

Chapter 13

Guidance on the duty to give
information under sections
77, 78 and 79 of the
Consumer Credit Act 1974

13.1 Application

13.1.1 **G** This chapter:

- (1) applies to a *firm* with respect to *consumer credit lending* and a *firm* with respect to *consumer hiring*;
- (2) does not apply to the obligation in or under section 78(4), (4A) or (5) of the CCA on a *lender* to give regular statements where *running-account credit* is provided under a *regulated credit agreement*.

Guidance

- 13.1.2 **G**
- (1) The *FCA* takes the view that sections 77, 78 and 79 of the CCA should be read in a way that allows the *borrower* or *hirer* to obtain the information needed in order to be properly informed without imposing unnecessary burden on *firms*.
 - (2) The statement referred to in the relevant section must be prepared according to the information to which it is 'practicable' for the *firm* to refer. In the *FCA*'s view, this means practicable at the time of the request and includes information which can reasonably be obtained from third parties.
 - (3) *Firms* should take steps to ensure that information is preserved and kept available to be used to give information to a *borrower* or *hirer*.

The request and the duty to give

- 13.1.3 **G**
- (1) A request must be from or on behalf of the *borrower* under sections 77 and 78 or from or on behalf of a *hirer* under section 79. This would include a friend or relative, a solicitor, a claims management company or other third party. Under *data protection legislation*, the *lender* or *owner* is not allowed to reveal such information to a third party without the authority of the *borrower* or *hirer*. It should therefore satisfy itself that the *person* making the request has proper authority to obtain the information. If a copy of such authority is not enclosed with the request, the *lender* or *owner* is entitled to reply by asking to see the authority.
 - (2) Where there are two or more *borrowers* or *hirers* and the request comes from one only, it must be nevertheless complied with, and the response must be given to both (or all) *borrowers* or *hirers*.

- (3) If the recipient considers that another *person* is the *lender* or *owner*, the recipient should either inform the applicant of who it considers is the correct recipient or pass the request on to that *person*.
- (4) In accordance with the sections referred to in (1) the *firm* must 'give' a copy of the executed agreement and any other document referred to in it and the required statement. In the *FCA's* view, sending a copy of them by ordinary second class post will suffice. Guidance on what constitutes a copy is given below and found in the case of *Carey v HSBC Bank plc* [2009] EWHC 3417 (QB).
- (5) The duty under the relevant section does not apply if no sum is, or will or may become, payable by the *borrower* or *hirer* under the agreement. This is irrespective of whether the agreement may have been terminated.

The copy agreement

13.1.4

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- (1) The copy of the executed agreement should be a 'true copy' of the original. However, as confirmed in the case of *Carey v HSBC Bank plc* [2009] EWHC 3417 (QB), in this context the term 'true copy' does not necessarily mean a carbon, photocopy, microfiche copy or other exact copy of the signed agreement. There is no obligation to provide a copy which includes a copy of the signature.
- (2) The *firm* can reconstitute a copy. It can do this by re-populating a template of the relevant agreement form with the details of the specific agreement taken from its records. If the *firm* does provide a reconstituted copy, it should explain that that is what it has done, to avoid misleading the *customer* that this is a contemporaneous copy.
- (3) The terms and conditions should be those applicable at the time the agreement was executed. The name and address at the time of execution must be included.
- (4) The reconstituted agreement should contain a heading prescribed by the *CCA* and any relevant cancellation notice.
- (5) If the reason why no copy is given in response to a request under these sections is that there never was an executed agreement, the *firm* should acknowledge this in its response.
- (6) If the agreement has been varied, the duty is to provide not only a copy of the agreement as originally executed but also either:
 - (a) a copy of the latest variation given in accordance with section 82(1) of the *CCA* relating to each discrete term of the agreement which has been varied; or,
 - (b) a clear statement of the terms of the agreement as varied.
- (7) Further, section 180(1)(b) of the *CCA* and regulation 3(2) of the Consumer Credit (Cancellation Notices and Copies of Documents) Regulations 1983 expressly allow certain matters to be omitted from the copy. There may be excluded from the copy of the executed agreement to be provided under these sections:
 - (a) any information relating to the *borrower*, *hirer* or surety, or information included for the use of the *lender* or *owner* only,

which is not required to be included by the CCA or by any regulations made under the CCA as to the form and content of the agreement;

- (b) any signature box, signature or date of signature;
- (c) in the case of *pawn* agreements, any description of the article taken in *pawn*.

The statement of account

13.1.5

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If the *firm* possesses insufficient information to enable it to ascertain the amount and date of any sum which is to become payable, it is sufficient to indicate the basis on which they would fall to be ascertained.

Failure to comply

13.1.6

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- (1) Failure to comply with the provisions means that the agreement becomes unenforceable while the failure to comply persists, and the courts have no discretion to allow enforcement.
- (2) In such cases, a *firm* should in no way, either by act or omission, mislead a *customer* as to the enforceability of the agreement.
- (3) In particular, a *firm* should not in such cases either threaten court action or other enforcement of the debt or imply that the debt is enforceable when it is not.
- (4) The *firm* should, in any request for payment or communication relating to a payment (other than a statement issued in accordance with the CCA or regulations made under it which does not constitute or contain a request for payment) in such cases, make clear to the *customer* that although the debt remains outstanding it is unenforceable.
- (5) In the judgment of *McGuffick -v- The Royal Bank of Scotland plc* [2009] EWHC 2386 (Comm) Flaux J held in a case under section 77 of the CCA that passing details of a debt to a *credit reference agency* and related activities do not constitute enforcement under the CCA. He also held that steps taken with a view to enforcement, including demanding payment from a claimant, issuing a default notice, threatening legal action and the actual bringing of proceedings, are not themselves 'enforcement' under the CCA. On the other hand he confirmed that the actions listed under sections 76(1) and 87(1) of the CCA did amount to enforcement notwithstanding that some of the actions 'less obviously' amounted to enforcement. These actions are demanding earlier payment, recovering possession of *goods or land*, treating any right conferred on the debtor by the agreement as terminated, restricted or deferred, enforcing any *security* and terminating the agreement.
- (6) While Flaux J agreed with the decision of HHJ Simon Brown QC (sitting as a Deputy High Court Judge) in *Tesco Personal Finance v Rankine* [2009] C.C.L.R. 3 that commencing proceedings was not enforcement, but a step taken with a view to enforcement, both he and HHJ Simon Brown appear to have been drawing a distinction between commencing proceedings and entering judgment in those proceedings.
- (7) This *guidance* deals only with the question of whether an agreement is unenforceable in relation to sections 77, 78 and 79 of the CCA. A

lender's rights to enforce an agreement may be restricted for a variety of reasons, by the *Act*, by or under the *CCA* and by virtue of the general law.

- (8) However, where a *firm* is aware that an agreement is unenforceable because of non-compliance with an information request under section 77, 78 or 79 of the *CCA*, a *firm* should make it clear when communicating to a *customer* about a debt that the debt is in fact unenforceable. Failure to do so, in that case, would in the *FCA's* view unfairly mislead the *customer* by omission. Any communication that implies expressly or otherwise that a debt is enforceable when it is known that it is not, would be misleading. One way to avoid this would be for the *firm* to explain to the *customer* the full meaning of 'unenforceable'.

