



## Consumer Credit: Covid (Continued) and Concealed Changes.

By Richard Mawrey QC

**The Financial Conduct Authority has again extended its Guidance on consumer debt and there are two largely unpublicised technical changes in the pipeline to beware of.**

### FCA Guidance

1. It was clear from the start that lockdown would have a serious effect on consumer debtors and hirers. The Treasury and the FCA, therefore, brought in rules from 20 March 2020 onwards to mitigate the financial hardship in all areas of debt.
2. The FCA did this by introducing 'Guidance' which amounted in reality to a series of rules for lenders. The first area to be tackled was that of mortgages with Guidance being initially issued on 20 March 2020 (three days before lockdown). Then came Guidance on credit cards, overdrafts and personal loans which was issued on 9 April 2020 and came into force on 14 April 2020. Finally there was Guidance on motor vehicle finance (including credit-sale and hire), high-cost short-term credit (HCST), non-motor hire-purchase (variously described as 'Rent To Own' and 'Buy Now Pay Later' but all essentially and juridically hire-purchase or conditional sale) and pawn contracts. This was finalised on Friday 24 April and came into force on Monday 27 April 2020.
3. All these sets of Guidance were updated in July 2020, the effect of which was to extend the ambit of the original Guidance to 31 October 2020.
4. All four sets of Guidance were the subject of Henderson Chambers alerters and the details of the FCA's rules can be found there together with the links to the relevant FCA website pages.

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5. Well, to the surprise of no-one bar the Government, despite months of national house-arrest and the economy dynamited to rubble, Covid-19 has not packed its bags and stolen silently away in the night but appears, like the poor (whose number it has greatly augmented) to be 'always with us'. Consequently, the FCA has decided to update its 'Final' – now 'Finalised' - Guidance (one is irresistibly reminded of a pop legend's 'Farewell Tour' which becomes an annual event). Once again, it has extended the period of grace for three months and the current Guidance is intended to take us through to 31 January 2021.

### The new Guidance

6. The most recent Guidance is issued in two tranches, both of which came into force on 2 October 2020.
  - Consumer credit and Coronavirus: Additional Guidance for Firms <https://www.fca.org.uk/publication/finalised-guidance/finalised-guidance-consumer-credit-coronavirus-additional-guidance-firms.pdf>
  - Overdrafts and Coronavirus: additional guidance for firms <https://www.fca.org.uk/publication/finalised-guidance/finalised-guidance-overdrafts-coronavirus-additional-guidance-firms.pdf>

### Guidance not rules

7. As before, it is sensible to consider the FCA's *modus operandi*. In this instance the FCA is proceeding by Guidance rather than by rules. We must reiterate, however, that the FCA expects that its guidance will be followed to the letter and threatens regulatory action against those who might be tempted to disregard it. As the FCA puts it 'This guidance sets out our expectation that firms should provide, for a temporary period only, exceptional and immediate support to consumers facing payment difficulties due to circumstances arising out of coronavirus.' The FCA makes it clear that this guidance is based on PRIN 6, 'A firm must pay due regard to the interests of its customers and treat them fairly' and PRIN 7 'A firm must pay due regard to the information needs of its clients, and communicate information to

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them in a way which is clear, fair and not misleading'. This is backed by the warning that the Guidance is 'potentially relevant to enforcement cases and the FCA may take it into account when considering whether it could reasonably have been understood or predicted at the time that the conduct in question fell below the standards required by Principle 6 and Principle 7'.

8. It is also necessary to keep in mind PRIN 11 which obliges offenders to self-report to the FCA.

### **Payment deferral**

9. In all the areas in which Guidance has been issued, the core of the scheme is a three-month moratorium, referred to as a 'payment deferral'. The FCA guidance defines 'payment deferral' as follows: 'an arrangement under which a firm permits the customer to make no or reduced payments under [the relevant type of contract] for a specified period without being considered to be in payment shortfall. A "full payment deferral" is where the firm permits the customer to make no payments. A "partial payment deferral" is where the firm permits the customer to make reduced payments of any amount'. In short, it is a postponement of repayment not a remission of the instalments: the debt remains. That is not to say that a lender might not agree to write off interest for a period but deferral as contemplated by the FCA does not go that far.

### **Existing Guidance**

10. Although the Guidance has been set out in detail in earlier Alerters, a summary may be useful. In essence
  - a. The default position for deferrals is that they should be, initially at least, for a period of three months: it was open to lenders to agree a longer period and, in exceptional cases, a shorter one, but the fallback position is always three months.
  - b. The onus is on the debtor to approach the lender and ask for a deferral rather than on the lender to suggest it: that said, lenders are obliged to tell customers

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that they can ask for a deferral and include details in their ordinary communications with debtors. If the debtor has a reasonable case for deferral, the creditor should negotiate with him.

- c. Unlike the position with granting credit, the lender is not obliged to be proactive or to make extensive investigations as to the financial circumstances, though it must always consider what would be in the best interests of the customer.
- d. A payment deferral is just that, a deferral. No part of the debt is cancelled and interest continues to run, albeit that the lender is strictly enjoined not to use the deferral as an excuse to increase interest rates, even when those rates are tied to the amount of the outstanding balance and the capitalisation of interest would push the capital outstanding into a new and higher interest band. The requirement not to increase interest is spelt out in very tough terms in the case of HCST lending.
- e. The normal forbearance rules for dealing with debtors who get into arrears (particularly those contained in CONC 7) have been suspended in the case of deferrals granted for Covid-related reasons but continued to apply where debtors were already in difficulties before the onset of the virus.
- f. Lenders cannot make any charge for granting the deferral and the non-payment for deferral reasons must not be given an adverse entry in credit registers.
- g. Only in exceptional cases should lenders attempt to enforce debts by legal action during the moratorium and more direct action such as repossessing mortgaged or charged properties or repossessing chattels subject to hire-purchase or hire is also forbidden.

### **The October 2020 Guidance**

- 11. The principal Guidance (Consumer credit and Coronavirus) is a very prolix document indeed (26 pages) and much of it is given to re-stating the basic rules for granting deferrals set out above. The FCA recognizes, however, that there will be ongoing problems both with those whose deferrals have come to an end and those who require extensions and new deferrals. When the Guidance was originally issued in March 2020 there was, understandably at the time, a feeling of 'all over

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by Christmas' and the Guidance was seen and hoped to be temporary. The tone of the current Guidance is much darker and, if there is any light at the end of the tunnel, the FCA is certainly not using it to read by.

12. Many debtors and hirers have now been in financial difficulties for six or seven months, and arrears during a potential three-month lockdown might have appeared surmountable at the time whereas now the prospect is much more daunting. The scaling down of Governmental financial assistance will inevitably push more debtors into the position of having to ask for a deferral. By the same token, unlike Government, lenders do not have the Magic Money Tree growing in their gardens. The time is approaching when some lenders might themselves be looking apprehensively at their assets.
13. As before, the FCA urges lenders to ensure that they have in place robust policies for dealing with debtors who ask for a deferral and those who let themselves get into arrears without asking for a deferral. Again and again, the FCA stresses that arrangements made with customers in difficulties must be sustainable and affordable and will not eat into the customers' everyday necessities or drive the customers into raising further and more expensive credit in an attempt to pay off existing credit.
14. Unsurprisingly the leitmotiv is always 'talk to the customer'. The FCA recognizes that it cannot place on lenders the onerous pre-contract investigations demanded by CONC to satisfy itself as to the viability of the credit before it is granted. The customer has to make much more of the running and justify his request for a deferral and the lender is not obliged to engage in a lengthy verification process before agreeing.
15. The new Guidance is especially concerned with three categories of debtor who are still or have become subject to financial difficulties
  - those who have had two deferrals already;

- those who were granted a deferral under the July Guidance and have not sought a further deferral;
  - those newly fallen into financial difficulties.
16. What the lender is expected to discuss with the customer is the way forward. Is a further period of deferral necessary or desirable? Should a new payment plan be developed so that the customer can pay *something* even if only current instalments with nothing off the arrears? Ought the credit to be entirely restructured for the future? All these questions have to be addressed.
17. It is recognized that lenders themselves may experience difficulties and be simply unable to cope with all problems with arrears and deferrals in the time available. The first rule here is so to handle the customer's account as to ensure that he is not worse off than he would have been if the lender had been able to deal with him in time. The Guidance emphasizes that it is the responsibility of lenders to put sufficient resources in place to meet their obligations to treat the customer fairly and this involves keeping open channels of communication.
18. The Guidance recommends some obvious but sensible steps including
- providing as far as possible a 'consistent point of contact';
  - being transparent about average waiting times, and times when customers are likely to experience longer or shorter waiting times;
  - use of call-backs;
  - offering pre-booked appointments;
  - referring customers to on-line tools where these are available;
  - clearly communicating the information or documents customers will need to have to hand.
19. The FCA is naturally somewhat concerned by customers refinancing which lenders may encourage them to do as a way out of their difficulties, particularly if they have got into debt elsewhere during the crisis. While this may be a solution for some, lenders are exhorted to make sure that the customer fully understands the position and is properly advised of all the possible alternatives. There is a recognition that,

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for many lenders, getting customers to refinance may seem a desirable way of minimising their losses but the FCA hints, not to delicately, that it will come down like a ton of bricks on lenders who get their customers to sign up to unrealistically optimistic new agreements.

20. A distinction is made, as with the earlier Guidance, between those caught by Covid and those whose agreements had got into arrears before the virus struck. Those with long-standing problems fall to be dealt with under existing procedures, in particular CONC 7, though any further difficulties experienced by the customer as a result of Covid have to be taken into account.
21. The new Guidance updates the rules as to specific forms of credit, while keeping the substance of the earlier Guidance intact.
22. With **hire-purchase and conditional sale**, lenders are invited to consider discussing with the customer the option of his terminating the agreement under the Consumer Credit Act 1974 ss 99 or 100.
23. In these cases and with **consumer hire**, the earlier prohibitions on repossession are reinforced and repossession (*a fortiori* court action) should be only be contemplated after 'all forbearance options have been considered and evidenced, or where the customer has failed to engage with the firm despite the firm having made all reasonable attempts to engage with the customer'. Clearly all the current health rules, including social distancing, must be observed if any repossession does take place.
24. There have obviously been problems with **pawn contracts** because the advice highlights a number of issues. Customers who have not so far sought deferral but are now in difficulties should ask for an extension of the right to redeem and pawnbrokers should not give notice of intention to sell if aware that the customer has financial problems. Nevertheless, the pawnbroker and the customer must give serious thought as to whether the customer is ever going to be able to redeem the pledge and, if not, immediate sale may be the better solution to prevent the debt mounting to a point where it eclipses the sale value of the pledge. If the customer

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cannot get to the store to redeem (though able to do so otherwise), because of lockdown or self-isolation, then the pawnbroker must not charge interest, fees or penalties for late payment until such time as the customer is able to attend to collect the pledge. Further, where, as is sadly too often the case, the pawnbroker has had to close its stores, the customer must be informed (and clear signs put in the store windows) as to how he can go about redeeming the pledge.

### Overdrafts

25. The Guidance here applies to ‘primary personal current accounts’ defined as the account into which a person’s main source of income is paid. The Guidance excludes private banks and credit unions and basic bank accounts.
26. The advice here is pretty much the same as for other credit agreements with the need to discuss matters with the customer, to be proactive to avoid the situation worsening and to negotiate either a further extension of the overdraft or a restructuring of the debt. Lenders are encouraged to waive interest and there is a repeat of the warning against the seductive perils of refinancing.
27. The key, as with other credit, is to devise a repayment plan which is realistic and affordable without, in effect, writing off the debt.
28. With ‘repeat use strategies’ to cope with customers with a pattern of repeat use of overdrafts, the Guidance points the lender in the direction of CONC 5D which contains rules for dealing with this problem.

### The Future

29. Both sets of Guidance make it clear that this is not the end nor even the beginning of the end, and the FCA expects to be issuing its fourth set of Guidance some time shortly into the New Year. Sadly one must say: watch this space.

**Nerd's corner: Two nasties coming down the track**

30. When 'exit day' from the European Union arrives, those making pre-contract disclosure under The Consumer Credit (Disclosure of Information) Regulations 2010 (SI 2010/1013) will have to make alterations to the forms of disclosure. References to wicked old Europe will have to come out and they will no longer be the Standard European Consumer Credit Information (SECCI) or the European Consumer Credit Information (ECCI), Various smaller changes are made both to the forms of disclosure and to other consumer credit legislation. These are all to be found in Consumer Credit (Amendment) (EU Exit) Regulations 2018 (SI 2018/1038). The Treasury has recently announced that it proposes to introduce a statutory instrument postponing the implementation of these Regulations to 1 June 2021.
31. More importantly the Government and the Treasury have been persuaded by the 'debtor-as-victim' lobby that default notices served under CCA s 87(1) are really *too too* unkind to the poor debtor. They should be (one supposes) more, well, consoling, instead of the really rather brutal forms laid down back in the Dark Ages by the Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983 (SI 1983/1561).
32. The Treasury therefore proposes a complete re-write of these notices, tweely referred to as 'debt letters'. It promises 'secondary legislation' to come into force in December 2020, albeit with a six month period for lenders to make the necessary changes. For more fun, log on to <https://www.gov.uk/government/news/new-debt-letters-rules-will-support-people-in-problem-debt>.
33. A deadly virus may stalk the land but the appetite for tinkering with consumer legislation is, happily, in robust health.

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