

## Chapter 4

# Pre-contractual requirements

## 4.2 Pre-contract disclosure and adequate explanations

### Application

4.2.1

**R**

This section, unless otherwise stated in or in relation to a *rule*:

- (1) applies to a *firm* with respect to *consumer credit lending*;
- (2) applies to a *firm* with respect to *credit broking* where the *firm* has or takes on responsibility for providing the disclosures and explanations to *customers* required by this section;
- (3) does not apply to an agreement under which the *lender* provides the *customer* with *credit* which exceeds £60,260, unless the agreement is a *residential renovation agreement*;
- (4) does not apply to an agreement secured on *land*; and
- (5) does not apply to a *borrower-lender agreement* enabling the *customer* to overdraw on a current account other than such an agreement which would be an *authorised non-business overdraft agreement*, but for the fact that the *credit* is not repayable on demand or within three *months*.

[Note: section 74(1D) of CCA]

4.2.2

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For the agreements referred to in **■** CONC 4.2.1R (3), **■** (4) and **■** (5), a *firm* within **■** CONC 4.2.1R (1) or **■** CONC 4.2.1R (2) should consider whether it is necessary or appropriate to provide explanations of the matters in **■** CONC 4.2.5R (2); in particular, a *firm* should consider highlighting the principal consequences to the *customer* including the consequences of missing payments or under-paying, including, where applicable, the risk of repossession of the *customer's* property.

[Note: section 55A(6) of CCA and paragraphs 3.1(box) of ILG]

### Other disclosure requirements

4.2.3

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- (1) The *disclosure regulations* made under section 55 of the CCA which require information to be disclosed before a *regulated credit agreement* is made remain in force.
- (2) Failure to comply with the *disclosure regulations* has the effect that agreements are enforceable against a borrower or hirer (as defined in the CCA) only with an order of court and enforcement for that

purpose includes a retaking of goods or *land* to which the agreement relates.

- (3) Other relevant disclosure requirements are found in ■ CONC 2.7 (distance marketing) and ■ CONC 2.8 (electronic commerce), the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095), the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) and the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) and the Cancellation of Contracts made in the Consumer's home etc Regulations 2008 (SI 2008/1816).

4.2.4

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The pre-contractual information disclosed under the *disclosure regulations* and the pre-contractual explanations required under ■ CONC 4.2.5 R should take into account any preferences expressed, or information provided by, the *customer* where the *firm* would in principle agree to offer *credit* on such terms

[Note: paragraph 3.13 (box) of *ILG*]

### Pre-contractual adequate explanations

4.2.5

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- (1) Before making a *regulated credit agreement* the *firm* must:
- (a) provide the *customer* with an adequate explanation of the matters referred to in (2) in order to place the *customer* in a position to assess whether the agreement is adapted to the *customer's* needs and financial situation;
  - (b) advise the *customer*:
    - (i) to consider the information which is required to be disclosed under section 55 of the *CCA*; and
    - (ii) where the information is disclosed in person, that the *customer* is able to take it away;
  - (c) provide the *customer* with an opportunity to ask questions about the agreement; and
  - (d) advise the *customer* how to ask the *firm* for further information and explanation.

[Note: section 55A(1) of *CCA*]

- (2) The matters referred to in (1)(a) are:
- (a) the features of the agreement which may make the *credit* to be provided under the agreement unsuitable for particular types of use;
  - (b) how much the *customer* will have to pay periodically and, where the amount can be determined, in total under the agreement;
  - (c) the features of the agreement which may operate in a manner which would have a significant adverse effect on the *customer* in a way which the *customer* is unlikely to foresee;
  - (d) the principal consequences for the *customer* arising from a failure to make payments under the agreement at the times required by the agreement including, where applicable and depending upon

the type and amount of *credit* and the circumstances of the *customer*:

- (i) the total cost of the debt growing;
  - (ii) incurring any default charges or interest for late or missed payment or under-payment;
  - (iii) impaired credit rating and its effect on future access to or cost of *credit*;
  - (iv) legal proceedings, including reference to charging orders (or, in Scotland, inhibitions), and to the associated costs of such proceedings;
  - (v) repossession of the *customer's* home or other property; and
  - (vi) where an article is taken in *pawn*, that the article might be sold, if not redeemed; and
- (e) the effect of the exercise of any right to withdraw from the agreement and how and when this right may be exercised.

[Note: section 55A(2) of CCA and paragraph 3.13 of ILG]

- (3) The adequate explanation and advice in (1) may be given orally or in writing, except where (4) applies.

[Note: section 55A(3) of CCA]

- (4) Where the matters in (2)(a), (b) or (e) are given orally or to the *customer* in person, the explanation of the matters in (2)(c) and (d) and the advice required in (1)(b) must be given orally to the *customer*.

[Note: section 55A(4) of CCA]

- (5) Paragraphs (1) to (4) do not apply to a *lender* if a *credit broker* has complied with those sub-paragraphs in respect of the agreement.

[Note: section 55A(5) of CCA]

- (6) Where the *regulated credit agreement* is an agreement under which a *person* takes an article in *pawn*:

- (a) the requirement in (1)(a) only relates to the matters in (2)(d) and (e); and
- (b) the requirements in (1)(b) and (d) do not apply.

[Note: section 55A(7) of CCA]

- (7) This *rule* does not apply to:

- (a) a *non-commercial agreement*;
- (b) a *small borrower-lender-supplier agreement* for restricted-use credit

[Note: section 74(1) of CCA]

- (8) [deleted]

(9) [deleted]

[Note: article 5(6) of the *Consumer Credit Directive*]

4.2.6

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The explanation provided by a *lender* or a *credit broker* under ■ CONC 4.2.5 R should enable the *customer* to make a reasonable assessment as to whether the *customer* can afford the *credit* and to understand the key associated risks.

[Note: paragraph 3.3 (box) of *ILG*]

4.2.7

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In deciding on the level and extent of explanation required by ■ CONC 4.2.5 R, the *lender* or *credit broker* should consider (and each of them should ensure that anyone acting on its behalf should consider), to the extent appropriate to do so, factors including:

- (1) the type of *credit* being sought;
- (2) the amount and duration of *credit* to be provided;
  - the actual and potential costs of the *credit*;
- (2B) the risk to the *customer* arising from the *credit* (the risk to the *customer* is likely to be greater the higher the total cost of the *credit* relative to the *customer's* financial situation);
- (2C) the purpose of the *credit*, if the *lender* or (as the case may be) the *credit broker* knows what that purpose is;
- (3) to the extent it is evident and discernible, the *customer's* level of understanding of the agreement, and of the information and the explanation provided about the agreement; and
- (4) the channel or medium through which the *credit* transaction takes place.

[Note: paragraph 3.4 of *ILG*]

4.2.7A

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- (1) ■ CONC 4.2.5R(1) requires the *customer* to be provided with an adequate explanation of the matters in ■ CONC 4.2.5R(2). Where there is more than one *customer* acting together as 'joint borrowers', the *lender* or *credit broker* should consider whether it may be appropriate to give separate explanations to each *customer* and whether the explanation should be the same or different for each, rather than giving a single explanation to all of them jointly. (Where the *borrower* is a *partnership* or an unincorporated association, the members or *partners* may be treated as a single *customer*.)
- (2) In deciding whether it is appropriate to give separate explanations to each *customer*, and in determining the level and extent of explanation required for each *customer*, the *lender* or *credit broker* should consider the factors in ■ CONC 4.2.7G separately for each *customer*.

(3) However, ■ CONC 4.2.5R(4) does not require an oral explanation of the matters in ■ CONC 4.2.5R(2)(c) and (d) to be given to one *customer* simply because an oral explanation of the matters in ■ CONC 4.2.5R(2)(a), (b) or (e) was given to a different *customer*.

4.2.8 **R** Where the *regulated credit agreement* is *high-cost short-term credit*, the *lender* or a *credit broker* must explain under ■ CONC 4.2.5R (1)(a) that entering into that agreement would be unsuitable to support sustained borrowing over long periods and would be expensive as a means of longer term borrowing.

[Note: paragraph 3.13 (box) of ILG]

4.2.9 **R** Even where a *customer* states or implies that there is no need for an explanation of the *regulated credit agreement*, the *lender* or *credit broker* must continue to comply with ■ CONC 4.2.5 R.

[Note: paragraph 3.10 of ILG]

4.2.10 **R** A *lender* or a *credit broker* must not encourage or induce a *customer* to waive the rights in ■ CONC 4.2.5 R.

[Note: paragraph 3.10 of ILG]

4.2.11 **R** Before a *lender* concludes that ■ CONC 4.2.5R (1) to ■ CONC 4.2.5R (4) do not apply to it in relation to a *regulated credit agreement* by virtue of ■ CONC 4.2.5R (5), the *lender* must take reasonable steps to satisfy itself that an explanation of that agreement complying with ■ CONC 4.2.5 R has been provided to the *customer* by the *credit broker*.

[Note: paragraph 3.11 (box) of ILG]

4.2.12 **R** The *lender* or the *credit broker* must enable a *customer* to request and obtain further information and explanation about a *regulated credit agreement* without incurring undue cost or delay.

[Note: paragraph 3.16 (box) of ILG]

4.2.13 **R** Neither a *lender* nor a *credit broker* may require a *customer* to acknowledge that the information and explanations it has provided are adequate to satisfy the requirements of ■ CONC 4.2.5 R.

[Note: paragraph 3.30 (box) of ILG]

4.2.14 **G** A *lender* or *credit broker* may require an acknowledgement that it has provided an explanation, and of receipt of any written information that forms a part of the explanation, but not an acknowledgement as to its adequacy. ■ CONC 4.2.13 R does not prevent the *lender* or *credit broker* asking if the *customer* has understood an explanation given.

[Note: paragraph 3.30 (box) of ILG]

**Adequate explanations in relation to particular regulated credit agreements**

4.2.15

**R**

The following information must be provided by the *lender* or a *credit broker* as part of, and in addition to that provided under, the adequate explanation required by ■ CONC 4.2.5 R, where applicable, in the specified cases:

- (1) for *credit token agreements*:
  - (a) different rates of interest and different charges apply to different elements of the *credit* provided (for example, a higher cost of withdrawing cash);
  - (b) the implications of only making minimum *repayments*;
  - (c) interest rates or charges may be increased;
  - (d) where applicable, the interest rates may be increased based on the risks presented by the individual *customer*;
  - (e) the limitations on any zero percentage or low interest or other introductory offer; and
  - (f) conditions on any balance transfers, including any fees and charges which may apply;
- (2) for *credit card cheques*, the higher associated costs relative to payment by credit card;
- (3) for *home credit loan agreements* and *high-cost short-term credit*, the effect of refinancing (within the meaning in ■ CONC 6.7.17 R) or otherwise extending the duration of the *credit* or of the *credit agreement*;
- (4) for *bill of sale loan agreements*:
  - (a) the risk of losing the asset which is the subject of the bill of sale and the loss this could entail;
  - (b) that repossession can take place without a court order;
  - (c) that repossession may not clear the debt owed; and
  - (d) unlike in the case of *hire-purchase agreements* and *conditional sale agreements*, the *customer* is not protected under this arrangement from repossession of the asset where one third or more of the *total amount payable* has been paid off;
- (5) for *hire purchase agreements* and *conditional sale agreements*:
  - (a) the *customer* does not own the *goods* until the sums required under the agreements have been paid, including any option to purchase fee and any other conditions have been satisfied;
  - (b) *goods* can be repossessed without a court order in the event of default, unless in relation to a *regulated credit agreement* the *customer* has paid a third or more of the *total amount payable*;
- (6) for a *credit agreement* which is used to consolidate existing debts of the *customer* (whether to the same *lender* or to another *person*) and where applicable in each case:
  - (a) the effect of consolidating the debts will involve payment of a higher rate of interest or charges or both (if the relevant

information about existing debts is known to the *lender* or *credit broker*);

- (b) the effect of consolidating the debts will involve increasing the period required for repayment (if the relevant information about existing debts is known to the *lender* or *credit broker*); and
- (c) the *credit agreement* would be secured on the *customer's* property;

(7) for a *credit agreement* which includes a condition requiring a guarantor, the requirement for the *customer* to provide *security* in the form of a guarantee.

[Note: paragraph 4.26c of *CBG*]

[Note: paragraph 3.13 of *ILG*]

4.2.16

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Where a *customer* does not have a good understanding of the English language, the *lender* or *credit broker* may need to consider alternative methods of providing relevant information concerning the explanation required by ■ CONC 4.2.5 R in order for the *customer* to make an informed decision, such as, providing the information to a person with such understanding who can assist the *customer*, for example, a friend or relative.

[Note: paragraph 3.4 (box) of *ILG*]

**Guidance for adequate explanations where agreements are marketed by distance or electronic means**

4.2.17

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Since the use of distance means of communication (such as the internet) by their nature limit the *lender's* or *credit broker's* ability to ascertain the *customer's* level of understanding of explanations provided, a *lender* or *credit broker* using those means may, for example, wish to provide local rate telephone number for *customers* who wish to seek further explanation.

[Note: paragraph 3.6 (box) of *ILG*]

4.2.18

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Interaction is an important part of compliance with the requirement in ■ CONC 4.2.5R (1), for example, where the agreement is marketed and concluded by *electronic means*. For an online application, the requirement in ■ CONC 4.2.5R (1)(c) (the right to ask questions) may be complied with by the *customer* being able to access an appropriately comprehensive set of answers to frequently asked questions about the agreement or by being able to speak to a representative of the online provider.

[Note: paragraph 3.8 (box) of *ILG*]

4.2.19

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For a *regulated credit agreement* marketed and concluded by *electronic means* to comply with ■ CONC 4.2.5 R the *customer* should pass through screens containing the required information and explanations, giving the *customer* the opportunity to see and read the explanations provided. Merely providing a link to where such information can be found is unlikely to satisfy

the requirements in ■ CONC 4.2.5 R, where the agreement can be concluded without accessing the link.

[Note: paragraph 3.15 (box) of ILG]

4.2.20 **G** For telephone or face-to-face transactions, interaction between the *customer* and the *firm's* representative is also important. It should be made clear to the *customer* that the *customer* can ask questions or request further information or explanation and, for example, the representative solely providing the *customer* with a written explanation of an agreement, or relying solely on a written script in relation to an agreement, is unlikely to comply with the requirement in ■ CONC 4.2.5 R.

[Note: paragraph 3.9 (box) of ILG]

4.2.21 **G** Where a *regulated credit agreement* is a modifying agreement under section 82(2) of the CCA, the requirements in ■ CONC 4.2 apply before the agreement is made.

[Note: paragraph 3.12 of ILG]

**Credit agreements where there is a guarantor etc**

4.2.22 **R**

- (1) This *rule* applies if:
  - (a) a *firm* is to enter into a *regulated credit agreement*; and
  - (b) an *individual* other than the *borrower* (in this *rule* referred to as "the guarantor") is to provide a guarantee or an indemnity (or both) in relation to the *regulated credit agreement*.
- (2) The *firm* must, before making the *regulated credit agreement*, provide the guarantor with an adequate explanation of the matters in (3) in order to place the guarantor in a position to make an informed decision as to whether to act as the guarantor in relation to the *regulated credit agreement*.
- (3) The matters are:
  - (a) the circumstances in which the guarantee or the indemnity (or both) might be called on; and
  - (b) the implications for the guarantor of the guarantee or the indemnity (or both) being called on.
- (4) For the purposes of (2), the *rules* and *guidance* listed in (5) apply as if:
  - (a) references to the *customer* were references to the guarantor; and
  - (b) references to ■ CONC 4.2.5R were references to this *rule*.
- (5) The *rules* and *guidance* are:
  - (a) ■ CONC 4.2.6G to ■ CONC 4.2.7AG;
  - (b) ■ CONC 4.2.9R and ■ CONC 4.2.10R;
  - (c) ■ CONC 4.2.12R to ■ CONC 4.2.14G; and
  - (d) ■ CONC 4.2.16G to ■ CONC 4.2.21G.

4.2.23

**R**

(6) For the purposes of this *rule*, a guarantee does not include a *legal or equitable mortgage* or a *pledge*.

(1) ■ CONC 4.2.22R does not apply to a *lender* if a *credit broker*, a solicitor, a barrister, (in Scotland) an advocate, or a relevant person has complied with that *rule* in respect of the agreement.

(2) Before a *lender* concludes that ■ CONC 4.2.22R does not apply to it in relation to a *regulated credit agreement* by virtue of (1), the *lender* must take reasonable steps to satisfy itself that:

(a) an explanation complying with ■ CONC 4.2.22R(2) has been provided to the guarantor; and

(b) the following had been provided to the *person* giving the explanation, before the explanation was given:

(i) a copy of the agreement;

(ii) if the guarantee or the indemnity (or both) is contained in a document other than the agreement, a copy of that document; and

(iii) a copy of any other document or information in writing relating to the agreement which had been provided to the guarantor by the *lender* or the *credit broker*.

(3) In this *rule*, “relevant person” means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation (within the meaning of that Act), and is not a solicitor, a barrister or (in Scotland) an advocate.

4.2.24

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■ CONC 4.2.23R permits the explanation required by ■ CONC 4.2.22R to be given by a *credit broker*. It also permits the explanation to be given by a solicitor, a barrister, a Scottish advocate or another “relevant person” (for example, in the course of giving independent legal advice to the guarantor). The explanation may only be given by such a *person* if the information and documents listed in that *rule* had been provided to that *person*.