

REGULATORY ESSENTIALS TRAINING PROGRAMME 2020

Consumer Credit Regime

13 July 2020



AGENDA

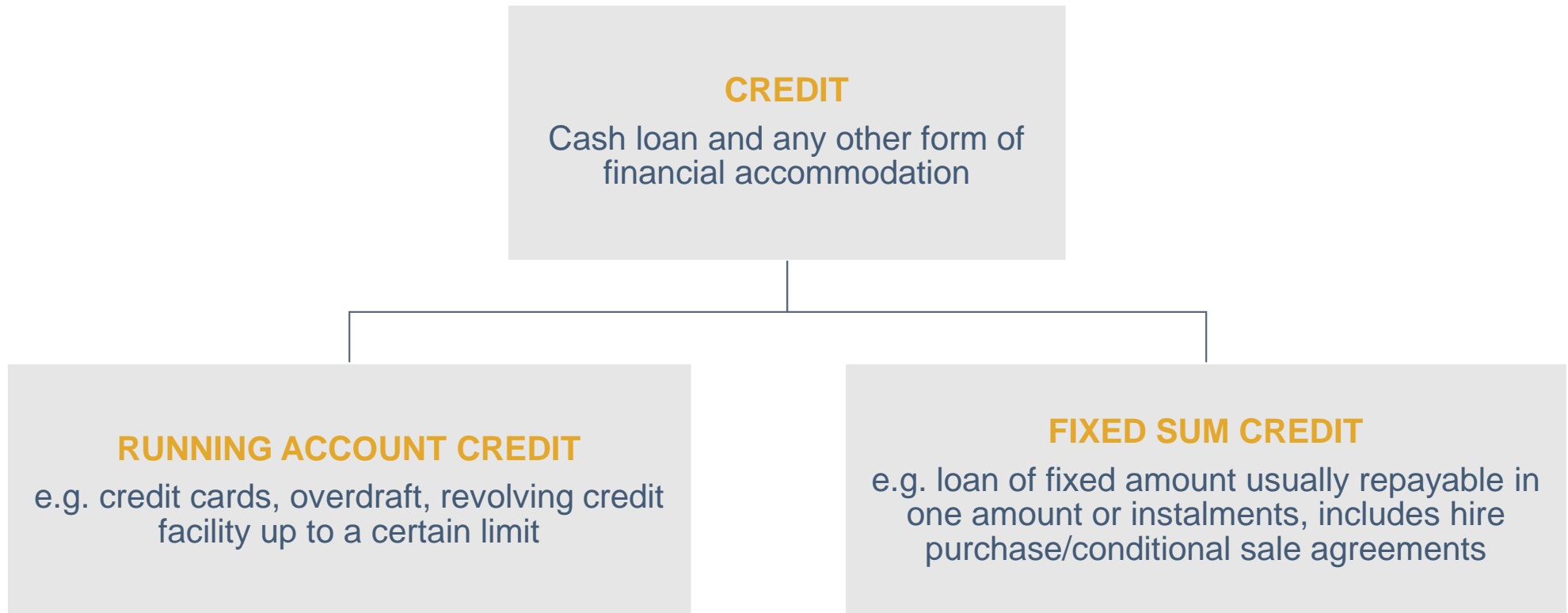
- The scope of the Consumer Credit Act 1974 (CCA)
- When will an agreement be regulated by the CCA?
- Why is it important to know when you're dealing with a CCA regulated agreement?
- Essentials of regulated credit and hire agreements under the CCA
- The unfair relationship provisions
- COVID-19 measures affecting the CCA regime

THE SCOPE OF THE CONSUMER CREDIT ACT 1974 (CCA)



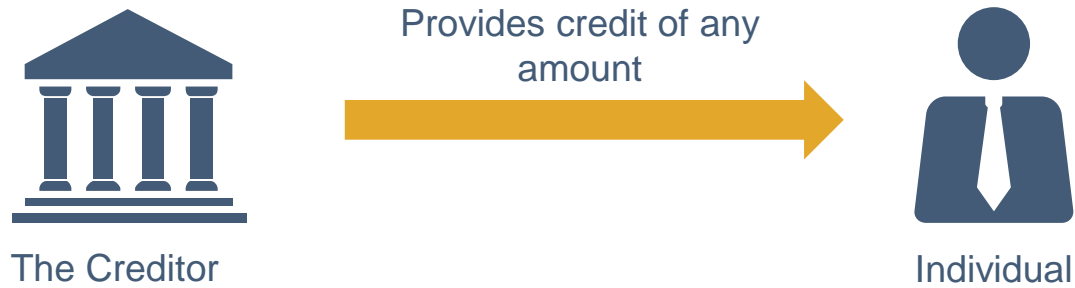
WHAT IS “CREDIT”?

SECTION 9 AND 10 CCA & 60L RAO



SCOPE: WHAT IS A CONSUMER CREDIT AGREEMENT?

SECTION 8 CCA & 60B(3) RAO



“Individual” includes:

- Natural person;
- Unincorporated body of persons not consisting entirely of body corporates; and
- Partnership of 3 or less (Section 189 CCA)

SCOPE: WHAT IS A CONSUMER HIRE AGREEMENT?

SECTION 15 CCA & ART 60N RAO

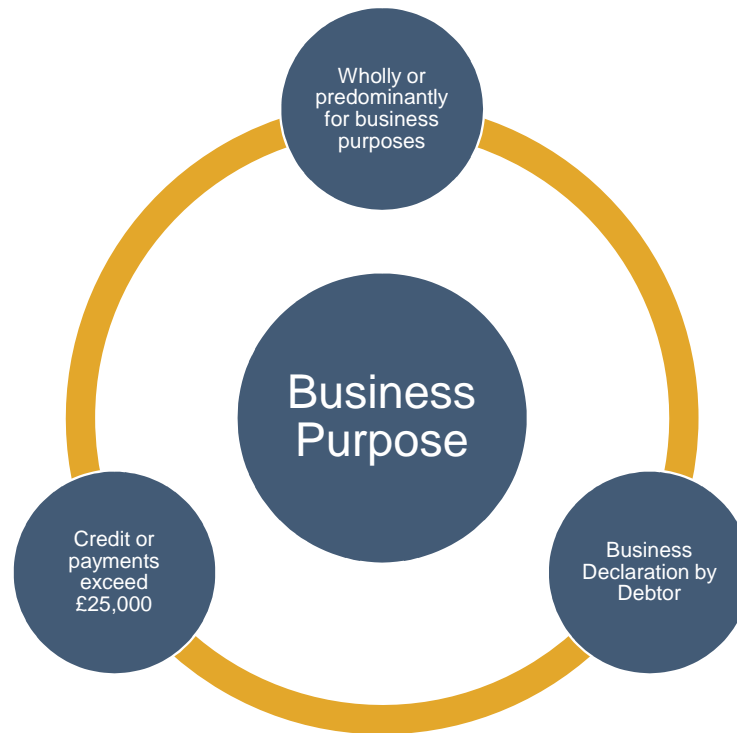
- An agreement made by a person with an **individual** (“hirer”) for the bailment or (in Scotland) the hiring of goods to the hirer, being an agreement which:
 - is not a hire-purchase agreement; and
 - is capable of subsisting for more than three months.



EXEMPTIONS APPLY

- Consumer credit and consumer hire agreements are regulated if they are “not exempt” (Section 189 CCA and Art 60B and 60N RAO).
 - The exemptions for credit agreements are set out under Art 60C to 60H of the RAO and for consumer hire under Art 60O to 60Q RAO.
- Even if an agreement is exempt from regulation under the CCA, section 140A CCA can still apply to credit agreements (not to hire).
 - The Consumer Rights Act 2015 will also apply where the borrower is a “consumer” (someone acting outside of their trade, business, craft or profession).

KEY EXEMPTIONS – BUSINESS PURPOSE EXEMPTION (ARTICLE 60C(3) RAO FOR CREDIT AND ARTICLE 60O(1) RAO FOR HIRE)



KEY EXEMPTIONS – HIGH NET WORTH EXEMPTION

ARTICLE 60H RAO FOR CREDIT AND 60Q RAO FOR HIRE

- Credit is in excess of £60,260
- Natural person with income not less than £150,000 or net assets not less than £500,000
- **Statement** of high net worth made by a UK qualified accountant or creditor (if creditor is a bank)
- A copy of the statement must be provided to the lender before the agreement is made.
- Agreement must include **declaration** agreeing to forgo protections of the CCA

ARTICLE 60F(2) RAO

“A credit agreement is an exempt agreement if—

- a) the agreement is a borrower-lender-supplier agreement for **fixed-sum credit**,
- b) the number of payments to be made by the borrower is **not more than twelve**,
- c) those payments are required to be made **within a period of 12 months or less** (beginning on the date of the agreement),
- d) the credit is—
 - i. secured on land, or
 - ii. provided without interest or other charges, and
- e) paragraph (7) does not apply to this agreement.”

Cannot rely on this exemption if the agreement is a conditional sale or hire purchase agreement, an agreement financing the purchase of land, or an agreement secured by a pledge (para 7 of article 60F RAO).

BOUNDARY WITH SECURED LENDING

Note - If you are **lending** to an **individual or to trustees** and taking security over **residential** property in the **EEA**, the facility is likely to be a regulated mortgage contract (rather than being regulated under the CCA)



The CCA creates specific requirements as to:

- ❑ the information to be given to customers before a regulated agreement is made;
- ❑ the form and content of the regulated credit or hire agreement itself; and
- ❑ the information and rights to be given to customers during the lifetime of the regulated agreement.

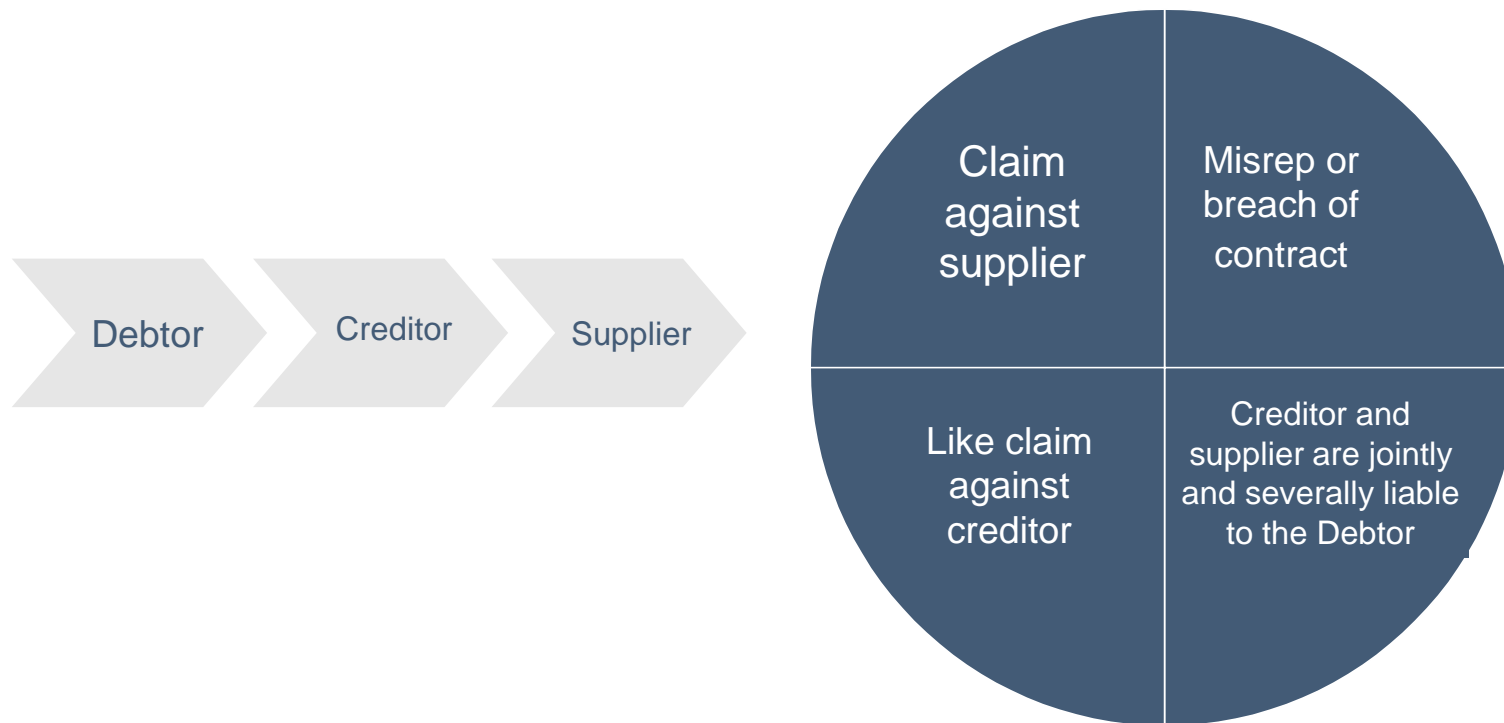
There are draconian consequences associated with non-compliance with certain provisions of the CCA



KEY RIGHTS UNDER REGULATED AGREEMENTS

PRODUCT	RIGHT	CCA REFERENCE
Credit agreements (except those excluded)	Right to withdraw from credit agreement within 14 days	66A
Some credit and hire agreements	Right to cancel	67 and 68
Hire purchase and conditional sale agreements	Right to voluntary termination once 50% of total amount payable is paid	99/100
Some hire agreements	Right to terminate after agreement has run for 18 months	101
All credit agreements	Right to settle early (rebate if applicable)	94-97
Debtor – Creditor – Supplier agreements under s. 12(b) or (c) CCA	Where customer has a claim against supplier for misrepresentation/breach of contract, they have a like claim against the creditor	75

SECTION 75 CCA

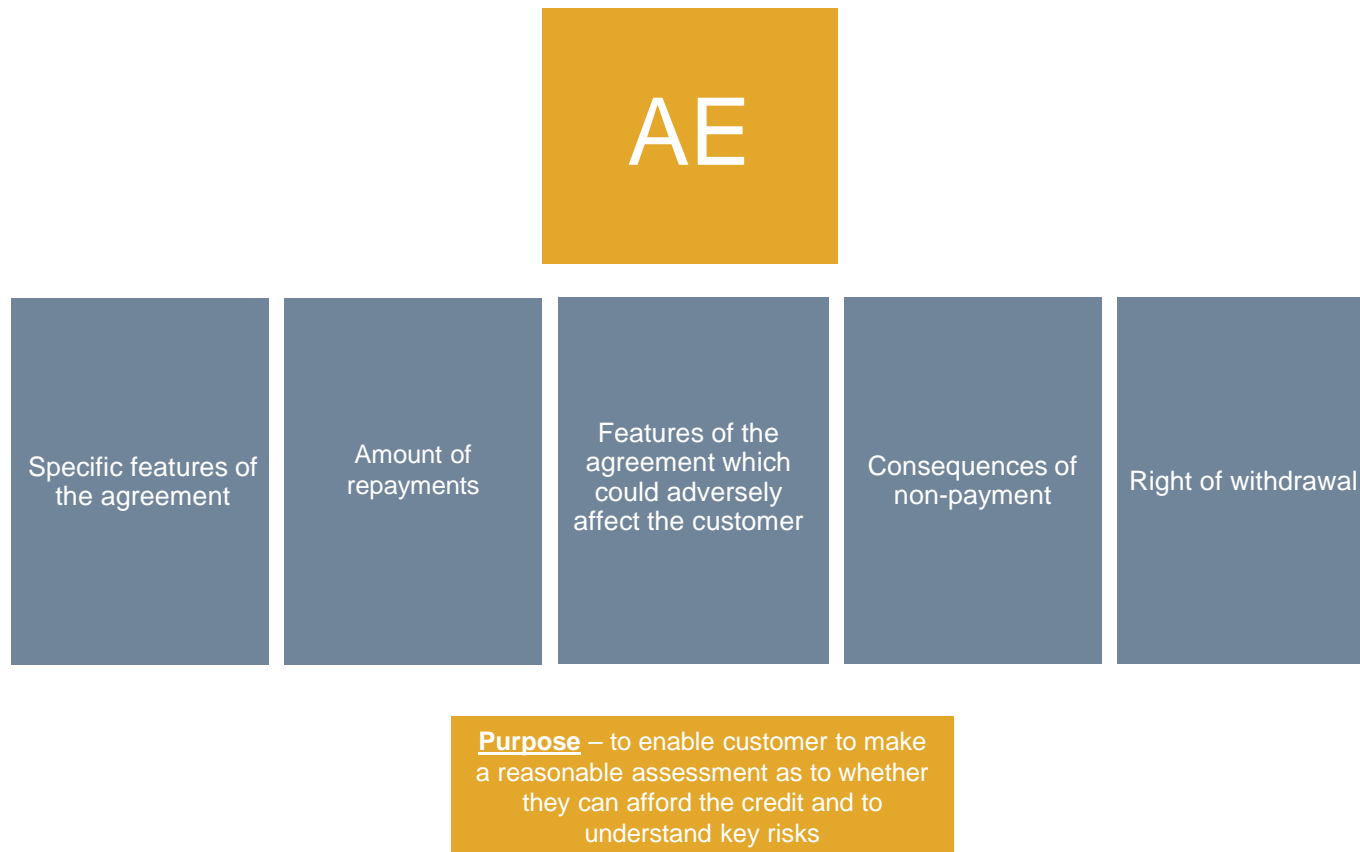


PRE-CONTRACT INFORMATION



ADEQUATE EXPLANATIONS

(CONC 4.2.5R)



ADEQUATE EXPLANATIONS

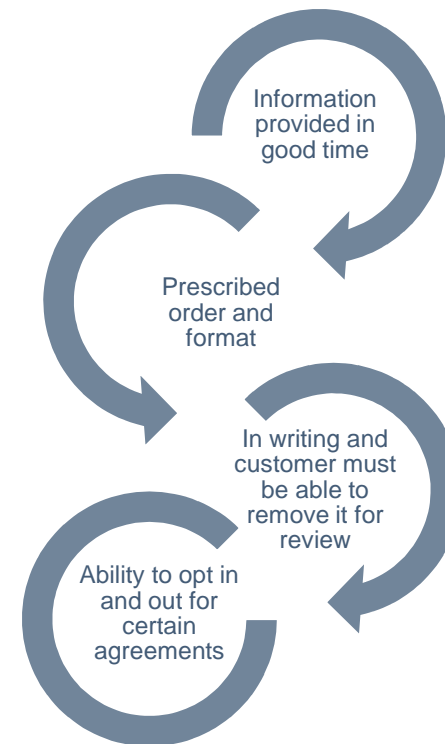
(CONC 4.2.5R)

- ❑ The AEs should take into account any preferences/information provided by the customer
- ❑ Must also advise the customer to consider the other pre-contractual information, inform them that they can take the AEs away and also provide an opportunity to ask questions
- ❑ Can be oral or written – but certain sections provided orally trigger requirement for others to be oral too
- ❑ Joint borrowers (CONC 4.2.7A)

PRE-CONTRACT DISCLOSURE

Key Legislation

- Consumer Credit (Disclosure of Information) Regulations 2004 (for hire and some credit)
- Consumer Credit (Disclosure of Information) Regulations 2010 (for most credit)
- The Disclosure Regs 2010 require pre-contract disclosures to be made by way of a Standard European Consumer Credit Information sheet (**SECCI**).
- The Disclosure Regs 2004 require information to be provided in a form that is the same as the hire agreement (but a with a few changes)
- Information has to be provided in a prescribed format following the prescribed order set out in the schedules to the Disclosure Regs.
- Non-compliance with the relevant requirements may make the agreement unenforceable without a court order.
- Following Brexit the SECCI shall simply be known as the Pre-Contract Credit Information.
- Also note the requirements under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 in relation to **consumer** agreements.



WHAT MUST BE INCLUDED IN A SECCI?

SCHEDULE 1D REGS

Contact details

- Name and address of creditor and any credit intermediary

Key Features

- Total amount of credit
- How and when credit will be provided
- Duration of agreement
- Repayments, total amount payable
- Security

Costs of Credit

- Interest rate and APR
- Other related costs and charges
- Late payment costs
- Consequences of missing payments

Other important legal aspects

- Right of Withdrawal
- Early repayment
- CRA declines
- Right to draft agreement
- Period of time SECCI is valid for

Distance marketing

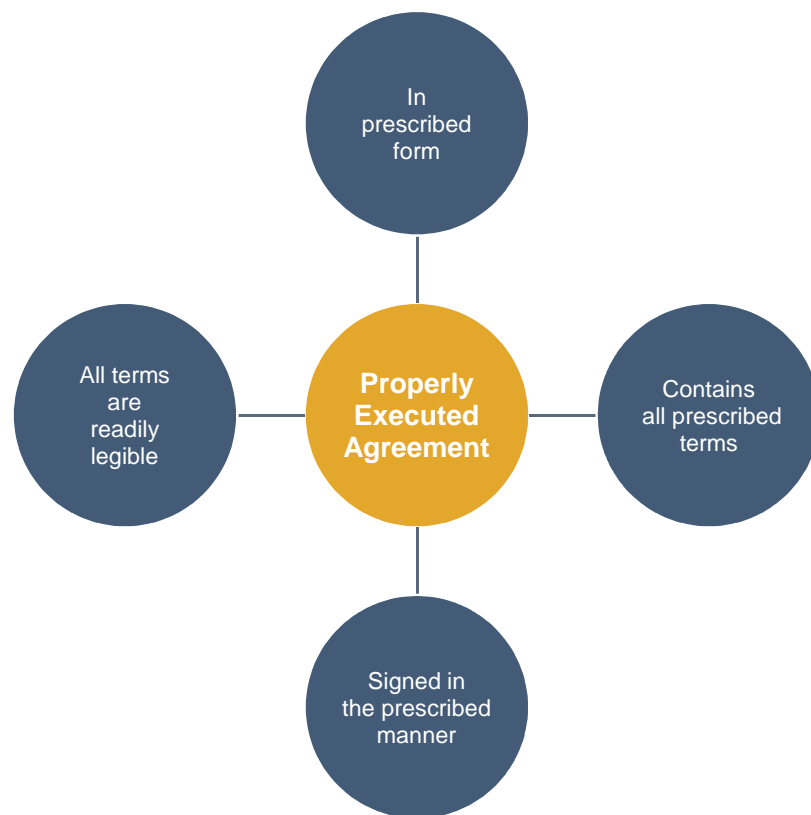
- Supervisory Authority
- Cancellation Rights
- Applicable Laws
- Languages

FORM, CONTENT AND EXECUTION OF AGREEMENTS



FORM OF REGULATED AGREEMENTS

CONSUMER CREDIT (AGREEMENTS) REGULATIONS 1983 & 2010



CONTENT OF AGREEMENTS- CREDIT

RELEVANT LAW	2010 AGREEMENTS REGULATIONS	CCA
<p>Sections 60 and 61 of the CCA</p> <p>Consumer Credit (Agreements) Regulations 2010 (2010 Agreements Regulations)</p>	<p>Requirements for display of information set out in the Agreement Regs.</p> <p>Information must be presented in a 'clear and concise manner'.</p> <p>The statutory forms are to be reproduced without any alteration.</p> <p>Execution requires 'a space indicated for the purpose of the debtor's signature'.</p>	<p>A regulated credit agreement has to be properly executed and signed in accordance with section 61 of the CCA.</p> <p>Must be signed by both debtor and the creditor- the latter is permitted to sign by an agent.</p> <p>Agreement may be set out on both sides of the same piece of paper or two or more individual pieces of paper which may be physically joined or separate (test case <i>Carey v HSBC</i>).</p> <p>Must be set out in a way that all its terms are readily legible.</p> <p>Improperly executed agreements are <u>unenforceable</u> against the borrower without a court order (section 65 CCA).</p>

CONTENT OF AGREEMENTS- HIRE

RELEVANT LAW	1983 AGREEMENTS REGULATIONS	CCA
<p>Sections 60 and 61 of the CCA</p> <p>Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553) (1983 Agreements Regulations)</p>	<p>The requirements for form and content of agreements are heavily prescribed under the 1983 Agreements Regulations.</p> <p>The statutory forms are to be reproduced without any alteration.</p> <p>In general terms a consumer hire agreement must be set out in the following order- KFI and KI followed by the customer's signature box (Schedule 3).</p>	<p>A regulated hire agreement has to be properly executed and signed in accordance with section 61 of the CCA.</p> <p>Must be signed by both hirer and the owner- the latter is permitted to sign by an agent.</p> <p>Agreement may be set out on both sides of the same piece of paper or two or more individual pieces of paper which may be physically joined or separate (test case <i>Carey v HSBC</i>).</p> <p>Must be set out in a way that all its terms are readily legible.</p> <p>Improperly executed agreements are <u>unenforceable</u> against the borrower without a court order (section 65 CCA).</p>

COPIES OF EXECUTED AGREEMENT- CREDIT

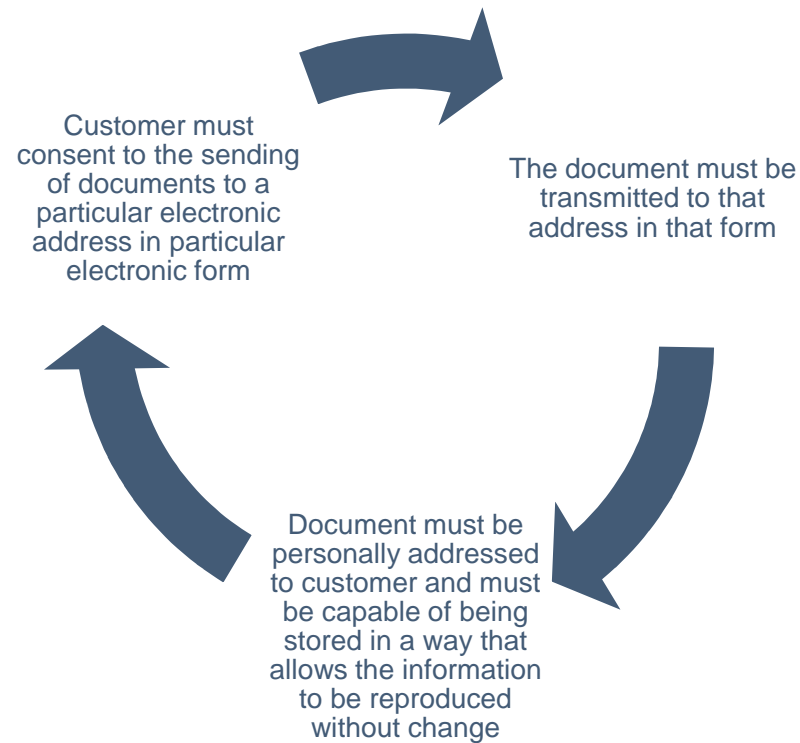
- Where a regulated consumer credit agreement has been made, the creditor must **give** a copy of the executed agreement, and any other document referred to in it, to the debtor.
- Or, don't need to give a copy where:
 - a copy of the unexecuted agreement (and of any other document referred to in it) has already been given to the debtor; and
 - the unexecuted agreement is in identical terms to the executed agreement.
- BUT, the creditor must inform the debtor in writing:
 - that the agreement has been executed;
 - that the executed agreement is in identical terms to the unexecuted agreement a copy of which has already been given to the debtor; and
 - that the debtor has the right to receive a copy of the executed agreement if requested.

COPIES OF UNEXECUTED AND EXECUTED AGREEMENT-HIRE (AND CERTAIN CREDIT AGREEMENTS)

- If the unexecuted agreement is presented personally to the debtor / hirer but not pre-signed by the creditor / owner then the creditor / owner must deliver a copy of the unexecuted agreement and any other document referred to in it at the same time (s62(1) CCA)).
- If the unexecuted agreement is sent to the debtor / hirer for signature then a copy of it and any other document referred to in it must be sent at the same time (s62(2) CCA)).
- Where an agreement has been made, the creditor / owner must give a copy of the executed agreement, and any other document referred to in it, to the debtor / hirer within 7 days following the making of the agreement (s63(2) of the CCA) unless:
 - a copy of the unexecuted agreement was sent to the debtor / hirer for his signature and, on the occasion of his signing it, it became an executed agreement (i.e. it was pre-signed by the creditor / owner); or
 - the unexecuted agreement was personally presented to the debtor / hirer for signature, and on the occasion when he signed it it became an executed agreement (i.e. it was pre-signed by the creditor / owner).
- If copy document requirements are not met then the agreement is unenforceable without a court order.

ELECTRONIC TRANSMISSION OF DOCUMENTS

SECTION 176A CCA



Note: certain documents cannot be sent electronically, e.g. default notices.

POST CONTRACTUAL NOTIFICATIONS



STATEMENTS

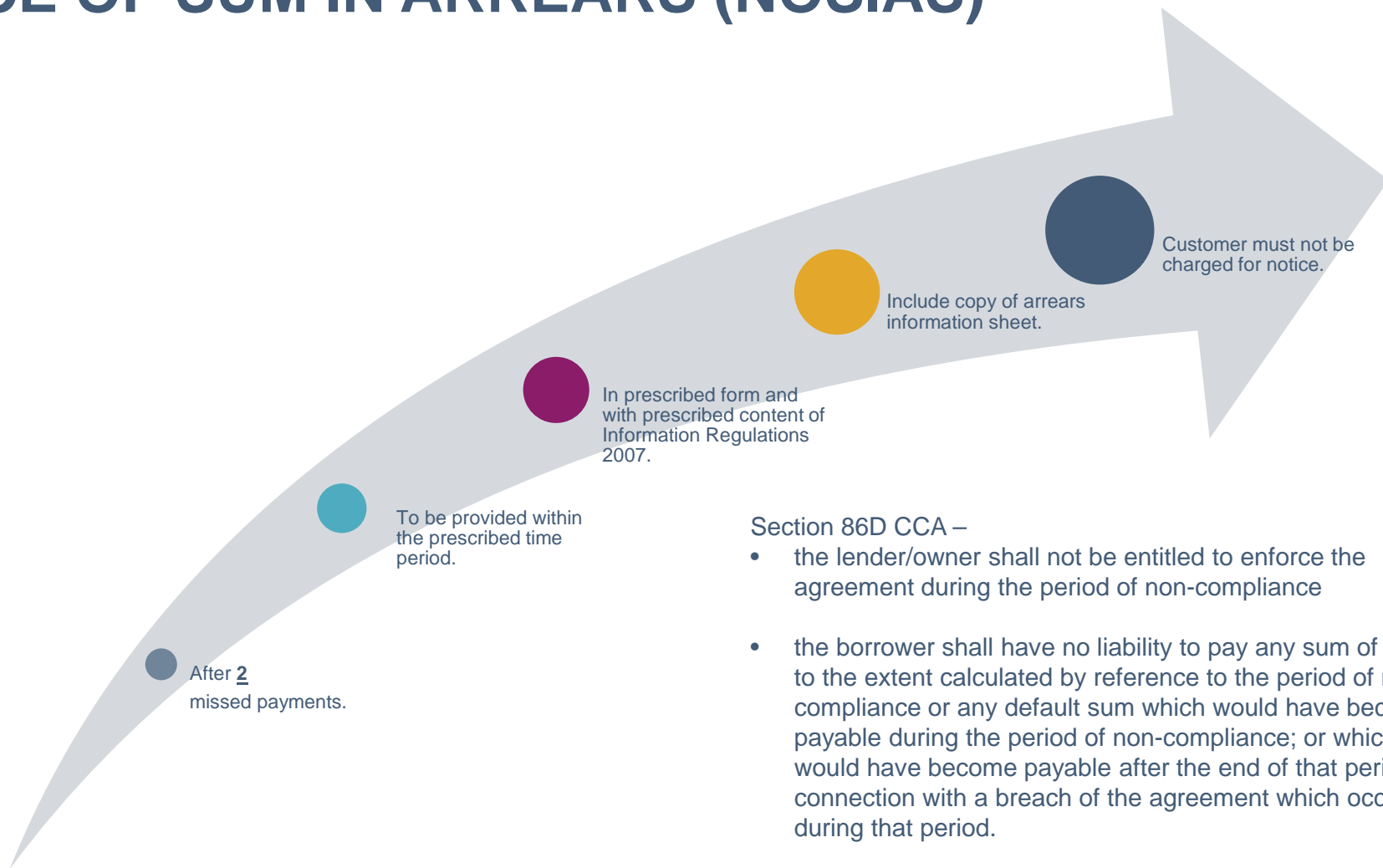
STATEMENTS FOR FIXED-SUM CREDIT (SECTION 77A CCA)

- Must include information prescribed by the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007.
- Must be sent at least annually.
- Failure to comply:
 - Loss of interest on any sums due during non-compliance;
 - No default sums in respect of the period of non-compliance; and
 - Cannot enforce the agreement during the period of non-compliance.
- Obligation stops when no sum payable and no sum will become payable.

STATEMENTS FOR RUNNING ACCOUNT CREDIT (SECTION 78(4) CCA)

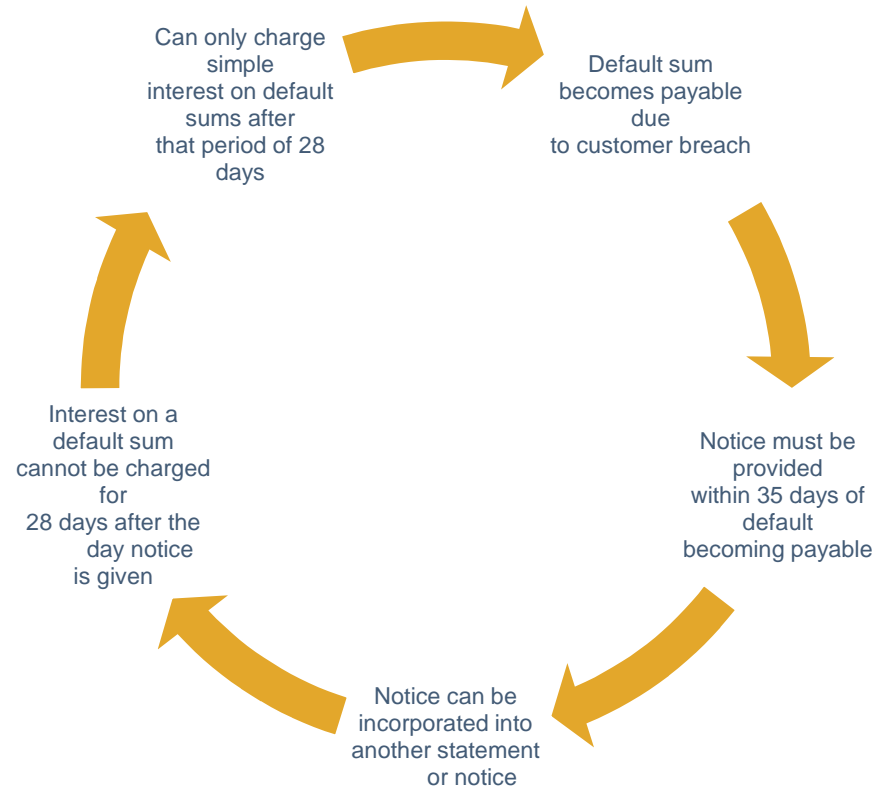
- Statements must include information prescribed by the Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007.
- Must be sent annually or more regularly if agreement provides for payment or calculation of interest with reference to shorter specified periods (e.g. monthly credit card statement).
- Not the same draconian consequences for non-compliance.

NOTICE OF SUM IN ARREARS (NOSIAS)



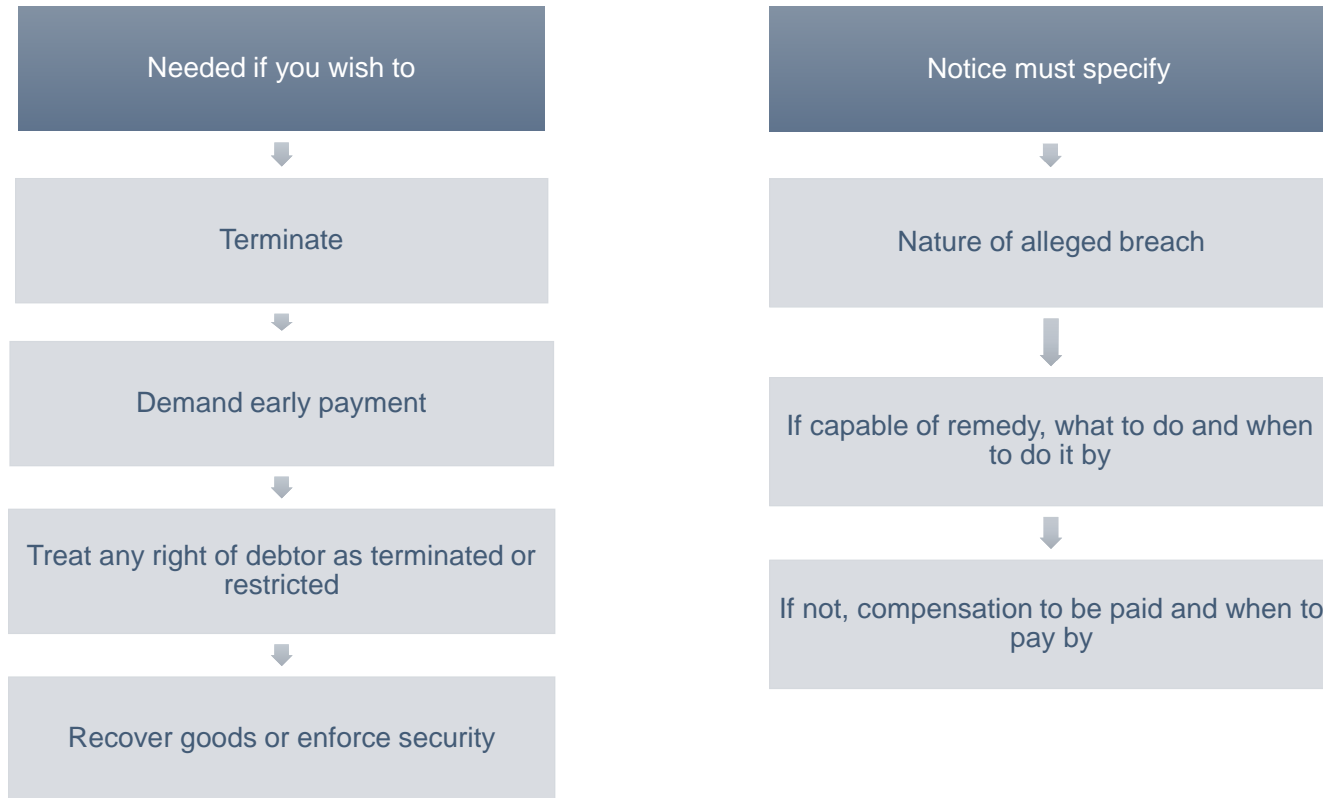
NOTICE OF DEFAULT SUM

SECTION 86E CCA



If notice is not provided within 35 days – creditor / owner cannot enforce Agreement

DEFAULT NOTICES



- The date to remedy or pay must not be less than 14 days after service of the notice.
- Must contain information in prescribed form. Must be in writing and in paper form.
- Must contain FCA information sheet.

THE UNFAIR RELATIONSHIP PROVISIONS



UNFAIR RELATIONSHIPS (SECTIONS 140A-C CCA)

- The court may make an order under section 140B if it determines that the relationship between the creditor and the customer is unfair on the customer because of one or more of the following:
 - any terms of the agreement or any related agreement.
 - the way in which the creditor has exercised or enforced its rights; or
 - any other thing done (or not done) by or on behalf of the creditor before or after making the agreement or any related agreement.
- “*Creditor*” - The court may treat anything done by an associate or former associate as done by the lender (if appropriate).
- “*Related agreement*” means a credit agreement consolidated into the main agreement, a linked transaction or security provided for the main agreement, a credit agreement consolidated into the main agreement or a linked transaction.

Interaction with the Consumer Rights Act 2015 (CRA)

- A term may be unfair under the CRA without producing an unfair relationship (e.g. because the term is insufficiently central to the relationship to make the relationship as a whole unfair).
- “Core terms” may give rise to an unfair relationship.
- The unfair relationship test applies to terms that have been individually negotiated.

UNFAIR RELATIONSHIPS - CONSIDERATIONS

- You establish whether the relationship is unfair or not.
- This is not merely an assessment of the contract/agreement (*Harrison v. Black Horse*).
- Reverse burden of proof – courts have often got this wrong. S140B(9) the burden is on a creditor to prove that a relationship is not unfair. (*Axton v. GE Money*; *Momoh v. Bluestone Mortgages*).
- However, *Carey v. HSBC* – a debtor cannot simply say ‘it’s unfair – you prove otherwise’ – he has to provide particulars.
- Covers things done (or not done) by a creditor or anyone acting on its behalf.
- Failure to give CCA s77/78 notice does not without more render the relationship unfair (*McGuffick*).
- Even if creditor complies with FCA/PRA rules in full, court can still nevertheless find the relationship to be unfair (*Plevin*).

CONSEQUENCES OF AN UNFAIR RELATIONSHIP

- Court has very wide powers including to:
 - require the creditor to repay any sum paid by the customer, or reduce the amount owed;
 - require the creditor to do / stop doing something; and
 - set aside any duty imposed on the customer under the agreement.

This has had particular consequences relating to PPI:

- Plevin v Paragon Personal Finance Limited 12 November 2014 Supreme Court.
- PPI sold by intermediary as the customer's agent. PPI not sold by lender, but lender knew about it. 71.8% of the insurance premium was undisclosed commission.
- Claimant alleged that non-disclosure of commission by the lender rendered the relationship with the lender unfair under s140B Consumer Credit Act 1974.
- Lord Sumption "at some point commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance. At what point is difficult to say, but wherever the tipping point may lie the commissions paid in this case are a long way beyond it".

COVID-19 AND CONSUMER CREDIT



FCA temporary measures to support consumers affected by COVID-19

Credit cards, loans and overdrafts

On 9th April 2020 the FCA confirmed a range of targeted temporary measures to help consumers negatively impacted and struggling with loan and credit card repayments and overdraft fees in light of COVID-19

On 1 July 2020 the FCA extended the temporary measures in relation to loans, credit cards and overdrafts until 31 October 2020

Motor Finance, HCSTC, RTO, BNPL and Pawnbroking

On 24 April the FCA published guidance introducing temporary measures to support consumers in the HCSTC and other consumer credit markets

On 24 April 2020 the FCA also published further guidance introducing a three-month payment freeze for which motor finance customers in financial difficulty could apply

On 3 July 2020 the FCA published further proposals to extend its temporary measures to support consumers in motor finance, HCSTC and other consumer credit markets

PAYMENT DEFERRAL AND CCA

Firms have been facing significant regulatory challenges implementing the required payment deferrals for customers in a manner which complies with the complex regulatory requirements of the CCA

WAIVER

- Non-contractual forbearance route by simply waiving lenders' rights under the agreement for a temporary period.
- The agreement stays in force.
- NOSIA implications?
- Risk of inadvertently triggering a 'Modifying Agreement'?

UNILATERAL VARIATION

- Is there a scope under the current agreement to do so?
- Risk of inadvertently triggering a 'Modifying Agreement'?

MODIFYING AGREEMENTS

- Requires strict adherence to the CCA's complex drafting rules, rules of execution and the provision of copies, and any error can result in the credit agreement being unenforceable without a court order.
- NOSIA implications?



QUESTIONS?

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