enabling and facilitating the conclusion of credit and hire agreements electronically under the CCA 1974*, December 2002, (CCP 015/02): http://www.dti.gov.uk/ccp/consultpdf/eagree.pdf

   The consultation period ended on 28 March 2003 with the DTI receiving 35 responses.

5. DTI, *A consultation document on the licensing regime under the Consumer Credit Act 1974*, January 2003 (CCP 005/03) (URN 03/627): http://www.dti.gov.uk/ccp/consultpdf/credlic.pdf

   The consultation period ended on 30 April 2003 with the DTI receiving 57 responses.

6. DTI, *Tackling Loan Sharks and More!* (CCP 007/03), March 2003, (URN 03/726): http://www.dti.gov.uk/ccp/consultpdf/extortcon.pdf. This consultation document considered proposals for reform of the protections offered to consumers in respect of extortionate credit. The consultation period ended on 6 June 2003 with the DTI receiving 70 responses.

7. DTI, *Establishing a Transparent Market: A consultation on proposals for regulations on: early settlement, consumer credit advertising, form and content of credit agreements, APRs on credit cards, on-line agreements*, 8 December 2003: http://www.dti.gov.uk/ccp/topics1/pdf1/creditpiu.pdf A summary of responses is available at: http://www.dti.gov.uk/ccp/topics1/pdf1/creditconres.pdf

8. DTI, C*onsultation document on the Provision of Alternative Dispute Resolution (ADR) for disputes arising under the Consumer Credit Act 1974*, 17 December 2003: http://www.dti.gov.uk/ccp/consultpdf/adrcondoc.pdf The consultation period ended on 14 March 2004 and a summary of responses has been published: http://www.dti.gov.uk/ccp/topics1/pdf1/creditadrconresp.pdf

In addition, the DTI has published two White Papers:

1. DTI White Paper, *Modern Markets: Confident Consumers*, Cm 4410, 22 July 1999: http://www.dti.gov.uk/consumer/whitepaper/wpmenu.htm

2. DTI White Paper, *Fair, Clear and Competitive – the Consumer Credit Market in the 21st Century*, Cm 6040, December 2003: http://www.dti.gov.uk/ccp/topics1/pdfl/creditwp.pdf