COMMERCE

Implementing the Consumer Credit Act—III

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Seeking business

PART IV of the Consumer Credit Act 1974 regulates the methods used by credit grantors and hire traders for seeking business. The controls extend to advertising, oral canvassing off trade premises, sending circulars to minors, distributing unsolicited credit tokens, giving quotations of business terms, and the conduct of business generally. Part X extends the controls, with exceptions and modifications, to ancillary credit businesses (ie credit brokerage, debt collecting, debt counselling, debt adjusting and credit reference agencies).

Certain of these provisions are now in operation, and the rest are expected to follow by the end of the year. Since the passing of the Act (31 July 1974) it has been an offence to canvass the business of credit brokerage, debt adjusting or debt counselling off trade premises and house mortgage brokerage fees have been limited to £1 where an introduction does not result in a mortgage within six months. The latter is now extended to all regulated, exempt and foreign agreements. Further provisions have been given commencement dates. From 1 October next it will be an offence to canvass debtor-creditor agreements off trade premises whether or not the canvassing has been requested (but with a saving for signed requests). The effect is to ban the canvassing of what the Crowther Committee called non-purchase-money loans, with a let-out for bank overdrafts. For purchase money loans (ie debtor-creditor-supplier agreements) the committee considered it would suffice to require a special canvassing authorisation in the licence, and the Act followed this (s 23 (3))-

From 1 July 1977 it is an offence for any person, with a view to financial gain, to send to a minor any leaflet or other document inviting him to borrow money, obtain goods on credit or hire, obtain services on credit, or apply for information on such matters (s 50). It is a defence to prove lack of knowledge of minority. Also from 1 July it is made an offence to distribute credit tokens to persons who have not asked for them by a signed request (s 51). This restriction on credit cards, trading checks and trading vouchers follows the outcry caused when the Access card was launched by mass mailing. It is not limited to consumers, but applies even where the recipient is an incorporated body.

Charge for credit

Part II of the Consumer Credit Act 1974 lays down the basic terms and concepts used in the Act. One of these is the total charge for credit. Section 20 requires the making of regu¬lations defining this in detail, subject to the general meaning given to it by subs (1) as 'the true cost to the debtor of the credit provided'. The essence is that it is the cost the debtor cannot avoid paying if he is to obtain the credit he desires. It is now spelt out by the Consumer Credit (Total Charge for Credit) Regulations 1977, and remarkably complex they are. In addition we have the 15 volume Consumer Credit Tables.

Since the concept is 'what must the debtor pay to get the credit ?' it is obvious the charge cannot be limited to payments under the credit agreement itself. If the debtor (or his relative) is obliged to enter into other transactions too (eg maintenance and insurance agreements for goods obtained on hire-purchase) the charges under these must be allowed for. It is the total charge for credit. So the regulations specify what transactions are to be brought into account.

However, not all charges under these transactions are suitable for inclusion. So the regulations specify which are to be disregarded. The upshot is that there are first brought into account all charges payable under the credit agreement itself, under any transaction entered into in compliance with that agreement, under any contract for the provision of security, and under any other contract which the creditor requires to be made or

maintained. Then there are excluded default charges, charges which would be payable even if the transaction were for cash, charges for incidental benefits or services contracted for prior to the agreement, charges for essential repairs, freely negotiated maintenance charges, premiums under a preexisting insurance policy and premiums under a freely negotiated credit protection policy.

The regulations go on to lay down certain statutory assumptions needed to quantify the total charge for credit. These relate to the amount of credit which will be advanced, when it will be advanced, when it will be repaid, the amount of index-linked repayments, the rate or amount of the individual items of charge, and when these will be paid. Some of these assumptions are difficult to follow, and in certain cases appear inconsistent.

The 'truth in lending' motive of the Consumer Credit Act requires consumers to be informed of the total charge for credit before they commit themselves. The forthcoming regulations on advertisements and quotations will therefore impose duties in this respect. To give a complete picture, the rate of the charge also needs to be stated. The Consumer Credit (Total Charge for Credit) Regulations 1977 deal with this aspect as well, in conjunction with the Consumer Credit Tables. The rate is defined by reference to another coined term, 'the annual percentage rate of charge', being the latter rate determined to one decimal place. The regulations lay down the fundamental rule for determining the rate. This describes it as the rate required to produce equality in the 'present values' of advances of credit to be made, and of the aggregate of repayments of credit and payments of charges. The same statutory assumptions as are described above, apply for this purpose. The application of the rule in two particular cases is spelt out by special formulae. These are provided for cases where a constant period rate of charge applies and where the amount to be paid by the debtor is payable in a single lump sum. Finally the regulations give authorisation to the officially published Consumer Credit Tables. They do this by saying that where an entry in the tables exactly applies to an agreement the rate set out in that entry is to be taken to be the rate determined in accordance with the fundamental rule just mentioned, the tables being calculated in accordance with that rule. The tables are of three types. Tables 1 to 10 apply where it is possible to calculate the 'charge per pound lent', ie the total charge for credit divided by the amount of credit to be advanced. Tables 11 to 14 are for traders who work to the flat rate, ie the total charge for credit divided by the product of the credit advanced and the duration of the agreement in years, and then multiplied by 100. Table 15 applies to transactions under which a constant period rate of charge is imposed in respect of periods of equal length.

The only current use for the rate of the total charge for credit is to ascertain whether an agreement qualifies as an exempt agreement because of a low charge for credit (see above). In the case of many agreements it is not possible under the present regulations to calculate the amount or rate of the total charge for credit. This is because of items which cannot be quantified in advance, and as to which no statutory presumption has been laid down. An example is a mortgage agreement which requires the borrower to pay the conveyancing fees of the lender's solicitor. Such an agreement cannot be an exempt agreement. When the regulations specifying the information to be included in advertisements, quotations etc, come to be made it has been officially stated that they will allow greater flexibility and allow the Tables to be used even though a transaction does not exactly match any entry.

Variation of agreements

The final subject dealt with by recent regulations and orders under the Consumer Credit Act 1974 is the variation of agreements. Section 82, which deals with this, was brought into force on 1 April 1977 (Consumer Credit Act 1974 (Commencement no 2) Order 1977, art 2 (1)). The subject falls into two parts: variation under a power contained in an agreement and variation by a subsequent agreement.

Variation under power contained in agreement

As from 1 April 1977, where under a power contained in a regulated agreement (other than one between private individuals) the creditor or owner varies the agreement, the variation does not take effect before certain notice requirements are satisfied. This results from the combination of s 82 (1) and the Consumer Credit (Notice of Variation of Agreements) Regulations 1977. Except in the case of bank overdrafts and similar agreements, the regulations require seven days' written notice to be given personally to the debtor or hirer. In the excepted case it suffices to rely on newspaper notices and notices posted up in the bank's premises.

There is some doubt as to the precise scope of this particular control. The most frequent type of variation is a change in interest rates. Whenever such a change occurs it is obviously necessary that the person obliged to pay the interest be made aware of it. But does it always or usually involve a variation of the agreement as opposed to the operation of its original terms? It seems not. For example an agreement may stipulate for interest at a certain percentage above Bank of England minimum lending rate. Whenever that rate changes the interest payable automatically changes too, but there is no variation in the terms of the agreement.

Certainly it cannot be said, in the language of s 82 (1), that it is a case where 'the creditor . . . varies the agreement' because the creditor has done nothing. Even where the index is a lending bank's own base rate, it can hardly be said that by changing its base rate generally, the bank has varied each loan agreement in which that term appears. More difficult is a term stipulating for interest at such rate as the lender may from time to time determine. Here a new determination looks very like a variation of the agreement by the lender, yet its literal terms are unchanged. These difficulties are somewhat academic. Undoubtedly the wisest practical course is for traders to observe the notice requirements whenever there is a change in what the consumer is required by the agreement to do.

The effect of failure to observe the notice requirements where they apply is to defer the operation of the charge, not to defeat it altogether. This can operate against the consumer where the change is to his advantage (eg a lowering of interest rates).

Variation by subsequent agreement

Where on or after 1 April 1977 what the Consumer Credit Act calls a modifying agreement (ie one varying or supplementing an earlier agreement) is made, this effects a form of statutory novation. The modifying agreement is treated as revoking the earlier agreement and replacing it by provisions reproducing the combined effect of the two agreements. Accordingly, obligations outstanding in relation to the earlier agreement are to be treated as outstanding instead in relation to the notional combined provisions. The origin of this may be traced to the anti avoidance provisions whereby hire purchase traders were prevented from circumventing the statutory safeguards by requiring the consumer to enter into one agreement for hiring of the goods and a second agreement

conferring on him an option to purchase them. Section 1 (2) of the Hire-Purchase Act 1965 provided that the two were to be treated as a single agreement entered into when the second was made.

The modifying agreement, may change the status of the earlier agreement. For example a borrower may fall into arrears on a land mortgage. The lender exercises his power of sale but finds the security insufficient. By a further refinancing agreement the borrower agrees to instalment provisions for discharging the remaining indebtedness. If the original agreement was a debtor-creditor-supplier agreement this will turn it into a debtor-creditor agreement. It may even turn an exempt agreement into a regulated one. If the lender was a building society, and the mortgage was for the purchase by an individual of a house, the loan agreement would be exempt (see above). The refinancing agreement would not be within the terms of the exemption, since it would not be secured on land. This could have inconvenient consequences if the building society had refrained from taking out a licence on the ground that all its credit agreements were exempt agreements.

Concluded F A R BENNION