COMPETITION COMMISSION

PAYDAY LENDING MARKET INVESTIGATION

Regulation of payday lending working paper

Introduction

1. The aim of this working paper is to outline the legal and regulatory framework applying to payday lending.

2. In this working paper, we first survey how the payday lending market is monitored. We then survey the legislation governing payday lending in the UK and briefly describe anticipated regulatory reforms as they might be expected to have an impact on the market investigation. We also detail specific considerations relevant to providing a loan in this market and outline the implications of that framework for payday lenders within the market.

Who regulates payday lending?

3. There are a number of bodies with policy and regulatory responsibility for payday loans and responsibilities are due to change in April 2014:

   - HM Treasury provides the main policy and legislative initiative in consumer credit having taken over responsibility from the Department for Business Innovation & Skills (BIS) in November 2013.
   - The Office of Fair Trading (OFT) currently enforces the consumer credit legislation and is responsible for the licensing regime. From 1 April 2014, the regulation of consumer credit and the responsibility for authorizing consumer credit lenders are being transferred to the Financial Conduct Authority (FCA).
   - The interaction of advertising law and the consumer credit regime means that the Advertising Standards Authority (ASA) and the OFT, and from 1 April 2014 the FCA, are concerned with the regulation of payday loan advertising.

- The Information Commissioner's Office (ICO) enforces data protection law and is concerned with the sharing of information in the credit market.
- The FCA has gained an additional competition objective and will gain concurrent powers under the Competition Act 1998 (CA98) and the Enterprise Act 2002 (the Act) (see further paragraph 25).[1]

The Department for Business Innovation & Skills

4. BIS has had primary responsibility for the government policy of 'Making consumer credit markets fairer' since 2009. The Coalition Agreement set out the Government's commitment to curb unsustainable lending; to strengthen consumer protections; and to put in place a safe, fair regulatory framework for credit and personal insolvency.

5. In 2011, BIS commissioned a report from the University of Bristol to inform understanding of the likely impact on lenders and consumers of introducing a variable cap on the total cost of credit that can be charged in the short-to-medium-term fixed-rate credit markets (the Bristol report). The purpose of the research was not to make a recommendation to BIS on whether or not a cap should be introduced, but to provide an up-to-date evidence base that would help inform policy decision-making in this area. The Bristol report[2] considered three short-term credit markets: payday lending (both retail and online); home credit; and pawnbroking. In its response[3] to the Bristol report, the Government said that its main concern was with the payday lenders. Its concerns were:
   - the relative speed and ease of access to payday loans;
   - the high cost of borrowing;

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[1] The FCA is to be given: (1) CA98 enforcement powers which can be used to address practices engaged in by companies operating in the UK that distort, restrict or prevent competition—including imposing penalty fines of up to 10 per cent of worldwide turnover on infringing companies; and (2) power under the Act to carry out market studies and make references to the Competition Market Authority.
[2] *Government response to the Bristol University report on high cost credit*, BIS, 6 March 2013 (www.bristol.ac.uk/geography/research/pfrc/themes/credit-debt/pfrc1302.pdf).
[3] www.gov.uk/government/uploads/system/uploads/attachment_data/file/137623/13-703-government-response-to-the-bristol-university-report-on-high-cost-credit.pdf.

- the way in which lenders assess the affordability of payday loans;
- the frequency with which loans are rolled over and the way in which this happens; and
- the levels of multiple and repeat borrowing.

6. On 6 March 2013, BIS announced a package of measures[4] aimed at tackling the problems in the high cost credit market. This included outlining plans for the OFT, the FCA and the ASA to regulate the market and for the Consumer Affairs Minister to meet members of the industry in person and call them to account.

7. On 3 October 2013, BIS produced reports[5] on two surveys which it commissioned to assess compliance with the payday lending good practice charter and codes of practice; and research conducted by Ipsos Mori for BIS on advertising of payday lending. The report on the charter and codes sets out the findings of surveys of more than 4,000 consumers and 44 payday lending firms. The advertising report provided qualitative research consisting of nine in-depth interviews and four focus groups held in Sheffield and London and considered customer responses to a range of advertising.

8. Following an announcement in November 2013, the Government introduced legislation to impose a duty on the FCA to place a cap on the charges which may be imposed in relation to payday loans. The Financial Services (Banking Reform) Act 2013 amended the Financial Services and Markets Act 2000 (FSMA) to place a duty on the FCA to implement such a price cap no later than 2 January 2015.[6]

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[4] www.gov.uk/government/news/government-takes-action-to-tackle-payday-lending-concerns.
[5] www.gov.uk/government/publications/payday-lending-research-reports.
[6] Section 137C(1A) FSMA 2000, inserted by s131 Financial Services (Banking Reform) Act 2013.

The Office of Fair Trading

9. The OFT regulates consumer credit in the UK. Credit providers must be licensed and the OFT aims to ensure that only those firms fit to hold or retain a licence do so and enforces licensing standards. The Comptroller and Auditor General issued a report on the Consumer Credit regulation functions of the OFT[7] in December 2012. It made recommendations to develop a new licensing regime that takes into account the number of considerations relevant to the risk profiles of lending firms and markets that the OFT regulates. The OFT announced in June 2013 that different forms previously used to apply for different types of credit licence were being replaced with a new single form for all the different licence categories:

- Category A—consumer credit business;
- Category B—consumer hire business;
- Category C—credit brokerage;
- Category D—debt adjusting;
- Category E—debt counselling;
- Category F—debt collecting;
- Category G—debt administration;
- Category H—provision of credit information services; and
- Category I—credit reference agency.

10. Category A covers a wide range of business activities[8] including the following (non-exhaustive list): hire purchase, issuing credit cards, budget accounts, instalment credit, cash loans, overdrafts, personal loans, pawnbroking, payday loans, bridging loans and shared equity loans. Introducing people to lenders or other credit brokers for the purposes of obtaining a first charge mortgage is regulated by the FCA. A

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[7] www.nao.org.uk/wp-content/uploads/2012/12/1213685es.pdf.
[8] www.oft.gov.uk/OFTwork/credit-licensing/do-you-need/licence-categories/.

consumer credit licence is required for consequential activities such as debt counselling.

11. The Consumer Credit Act 1974 (CCA) sets out the range of consumer protection requirements for lenders and brokers in relation to the advertising and marketing of loans, the form, content and execution of credit agreements, pre-contractual and post-contractual disclosure requirements, default and termination, the taking of securities, and judicial controls over the enforcement of debts.

12. In addition to the basic form, applicants for licences to undertake higher risk activities are required also to complete the relevant parts of the Credit Competence Form. The following activities are considered to be high-risk:

- A—consumer credit (if secured/sub-prime and/or in the home and/or short-term, high-cost payday type loans);
- C—credit brokerage (if secured/sub-prime and/or in the home);
- D—debt adjusting (if you or an associate charge for any credit activities);
- E—debt counselling (if you or an associate charge for any credit activities);
- F—debt collection;
- G—debt administration (if secured/sub-prime);
- H1—credit information services (including credit repair); and
- I—credit reference agency.

13. It follows that payday lenders are normally required to complete the Credit Competence Form.

14. As part of its responsibility for the consumer credit regime, the OFT launched a review of compliance by payday lenders with the relevant legislation and guidance[9] on 24 February 2012. In November 2012, the OFT published an interim report on the compliance review. The OFT's final report was published in March 2013, setting out the OFT's plan of action.

15. In its March 2013 report, the OFT published the findings of its formal review of compliance by payday lenders with its relevant legislation and guidance, in particular the Irresponsible Lending Guidance. The OFT wrote to 50 payday lenders (accounting for 90 per cent of the market), requiring them to take immediate steps to address areas of non-compliance and to prove within 12 weeks that they had done so or risk losing their licence. Nineteen[10] of the 50 lenders have informed the OFT that they are leaving the payday market. Four of these have surrendered their licences and are not required to provide an audit report. The remaining 15 continue to trade in other areas of business that require a credit licence and have been required to provide an audit report to the OFT. In total, the OFT has received audit reports from 46 lenders, including all those who retain a licence.

16. In addition to the 50 leading lenders, and since the OFT published its payday review report in March 2013:

- three firms engaged in payday lending have had their licences revoked after their appeals against OFT determinations were either dropped or struck out by the First Tier Tribunal;[11] and
- a further four lenders have also surrendered their licences.

[9] The main relevant guidance is the Irresponsible Lending Guidance (www.oft.gov.uk/shared_oft/business_leaflets/general/oft1107.pdf) (see also paragraph 43 hereinafter).
[10] www.oft.gov.uk/OFTwork/credit/payday-lenders-compliance-review/.
[11] Appeals to the First Tier Tribunal are against the decisions from government departments and other public bodies. The Upper Tribunal hears appeals from the First Tier Tribunal on points of law, ie an appeal made over the interpretation of a legal principle or statute. Further appeals may be made, with permission, to the Court of Appeal. (www.justice.gov.uk/about/hmcts/tribunals).

17. Under the consumer credit regime, the OFT shares certain responsibilities with the ASA for the regulation of advertising relating to payday lending. As part of its compliance review, the OFT conducted an advertising sweep of over 50 payday lending websites[12] and wrote to the main trade bodies in the payday lending market outlining areas where standards in advertising needed to improve.[13]

18. On 6 March 2013, at the same time as publishing the report on its compliance review, the OFT announced that, subject to consultation, it proposed to refer the payday lending market to the CC for investigation. The OFT announced its final decision on 27 June 2013 to refer the market to the CC to conduct a market investigation.[14]

The Financial Conduct Authority

19. The Financial Conduct Authority (FCA) has the power to make general rules under section 137A of the FSMA, including the power to make rules limiting interest rates, associated charges and the duration of a credit agreement.

20. Interim permissions are currently being issued by the FCA in anticipation of the FCA's assumption of full responsibilities from 1 April 2014.

21. Currently and anytime before 1 April 2014, a new entrant will require a consumer credit licence, administered by the OFT. From 1 April 2014, the licensing system will be revoked and replaced by a system of authorisation under the Financial Services and Markets Act 2000, administered by the FCA. All firms who hold a consumer credit licence issued by the OFT will only be able to carry on consumer credit

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[12] www.oft.gov.uk/shared_oft/Credit/oft1481e.pdf. This comprised all known large and medium-sized lenders including members of the four main trade bodies, new entrants to the industry and licensees that had been the subject of consumer complaints or enforcement action. We also included a random sample of websites identified as a result of using search-engine terms such as 'quick cash loans' or 'adverse credit payday'.
[13] www.oft.gov.uk/shared_oft/Credit/oft1481e.pdf.
[14] www.oft.gov.uk/shared_oft/markets-work/payday-MIR.pdf.

activities under their existing licence until the 31 March 2014; current consumer credit licences expire on that date. Current licence holders must contact the FCA in order to register for interim permission if they wish to continue carrying on consumer credit activities from 1 April 2014.

22. The cost of the interim permission is £350 for companies and £150 for sole traders. After 1 April 2014, firms will need to complete a more detailed application process for FCA authorisation. There will be a phased approach to authorisation, where the FCA will ask different types of firms to apply by different deadlines. Payday lending firms will be classified as carrying out 'high-risk' activities and will require full permission, whereas other firms carrying out 'lower-risk' activities will only require 'limited permission' under a less onerous authorisation process. The FCA's standards are known as 'threshold conditions'. For this they consider the firm's business model, the experience and integrity of key personnel, the ownership of the firm and its financial position.

23. Firms will still be able to carry out regulated credit activities using their interim permission while they are waiting for the outcome of their application for authorisation. The FCA charges firms that are fully authorised fees when they apply to become authorised and every year they are authorised. Under the new regime, not all firms will pay the same amount. The fee payable will be proportionate to the size of the firm's business and the type of authorisation. Firms with limited permission are likely to have lower fees than those of higher-risk firms.

24. In preparation for this, the FCA published two consultation papers[15] covering its proposals for the consumer credit regulatory regime. A consultation on the high-level approach and high-level rules in March 2013 and a consultation on the detailed

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[15] www.fca.org.uk/news/firms/consumer-credit-detail.

proposals in October 2013. The policy statement confirming the final high-level rules was also published in October 2013.

25. Chapter 5 of the October consultation described the FCA's intended regulatory approach to consumer credit and the extent to which new rules will be issued to effect that regulation. Chapter 6 of the consultation paper covered high-cost short-term credit. It outlined a number of specific proposals on payday lending, including:

- limiting rollovers to two;
- limiting unsuccessful uses of Continuous Payment Authority (CPA) to two and a prohibition on part-payment requests via CPA;
- a rule requiring risk warnings on payday loan promotions;
- a rule requiring payday lenders to provide information to consumers about free debt advice; and
- the transposition of existing OFT affordability guidance and the FSA conduct standards and financial promotions regime into FCA rules and guidance.

26. The October consultation period closed on 3 December 2013. The FCA intends to publish new rules in February 2014 and to provide support to the firms affected, including targeted communications, presentations and plain language guidance.[16] The FCA expects to publish the plain language guidance will be published in March 2014 and a further paper outlining other risks and potential action in the consumer credit market in April 2014.

27. In addition to its consumer credit responsibilities, section 6 of the Financial Services Act 2012 gives the FCA a competition objective to promote effective competition in the interests of consumers. The FCA will be required to identify and address competition problems and adopt a pro-competitive approach to regulation. The

[16] www.fca.org.uk/static/fca/documents/consultation-papers/fsa-cp13-07.pdf.

competition objective is ancillary to the FCA's consumer protection and integrity objectives and it is limited by its compatibility with those other objectives.

28. The Financial Services (Banking Reform) Act 2013, gave the FCA the competition law powers contained in Part 1 of the CA98 (ie powers to take enforcement action against anti-competitive agreements and abuses of a dominant position) and Part 4 of the Act (ie powers to make market investigations references).[17] To underline the importance of its competition functions, there will be a duty on the FCA to consider the use of its Competition Act powers before exercising certain powers in the FSMA. This duty is consistent with requirement on certain other sector regulators and it is designed to ensure that regulators make effective their competition powers.

29. The financial promotions regime under section 21 of the FSMA has been extended to include consumer credit by amendments included in the Financial Services Act 2012. The FCA also has a new power (under new section 137C of the FSMA) to direct firms to withdraw or amend misleading financial promotions. Under the FSMA, a financial promotion is 'an invitation or inducement to engage in investment activity' that is made 'in the course of business' and is 'capable of having an effect in the UK'. That broad definition captures all promotional activity, including traditional advertising, telephone sales and face-to-face conversations, in relation to all products and services regulated by the FCA.

30. From 1 April 2014, the Consumer Credit Advertising Regulations, along with a number of other CCA provisions, will be replaced by the new FCA Rules in the new CONC Sourcebook.[18]

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[17] Section 129 and schedule 8 Financial Services (Banking Reform) Act 2013. These powers have not yet been commenced.
[18] CONC reflects the majority of the existing CCA Regulations and OFT guidance.

The Advertising Standards Authority

31. The ASA is not the lead regulator for financial advertising.[19] The ASA work compliments that of the FCA and the OFT by covering the 'non-technical' elements of financial marketing communications that are not subject to the 'technical' requirements of the FSMA, the CCA and the Consumer Credit (Advertisements) Regulations 2004; for which the FCA and the OFT are the lead enforcers respectively.

32. 'Non-technical' in this context refers to matters of serious or widespread offence, social responsibility and the truthfulness of claims that do not relate to specific characteristics of the financial product itself.

33. This arrangement means that consumers are protected by a comprehensive set of rules that cover all aspects of the advertising of a financial product or service. The ASA liaises with the OFT and the FCA regularly to ensure consistency of approach and to avoid double jeopardy.

34. As to the payday loan sector, it will be for the FCA to take the lead (for broadcast advertising) or be solely responsible for (for non-broadcast advertising) enforcing any measures that are designed to ensure that consumers are not misled as to the nature of, or risks associated with, a consumer credit product. The ASA will continue to ensure that advertisements are not irresponsible, capable of causing serious or widespread offence, or untruthful in terms of claims that do not relate to specific characteristics of the consumer credit product itself.

35. As with advertisements subject to the FSMA regime, the ASA will consider concerns about advertisements for consumer credit that relate to matters of serious or

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[19] www.asa.org.uk/~/media/Files/ASA/Public%20affairs/ASA%20response%20to%20high-level%20proposals%20for%20an%20FCA%20regime%20for%20consumer%20credit.ashx.

widespread offence, social responsibility or the truthfulness of claims that do not relate to specific characteristics of the consumer credit product itself.

36. Notable enforcement action by the ASA includes the recent banning of a Wonga advertisement, deemed irresponsible because it gave the impression that the use of a payday loan was something that might be done routinely and without sufficient consideration.[20] Another recent example is a Cash Lady advertisement, banned because it made references to past financial difficulties and implied that payday loans were more convenient and desirable than loans from high street banks.[21] Cash Lady has also been told to avoid using celebrity endorsements by individuals (in this case Kerry Katona) whose financial problems are well known.

Financial Ombudsman Service

37. The Financial Ombudsman Service is the statutory dispute-resolution scheme set up by parliament under the FSMA[22] and also has powers under the CCA. The Financial Ombudsman Service provides consumers with a free independent service to help resolve complaints about regulated financial firms and consumer credit licensees.

38. Under the CCA, the Financial Ombudsman Service makes rules regarding the handling of consumer credit complaints, with the approval of the FCA and these are included in the FSA/FCA Handbook under the DISP.[23]

39. Although payday loans account for only a small proportion of the cases[24] considered by the ombudsman service, in April/May 2013, the Financial Ombudsman Service

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[20] www.asa.org.uk/Rulings/Adjudications/2013/10/WDFC-UK-Ltd/SHP_ADJ_232698.aspx.
[21] www.asa.org.uk/Rulings/Adjudications/2013/5/PDB-UK-Ltd/SHP_ADJ_219095.aspx.
[22] www.opsi.gov.uk/acts/acts2000/ukpga_20000008_en_1.
[23] www.fca.org.uk/static/documents/handbook/readers-guide.pdf.
[24] In 2012/13, FOS handled 2,161,439 initial enquiries and complaints from consumers. A record 508,881 enquiries went on to become formal disputes. 74 per cent of these cases—378,699 disputes—related to payment protection insurance.

received[25] around 30 to 40 cases each month—this represents a 75 per cent increase on last year. According to the Financial Ombudsman Service, many of the complaints involve the lender's use of CPA—which allows the lender to collect payments directly from the consumer's bank account. Complaints involve payday lenders trying to take payments unexpectedly—or repeatedly attempting to take payments when the consumer has already explained that they do not have enough money to cover the debt. The Financial Ombudsman Service also receives complaints about unaffordable lending, the debt recovery methods used by some payday lenders as well as continuing to use CPAs after the borrower has sought to cancel them.

Regulatory framework

40. The working definition of payday loans in our issues statement[26] was unsecured loans which are taken out for 12 months or less, and where the minimum amount that can be borrowed is £1,000 or less.

41. The term 'payday loan' is not defined under the CCA.

42. Payday loans are given under either 'fixed-sum' or 'running account' credit agreements.

43. Running-account credit is a facility under a credit agreement whereby the borrower is enabled to receive from time to time, from the creditor, cash to an amount or value such that, taking into account payments made by the borrower (or payments to be credited to the borrower), the credit limit stipulated in the agreement (if any) is not at any time exceeded.

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[25] www.financial-ombudsman.org.uk/publications/ombudsman-news/109/109-payday-lending.html.
[26] www.competition-commission.org.uk/assets/competitioncommission/docs/2013/payday-lending/140813_payday_lendings_statement_of_issues.pdf.

44. Fixed-sum credit is any other facility under a consumer credit agreement whereby the borrower is enabled to receive credit (whether in one amount or by instalments).

45. Such consumer credit agreements fall under the CCA,[27] the legislation implementing the EU Consumer Credit Directive 2008,[28] and further amplified by the OFT Irresponsible Lending Guidance and certain self-regulation measures.

The Consumer Credit Act 1974

46. The CCA is the principal piece of legislation regulating lending and credit-related activities in the UK. The CCA lays down rules requiring information to be given to borrowers before entry into a consumer credit agreement. New regulations requiring information to be given to borrowers before entry into a credit agreement came fully into force on 1 February 2011, implementing provisions of the Consumer Credit Directive (CCD).

47. BIS have published a guide[29] which explains the key changes that have been made to the CCA and other associated legislation to implement the CCD. While the changes effected by the CCD are wide-ranging, the below summarizes the key points in the Consumer Credit Regulations 2010.[30]

Creditworthiness and adequate explanations (sections 55B and 55A of the CCA)

48. Creditors are required to assess the borrower's creditworthiness before granting credit or significantly increasing the amount of credit. The assessment must be based on sufficient information, obtained from the borrower where appropriate, and from a credit reference agency (CRA) where necessary.

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[27] Section 10 of the CCA.
[28] See paragraph 41.
[29] www.gov.uk/government/uploads/system/uploads/attachment_data/file/31904/10-1072-consumer-credit-directive-quick-guide.pdf.
[30] SI 2010/1010.

49. Creditors must ensure that the borrower is provided with an adequate explanation of the proposed credit agreement, for example the particular features of the agreements, the cost and the consequences of failure to make payments, to enable the borrower to assess whether the agreement is suited to his or her needs and financial situation. It specifically requires the explanation to cover those features which might make the credit unsuitable for a particular type of use and features which may operate in an unforeseen circumstance, which may have a significant adverse effect. The explanation must be provided orally in a face-to-face situation. The borrower must be able to ask questions about the agreement, or to ask for further information or explanation.

Pre-contractual information and agreements (section 55 of the CCA)

50. The Disclosure Regulations require pre-contractual information to be given in good time before the borrower enters into the agreement. The information must be clear and easily legible, and the borrower must be able to take it away to consider it and to compare it with other offers if they wish. In most cases the information must be provided in a standard format, the Pre-contract Credit Information form, known as the ‘SECCI’, to aid comparability and consumer understanding. In the case of overdrafts, a different standard form may be used but is not mandatory. If this form is not used, all the information must be equally prominent.

51. The Agreements Regulations do not prescribe the form of the credit agreement, or the ordering of information. They prescribe the information that must be included in the document which the borrower signs. It must be clear and concise and easily legible. There are new rules regarding the provision of copies of executed agreements. There is a new right for consumers to request a statement of account for a fixed-term loan. The statement can be requested at any time during the life of the agreement but not more frequently than once a month.

Right of withdrawal (section 66A of the CCA)

52. The borrower can withdraw from an agreement within 14 days following conclusion of the agreement or (if later) once the borrower has received a copy of the executed agreement or notification of the credit limit on a credit card. The borrower must repay the credit and must also pay interest for each day the credit was drawn down.

Online execution of agreements

53. The CCA Order 2004[31] allows for the execution of CCA-regulated agreements online (or by other 'electronic communications') and permit creditors to send out copies of agreements and notices by electronic means where the borrower has agreed to this.

54. The Order sets out the amendments to the CCA and associated regulations needed to bring this into effect, including changes to the form of agreements to allow for electronic signatures. In each case, the creditor is required to specify the form of electronic communication needed to conclude the agreement. Electronic communication is widely defined, and includes email and online transactions. It also, in principle, includes telephone communications, although the creditor would still need to ensure that it had complied with the provisions of the CCA such as the form of agreements and delivery of copies of agreements. Although most notices can be sent electronically, it is not possible to take enforcement action unless a default notice has been sent by post (see paragraph 61).

The Irresponsible Lending Guidance

55. Under section 25 of the CCA, the OFT has a duty to ensure that licences are only held by businesses that are fit to hold them (known as the 'Section 25 Test'). In

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[31] The Consumer Credit Act 1974 (Electronic Communications) Order 2004, SI 2004/3236.

March 2010, the OFT published its Irresponsible Lending Guidance.[32] The foreword of the Irresponsible Lending Guidance states:

> The primary purpose in producing this guidance is to provide greater clarity for businesses and consumer representatives as to the business practices that the [OFT] considers may constitute irresponsible lending practices for the purposes of section 25(2B) of the [CCA]. It indicates types of deceitful or oppressive or otherwise unfair or improper business practices which, if engaged in by a consumer credit business, could call into consideration its fitness to hold a consumer credit licence.

The guidelines set out the expectation that lenders will conduct a reasonable assessment of affordability and monitor repayments. If customers fall into difficulties with their repayments, the lender is expected to show forbearance in resolving the problem.

The Consumer Credit Directive 2008/48/EC

56. The CCD was adopted on 23 April 2008, replacing the previous Consumer Credit Directive. In the UK, the CCD has been implemented by six sets of regulations:

- *The Consumer Credit (EU Directive) Regulations 2010, SI 2010/1010* (the EU Directive Regulations). These regulations make a number of amendments to the CCA and to secondary legislation made under the CCA to implement various requirements of the CCD.
- *The Consumer Credit (Total Charge for Credit) Regulations 2010, SI 2010/1011* (the TCC Regulations). These regulations set out how the total charge for credit and the annual percentage rate of charge disclosed in advertising and consumer information must be calculated. They largely replace previous regulations on the total charge for credit.

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[32] www.oft.gov.uk/shared_oft/business_leaflets/general/oft1107.pdf.

- *The Consumer Credit (Disclosure of Information) Regulations 2010, SI 2010/1013* (the Disclosure Regulations).[33] These regulations set out what information must be provided to consumers before they enter into a credit agreement and the way in which that information must be provided. They largely replace previous regulations on the disclosure of pre-contractual information.
- *The Consumer Credit (Agreements) Regulations 2010, SI 2010/1014* (the Agreements Regulations). These regulations set out what information must be included in a credit agreement and how it must be presented and include requirements on the signing of a credit agreement. They largely replace previous regulations on the form and content of agreements.
- *The Consumer Credit (Amendment) Regulations 2010, SI 2010/1969* (the Amendment Regulations). These regulations amend errors that were identified in the EU Directive Regulations, the Disclosure Regulations and the Agreements Regulations.
- *The Consumer Credit (Advertisements) Regulations 2010, SI 2010/1970* (the Advertisements Regulations). These regulations set out what information must be included in advertisements for consumer credit agreements and how that information must be presented. They largely replace previous regulations on advertisements.

57. The implementing regulations came into force on 1 February 2011 and apply to all consumer credit agreements regulated under the CCA (other than agreements secured on land). The changes principally affect creditors, but also impact to some extent on credit-brokers and credit intermediaries.

58. The CCD does not apply to credit agreement involving a total amount of credit less than €200 or more than €75 000 (£160 to £64 000), which leaves open the question

[33] The Consumer Credit (Amendment) Regulations 2011 (SI 2011/11) made some amendments to the 2010 Regulations.

of credit agreement outside the scope of the directive, for example payday loans below £160. For these loans, the directive states in recital 10 that a ‘Member State could thereby maintain or introduce national legislation corresponding to the provisions of this Directive or certain of its provisions’.

59. An explanatory memorandum prepared by BIS to the Consumer Credit Regulation 2010 outlines that loans below €200 (£160) are subject to the full requirements of the CCD.[34]

60. The CCD required the introduction of a number of new requirements into UK law. These include:

- a duty on the lender to provide information in advertising and at the pre-contract stage as well as adequate explanations about the credit on offer to the consumer (articles 4, 5 and 6, CCD);
- an obligation on the lender to check creditworthiness before offering or increasing credit (article 8, CCD);
- requirements concerning access to credit reference databases (article 9, CCD);
- a right for consumers to withdraw from a credit agreement within 14 days without giving any reason (article 14, CCD). If the consumer exercises their right of withdrawal, they shall pay to the creditor the capital and the interest accrued thereon from the date the credit was drawn down until the date the capital is repaid, without any undue delay and no later than 30 calendar days after the despatch by them to the creditor of notification of the withdrawal;
- requirements on lenders to inform consumers when debts are sold on (article 17, CCD); and
- requirements for credit intermediaries to disclose fees and links to creditors (article 21, CCD).

[34] www.legislation.gov.uk/uksi/2010/1011/pdfs/uksiem_20101011_en.pdf.

Interaction with other legislative provisions

61. Other EU legislative instruments concerned with consumer credit have provisions that do apply to payday lending. In particular, the Payments Services Directive (Directive 2007/64) is intended to create a single market for payment services and contains provisions on payment instruments, including recurrent payment such as CPA.

62. The Consumers' Association Which? is conducting a campaign against default charges imposed by payday lenders on customers who do not repay on time.[35] This campaign is based on the Unfair Terms in Consumer Contracts Regulations 1999. For further background on these regulations see Annex A.

63. There are also provisions in the Unfair Commercial Practices Directive (Directive 2005/29/EC) that read across to CCD provisions on advertising. This directive requires traders to inform consumers in advertising and other invitations to purchase about the total cost of a financial service also in situations where the CCD does not apply. The CCD also extends the Distance Marketing of Consumer Financial Services Directive (Directive 2002/65/EC) so that further pre-contractual information is provided in the case of voice telephony communications that lead up to the conclusion of a credit agreement.

Self regulation

64. Following discussions between BIS, the OFT, and the four trade associations representing over 90 per cent of the payday and short-term loan industry, a Good Practice Customer Charter[36] was published by the four trade associations representing payday lenders in July 2012: Consumer Credit Trade Association

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[35] See press release at http://press.which.co.uk/whichpressreleases/which-calls-on-payday-lenders-to-cut-high-fees/, 13 January 2014.
[36] www.cfa-uk.co.uk/assets/files/PD&STL_Charter.pdf.

(CCTA), Consumer Finance Association (CFA), BCCA and Finance & Leasing Association (FLA)[37] (Trade Associations).

65. Trade Associations have committed their members to explaining how loans work and the costs involved; increasing transparency about loan repayments so that consumers can make informed decisions and are not surprised by hidden payments; providing help for customers in financial difficulty by freezing charges and interest; undertaking robust credit and affordability assessments to ensure loans are suitable for the customer's situation; and effective compliance monitoring by the Trade Associations to root out poor practice in the industry. The CFA's Code of Practice also introduced a limit of three per rollover customer.[38]

66. Under the Good Practice Charter, the Trade Associations require their members to provide an annual statement of compliance and to be subject to periodic independent compliance visits. Failure to comply with the Charter could result in firms being subject to written warnings, recommendations as to future conduct and expulsion from the Trade Association for more serious breaches.

67. In relation to BBCA, any issues of non-compliance are raised with the lender to take action. If agreement cannot be reached members can face disciplinary action. The CCTA's[39] and the CFA's[40] own Code of Practice states that they would possibly suspend or expel any of their members who fail to comply with the code.

Legal considerations in offering payday loans

68. As explained above, the regulation of consumer credit products requires certain information to be included in contracts and prescribes the way that the information

[37] FLA has only one member in this sector which is Wonga.
[38] www.moneyshop.tv/CFA_Lending_Code_for_Small_Cash_Advances_25_July_2012.pdf. Point 4, f), iv) of the Code of Practice 'Members shall not allow customers to extend a short term loan on more than three occasions'.
[39] Annex C Code of Practice for bills of sale lenders (paragraphs 2.4 & 2.5) www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/11-516-government-response-proposal-ban-bills-of-sale.
[40] www.moneyshop.tv/CFA_Lending_Code_for_Small_Cash_Advances_25_July_2012.pdf.

must be ordered. The aim is to ensure that consumers are given sufficient, balanced information about the nature and cost of credit to enable them to compare different products and choose the ones that are best for them.

Formalities of a credit agreement

69. Since 2011, creditors must provide with certain specified information in a pre-contract information form and the borrower should be advised by the retailer to consider this information before signing the agreement. This is to ensure that the borrower is fully aware of the cost of the agreement and of his or her legal responsibilities. Creditors must ensure that the borrower is provided with an adequate explanation of the proposed credit agreement to enable him or her to assess whether the agreement is suited to his or her needs and financial situation.

70. Under section 55A of the CCA the creditor must provide the borrower with adequate information to enable the debtor to assess the suitability of the agreement and its terms to his needs and financial situation and how to seek further information. In particular the following information must be provided:

- the features of the agreement that may make it unsuitable;
- the length of the agreement;
- the amount and frequency of payments; and
- details of the customer’s cancellation rights.

71. The agreement must be signed by both the creditor and the borrower who is entitled to a copy of the agreement. If this information is not given or is not signed by both parties the agreement could be unenforceable.

Ending the agreement and early payment

72. The customer may end the agreement at any time by repaying the full amount owed.

73. Under section 66A of the CCA, the customer has the right to withdraw from his credit agreement without having to give any reason. To do so the customer must give oral or written notice to the lender before the end of the period of 14 days beginning from the day after he or she received a copy of the agreement. The customer is required to repay the credit without delay and no later than 30 calendar days after giving notice of withdrawal together with the interest accrued from the date the credit was provided until the day the credit is repaid.

74. Under section 94 of the CCA, the borrower can settle a regulated consumer credit agreement early by giving notice to the lender and paying the amount due less a rebate. The borrower is also entitled to information about the amount needed to settle. This has been extended from 1 February 2011 to provide a new right of partial early repayment. The changes arise from implementation of the CCD, and are contained in the various Consumer Credit Regulations 2010 cited in paragraph 52.

Defaulting on payments

75. In the payday lending sector, the implications of late payment vary from lender to lender. Typically a customer will be charged a late payment fee and will accrue interest on the outstanding balance. Often a lender will make further attempts to collect money owed from the customer in either one payment or in several amounts on a continuous basis.

76. Lenders usually charge the customer a missed payment fee and interest will continue to accrue.

77. Information in relation to failed payments will be noted on the credit record and may affect the customer's ability to obtain credit in the future. A creditor must give the borrower a notice of sums in arrears, plus an arrears information sheet at intervals of

six months until the borrower is no longer in arrears, or until a judgment is made regarding the amount owed. A creditor cannot enforce an agreement during the time it fails to comply with this requirement and the borrower would not be liable to pay interest during this time.

78. Before any enforcement action can be taken against the borrower, the creditor must send the borrower a default notice and default information sheet, giving the borrower the opportunity to make the payment within a specified time. It must set out what action it intends to take if the borrower fails to make the payment.

Rollover loan

79. If a customer is unable to repay a payday loan when it falls due, a lender may allow the customer to extend the loan for a further period of time (eg until the next payday).

80. There is no legal definition for 'rollover' or 'extended loan'. In its final report, the OFT had made it clear that lenders must ensure that borrowers understand what a rollover is—'in particular whether it amounts to a new agreement and whether payments will reduce the capital, or only cover interest and charges'.[41]

81. Each lender has its own policy and practices regarding rollovers. Some allow limited or unlimited renewals of the loan. Others require borrowers to request renewals. It seems that in practice, an agreement modifying[42] a fixed sum loan or running account agreement will be sent after the payment date and signed.

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[41] www.oft.gov.uk/shared_oft/Credit/oft1481.pdf, p11.

[42] On modifying agreements, s82(2) of the CCA states:

> '(2)Where an agreement (a "modifying agreement ") varies or supplements an earlier agreement, the modifying agreement shall for the purposes of this Act be treated as—
> (a)revoking the earlier agreement, and
> (b)containing provisions reproducing the combined effect of the two agreements,
> and obligations outstanding in relation to the earlier agreement shall accordingly be treated as outstanding instead in relation to the modifying agreement.'

82. The CFA's Code of Practice gives a definition of an 'extended loan': 'Members shall never extend interest or fees due on a short term loans. Only the original principal sum may be extended. Members shall not operate automatic extensions, but instead, will discuss the options available with the customer and only extend repayment after express agreement with the customer.'

83. Where the customer requests the option to extend the loans, CFA's members shall carry out an appropriate and proportionate affordability assessment before an extension is granted. A 'modifying agreement' shall be signed by the customer alongside with new interest rate, terms and conditions.

84. In its proposal,[43] the FCA considers that:

> a loan is rolled over if the period over which loan repayments are to be made has been extended, or if the due date for any loan repayment has been moved to a later date, whether by means of an agreement that replaces, varies or supplements an earlier loan or otherwise (excluding any forbearance by the lender where the firm does not receive any consideration in connection with the rollover and the effect is that no interest or other charges (other than where a charge is a reasonable estimate of the cost of the additional administration required as a result of the customer having rolled over the agreement) accrue from the date of the rollover).

85. New rules to protect borrowers proposed by the FCA will provide that lenders will be prevented from rolling over loans more than twice to stop charges escalating. Once a loan can no longer be renewed, the lender must pursue collection of the amount due.

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[43] www.fca.org.uk/static/documents/consultation-papers/cp13-10-appendices.pdf.

Legal implications for payday lenders

86. Since the Consumer Credit Regulations 2010 implementing the CCD, creditors are required to assess the customer's creditworthiness before agreeing to offer a credit agreement or increasing the sum of credit. The creditor's decision whether to offer a credit, or increase or extend a credit, should be based on information provided by the customer and any necessary information gathered from credit reference agencies.

Affordability and credit check history

87. As explained above, the CCD now requires lenders to assess a consumer's creditworthiness on the basis of 'sufficient information' before concluding a credit agreement. The new regulations do not specify what checks should be made, and lenders are left to determine the appropriate methods in each set of circumstances.

88. Under the ILG, the OFT expects that affordability is assessed. Consequently, assessing affordability is a central requirement for any company offering credit to consumers. Affordability will clearly depend on the type of credit product being offered, and the amount of credit to be provided.

89. In its guidance,[44] the OFT advises that to make an accurate assessment of affordability for any customer, a number of 'affordability indicators' might need to be considered, including:

- the type of credit product;
- the amount of credit to be provided and the associated cost and risk to the borrower;
- the borrower's financial situation at the time the credit is sought;
- the borrower's credit history including any indications of the borrower experiencing or having experienced financial difficulty;

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[44] The OFT Irresponsible Lending Guidance, paragraph 4.10, www.oft.gov.uk/shared_oft/business_leaflets/general/oft1107.pdf.

- the borrower’s existing and future financial commitments including any repayments due in respect of other financial products and significant non-credit commitments;
- the impact of a future change in the borrower’s personal circumstances: for example, this could include a known end date of current employment due to circumstances such as retirement or the end of a fixed-term employment contract—either of which may lead to a fall in the borrower’s disposable income;
- the vulnerability of the borrower: for example, whether the borrower is known to lack—or is reasonably believed to lack—the mental capacity to be able to understand information and explanations provided to him and make informed borrowing decisions based on his understanding of such information and explanations at the time they are provided; and
- in any particular case it is for the lender to consider what is appropriate and proportionate in the circumstances and which enables the creditor to form a view on as to the debtor’s ability to repay the loan without undue difficulty.

90. To process the loan transaction, lenders may use customer data to carry out affordability assessments.

Repayment mechanism

91. When taking out a payday loan, it is common for the lender to request the borrower to grant a CPA. Once agreed, a CPA allows the lender to take a series of payments using a customer’s debit card or credit card without having to seek express authorization for every payment. The lender is able, in practice, to collect the payment at anytime from 5am on the promise date.

92. CPAs are a form of ‘recurring payments’. Recurring payments are covered by the Payment Services Directive (PSD, 2007/64/EC) which was implemented in the UK by

the Payment Services Regulations 2009[45] on 1 November 2009. These regulations set out conduct obligations for payment service providers.

93. In November 2012 the OFT issued a revised set of guidance for businesses engaged in recovery of consumer credit debts[46] and which addressed the misuse of CPAs.[47] The OFT further issued, in December 2012, a set of principles for businesses using CPAs and to assist them by indicating the core standards of behaviour which, in the OFT's view, should underpin CPA use.[48] The principles make clear to all businesses what they need to do to ensure that they fully meet their legal responsibilities when using CPAs, including that they:

- are fully transparent about terms before a consumer signs up to a CPA arrangement;
- ensure the consumer has given informed consent to the use of a CPA, and do not use 'opt out' provisions or other means to automatically assume the consumer has given consent;
- provide adequate notice of any changes to the scope of the agreed authority, such as the amount or timing of payments; and
- provide clear and prominent information on how to cancel a CPA.

94. Under Regulation 55(3) and (4) of the Payment Services Regulation 2009, 'the payer may withdraw its consent to a payment transaction at any time before the point at which the payment order can no longer be revoked under regulation 67' and 'the payer may withdraw its consent to the execution of a series of payment transactions at any time with the effect that any future payment transactions are not regarded as authorised for the purpose of this Part'.

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[45] SI 2009/209.
[46] www.oft.gov.uk/shared_oft/consultations/OFT664Rev_Debt_collectio_g1.pdf.
[47] Please see paragraph 3.9(m), www.oft.gov.uk/about-the-oft/legal-powers/legal/cca/debt-collection.
[48] www.oft.gov.uk/business-advice/treating-customers-fairly/cpa-principles/.

95. Regulation 67 deals with time limits for stopping payments. For CPAs, this will usually be the end of the business day before the payment is due.

96. If a payment causes the customer to incur any fees—such as an overdraft charge or a late payment fee—or to lose any interest, then those losses have to be refunded.[49]

Continuing obligations of the creditor

97. Under sections 77, 77B (fixed-sum credit) and 78 running-account credit) of the CCA, the borrower is entitled to request a copy agreement at any time, together with a statement of account upon payment of a £1 fee in respect of information obtained under section 77.

98. If a creditor does not comply with the requirements of sections 77 or 78, it cannot enforce the agreement during non-compliance, and the borrower would not be obliged to pay interest until the creditor complies.

Handling and sharing customer data

99. As part of their business, payday lenders receive information from customers through the use of websites, application forms and credit agreements. A significant amount of information about customers comes under the control of payday lenders, and there are circumstances in which lenders may wish to disclose that information to a limited number of third parties. Therefore, data protection law is highly relevant to the payday lending industry and compliance with this law is an area of regulatory concern.[50]

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[49] Regulation 63 Payment Services Regulations 2008 and Recital 36 of the PSD, 2007/64/EC.

[50] In the OFT's payday lending compliance review, 18 of the 52 lenders investigated did not appear to be fully compliant elements of the data protection legislation. In particular, 14 lenders did not allow consumers to opt-out of having their details passed on to third parties, contrary to the DPA, and seven lenders did not allow consumers to opt-out of receiving electronic marketing messages, contrary to the PECR: see Annex D, *Payday lending compliance review final report*, OFT, March 2013.

100. Payday lenders are data controllers under the Data Protection Act 1998 (DPA) and as a general rule, they are under a basic obligation not to process personal data, which includes not disclosing it, unless one of the conditions for processing[51] is satisfied and the subject information provisions[52] are adhered to.

101. It is a statutory requirement that all Data Controllers notify the ICO before processing data.[53] In practice, lenders normally display their registration number with their privacy policy or in privacy notices. Failure to notify the ICO is criminal offence.[54]

Privacy policies

102. A fair processing notice or privacy notice will be required at the point at which data is collected.[55] Lenders attach these to credit agreements or display them via a link at the bottom of a webpage or during the application process. Many payday lenders will not let customers proceed with their application unless they have read and accepted the terms of the privacy policy.

Data sharing

103. Lenders disclose customer information to a limited number of third parties for commercial purposes. For example, information might be shared with CRAs to prevent crime and money laundering, as well as law enforcement agencies to prevent fraud and to publishers and retailers for contracted marketing purposes. The ICO has issued guidance on this, with the aim of outlining objective standards for

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[51] Schedule 2 of the DPA.
[52] The subject information provisions are defined in s 27(2) of the DPA and include an organization's duty to provide individuals with a privacy notice, in accordance with paragraph 2(1) of Schedule 1, Part II of the DPA, when their personal data is collected; and an individual's right to make a subject access request under s7 of the DPA.
[53] Section 17(1) of the DPA.
[54] Section 21(1) of the DPA.
[55] Paragraph 2 of Schedule 1, Part II of the DPA.

judging defaults and ensuring that credit data accurately reflects ability of the data subject to repay.[56]

104. In the consumer credit industry, the Principles of Reciprocity[57] provide common market standards for the purpose of data sharing. The governing principle, enumerated by the Steering Committee on Reciprocity, of which numerous trade associations are members,[58] is that: 'Data are shared only for the prevention of over-commitment, bad debt, fraud and money laundering, and to support debt recovery and borrower tracing, with the aim of promoting responsible lending.'[59]

105. There is debate within the industry about the merits of improving the rate of data sharing with credit reference agencies. More frequent or real-time sharing would, it is argued, enable to take other payday loans into account when carrying out affordability checks.[60]

106. Information exchanges are seen as having the potential to breach Article 101 of the Treaty on the Functioning of the European Union (TFEU) if they have the object or effect of restricting or distorting competition.[61]

107. The European Court of Justice (ECJ) has considered[62] that credit registers are in principle capable of improving the functioning of the supply of credit. In substance, if, owing to a lack of information on the risk of borrower default, financial institutions are unable to distinguish those borrowers who are more likely to default, the risk thereby

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[56] *Data Protection Technical Guidance: Filing defaults with credit reference agencies,* ICO, August 2007.
[57] The Principles of Reciprocity are a set of guidelines governing the sharing of personal credit performance and related data via the closed user groups at the credit reference agencies.
[58] Trade associations and industry bodies represented are the British Bankers' Association, British Retail Consortium, Building Societies Association, Consumer Credit Association UK, CCTA, Council of Mortgage Lenders, Credit Services Association, Energy Retail Association, FLA, Mobile Telcos and The UK Cards Association. The credit reference agencies represented on SCOR are mainstream credit reference agencies Experian, Equifax and Callcredit, plus niche market credit reference agency CoreLogicTeletrack.
[59] *Information sharing principles of reciprocity*, Select Committee on Reciprocity, March 2013.
[60] Source: [ADVERTISED TRANSACTION TIMES, WONGA SITE VISIT AND LENDING METRICS CALL].
[61] Article 101 TFEU.
[62] Case C-238/05 *Asnef-Equifax.*

borne by such institutions will necessarily be increased and they will tend to factor it in when calculating the cost of credit for all borrowers, including those less likely to default, who will then have to bear a higher cost than they would if the institutions were in a position to evaluate the probability of repayment more precisely.

108. None the less, the judgment indicates that the compatibility of an information exchange system depends on the economic conditions on the relevant markets and on the specific characteristics of the system concerned, such as, in particular, its purpose and the conditions of access to it and participation in it, as well as the type of information exchanged—be that, for example, public or confidential, aggregated or detailed, historical or current—the periodicity of such information and its importance for the fixing of prices, volumes or conditions of service.

109. The ECJ has considered data sharing in the context of credit reference agencies and found that 'a system for the exchange of information on credit between financial institutions ... does not, in principle, have as its effect the restriction of competition within the meaning of that provision, provided that the relevant market or markets are not highly concentrated, that that system does not permit lenders to be identified and that the conditions of access and use by financial institutions are not discriminatory, in law or in fact'.

Direct marketing

110. Lenders will often use the data that they collect for the purpose of their own direct marketing campaigns.[63] While there are no restrictions on sending marketing that the individual has specifically requested, unsolicited marketing is subject to restrictions under the DPA and the Privacy and Electronic Communications (EC directive) Regulations 2003 (PECR) and the Irresponsible Lending Guidance.

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[63] Direct marketing includes any marketing or advertising directed at a particular individual—see s11(3) of the DPA.

111. As part of their direct marketing strategies, lenders often make marketing calls to unsolicited individuals. These calls should be screened against the Telephone Preference Service (TPS) and anyone registered with the TPS should not be called by the lender unless the individual has taken a proactive step to notify them that they do not object to receiving marketing calls.[64] Some payday lenders are known to pursue direct marketing strategies through the use of texts and emails. Normally, active consent is required if a lender wishes to send marketing by any form of electronic message.[65] In addition, lenders should not disguise or conceal their identity and should provide sufficient contact details to allow for a reply.[66]

112. Often lenders use forms of electronic messaging for the purpose of targeting existing customers. The DPA provides for an exception in the case of contacting existing customers known as the 'soft opt-in'. This effectively allows lenders to market their own similar products or services, such as further loans, to customers who have previously received or applied for a loan,[67] provided that they gave the customer a simple opportunity to opt out of the marketing in the first message and every message afterwards.[68]

113. For the purpose of marketing online, lenders also store information relating to the computer of the user, such as browsing history. If using such information to target online adverts at individual users, lenders must comply with the data protection principles.[69] The PECR also contains specific rules in relation to the use of cookies.

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[64] Regulation 21(1) of the PECR.
[65] Regulation 22(2) of the PECR.
[66] Regulation 23 of the PECR.
[67] One consumer association expressed concern that customer details are retained in the absence of a loan agreement: see *Which? Consultation Response, Payday Lending: Consultation on a market investigation reference,* 1 May 2013. It is not necessary for a loan to be provided or an agreement to be reached for lenders to lawfully retain the personal data of customers.
[68] Regulation 22(3) of the PECR.
[69] *Personal information online: code of practice,* ICO, July 2010, pp20–23.

Lenders setting cookies must tell people that the cookies are there, explain what the cookies are doing, and obtain their consent to store a cookie on their device.[70]

Use of marketing lists and third-party lead generators

114. A number of lenders purchase marketing lists from brokers or lead generators. Although the information is provided by a third party, lenders will still be bound by the DPA and need to ensure that the third party obtained the personal data fairly and lawfully.[71] As such, they might be expected to find out how the data was obtained, what the individuals were told and when and how consent was obtained.

[70] Regulation 6 of the PECR.
[71] *Direct marketing: code of practice,* ICO, September 2013, pp39–41.

Background on the Unfair Terms in Consumer Contracts Regulations 1999

1. Under the regulations, an unfair term is one which has not been individually negotiated and which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer (regulation 5). The assessment of unfairness must take into account all the circumstances attending the conclusion of the contract. That assessment may not relate to the definition of the main subject matter of the contract or the adequacy of the price or remuneration against the service supplied as long as the terms are in plain intelligible language (regulation 6). Unfair terms are not binding on consumers (regulation 8). The OFT or a qualifying body named in Schedule 1 to the regulations, including the Consumers' Association, may apply for an injunction to prevent the continued use of an unfair contract term.

2. In *Office of Fair Trading v Abbey National plc and others*[1] the ability of banks to make default charges on customers who made payments or tried to make payments out of an account with insufficient funds was challenged as unfair and in the alternative a penalty contrary to common law and an injunction was sought. The commercial Court found that the OFT had power to assess the charges for fairness under the regulations because they were not prices for services and also that the regulations did not displace the common law on unlawful penalties. On appeal, eventually to the Supreme Court, on the points concerning the interpretation of the regulations that Court ruled in summary:[2]

   - Unauthorized overdraft charges are part of the price that customers agree to pay for the whole 'package' of services from their bank. The exemption in the

[1] [2008] EWHC 875 (Comm).
[2] [2009] UKSC 6.

Regulations therefore applies and the OFT cannot challenge the fairness of the banks' charges.

- It is not correct to say that the exemption only applies to the 'core' or 'essential' price in the contract. There was no justification for making such a distinction, and the exemption in the regulations applies to all prices.
- These charges were not in any event non-core or non-essential. Banks provide a package of services to customers, and, in return, the customers pay a package of prices: interest and charges on overdrafts, charges for specific services (eg foreign currency payments), and interest foregone on credit balances. The charges are an important part of the charging structure.
- The fairness of the charges could theoretically be challenged on some other ground. The Supreme Court dismissed the grounds that the OFT had provisionally raised in the course of its investigation as irrelevant and inadmissible, because in comparing charges with only certain services (as opposed to the whole package), the OFT's investigation was 'beside the point'.