EU and UK Consumer Credit Regulation: Principles, Conduct, and Consumer Protection: Divergence or Convergence of Approach?

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Abstract

The regulation of financial services is going through major reform both at European and national level. This article examines the specific case of consumer credit, the new mortgage credit directive, and how European reforms in relation to secured lending on residential property are exhibiting signs of change of direction in relation to the basis of regulation of consumer credit. Whilst at EU level, legislative control is still sector specific, there is an observable shift in the UK towards a single regime for financial services. An examination of the new directive is made, giving a comparison between this latest consumer credit initiative and concurrent reforms in the regulatory framework that are taking place in the UK. It examines the extent to which the EU and UK regulatory initiatives reflect similarity in approach, highlights potential difficulties, and considers whether overall this is a positive development for consumer protection.

Introduction

As has been well documented, the regulatory framework of financial services in the UK has changed, as a result (at least in part) of the financial crisis. The aim is to strengthen the regulatory system, provide clarity in terms of responsibility and to introduce appropriate tools and flexibility for the new regulatory bodies. A further aspect to this reform is the fundamental change to the regulation of consumer credit, with the hope of bringing a 'simpler, more responsive regime'.[1] Responsibility for consumer credit regulation transferred from the Office of Fair Trading ('OFT') to the Financial Conduct Authority ('FCA') on April 1, 2014, so bringing the conduct of all financial services under one regulatory 'roof'. However, the most radical element to the reform is that the present consumer credit legislation has, at least in some respects, been scrapped in favour of the rule-book regulatory regime, which currently applies to other financial services, under the auspices of the Financial Services and Markets Act

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[1] HM Treasury/BIS, *A New Approach to Financial Regulation: Consultation on Reforming the Consumer Credit Regime* (2010) Foreword, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31894/10-1160-new-approach-consultation-reforming-consumer-credit.pdf (last accessed 14 Mar. 2014).

2000 ('FSMA').[2] This will represent a sea change in approach to credit regulation from a 'rules-based' to 'principles-based' approach.

These changes in the UK have been and are being brought about against a background, at EU level, of a fluid landscape containing a plethora of directives and regulation. In terms of the supervisory structure and macro-prudential regulation of banks/deposit holders there is pressure to move to a harmonised approach with innovations being discussed and agreed on over-arching supervisory frameworks and capital requirements. However, in terms of micro-prudential regulation beyond the supervisory processes,[3] conduct of business and product control, there is defined sector-specific legislation, with consumer credit further separated from other financial services, as has been, until recently, the current position in the UK. With the introduction of the Directive on Credit Agreements Relating to Residential Property ('CARRP'), commonly referred to as the Mortgage Credit Directive,[4] further divisional control has been created. The Directive, adopted in February 2014, professes to promote an internal market in mortgage credit for residential immovable property.[5] In addition, the Directive, reflecting the Consumer Credit Directive, has as its objectives, high levels of consumer protection, market stability and ensuring responsible creditor behaviour.[6] However, whilst the Directive in some respects mirrors current consumer credit regulation, there is a differing approach to how control of secured lending is delivered, with the introduction of general principles and micro-prudential requirements. At a time, when in the UK the approach is moving towards a simpler,[7] inclusive approach to the regulation of financial services, EU

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[2] For the relevant policy documents see e.g. HM Treasury/BIS, *A New Approach to Financial Regulation: Judgement Focus and Stability* Cm 7874 (2010) paras 4.53–4.56; HM Treasury/BIS, *A New Approach to Financial Regulation: Securing Stability, Protecting Consumers* Cm 8268 (2012) paras 1.17, 4.16–4.23, A 50–A 51. For the consultation papers see e.g. HM Treasury/BIS, *A New Approach to Financial Regulation: Consultation on Reforming the Consumer Credit Regime, supra* n.1; HM Treasury/BIS, *A New Approach to Financial Regulation: Transferring Consumer Credit to the Financial Conduct Authority* (2013). For FSA and FCA policy papers see eg FSA *Journey to the FCA* (2012) https://www.fsa.gov.uk/fca; FCA *Detailed Proposals for the FCA regime for consumer credit* (2013) CP 13/10 https://www.fca.org.uk/statc/consultation-papers/cp-10.pdf.

[3] Micro-prudential supervision of the financial market is provided for by the European Banking Authority, European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority.

[4] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ L 60/34 (2014)

[5] This however was met with some cynicism at the Proposal stage -see for example *Opinion of the Committee on Legal Affairs for the Committee on Economic and Monetary Affairs on the proposal for a directive of the European Parliament and of the Council on credit agreements relating to residential property* (COM (2011) 0142, Rapporteur Alexandra Thein.

[6] Preamble paras 5–6.

[7] Specifically in relation to the consumer credit regime: HM Treasury *Judgement Focus and Stability, supra* n.2 para. 4.55. Policy objectives elsewhere are stated as being 'clarity coherence and market oversight; effective and appropriate consumer protection…through a responsive and flexible framework;…simplification and deregulation; and a proportionate and cost effective regime' HM Treasury *Consultation on Reforming the Consumer Credit Regime, supra* n.1, Executive Summary 5. In contrast the consultation paper in 2013 concentrates on

regulation, whilst taking a more inclusive direction in certain respects, seems firmly fixed in a 'fragmented approach' when it comes to consumer credit. This does not sit particularly well with the UK's aim of a flexible market, and desire for proportionate and 'manageable regulatory burden on business'.[8] However, whilst it has been argued that, up until now, there has been a clear divergence in the underlying ethos between the EU and the UK in relation to the credit consumer,[9] this latest initiative on mortgage credit signposts a perceptible shift in how credit is to be regulated in the EU, not only in terms of scope but also method. This may suggest, taken together with the fundamental changes being brought about in the UK, that convergence in EU and UK approaches rather than divergence is now in evidence. The purpose of this paper is to explore these latest developments in consumer law in relation to credit. It will make making some observations about what this tells us about current approaches to protection of the credit consumer and will examine these trends in relation to EU and UK regulation, assessing whether there is an observable shift towards approximation in terms of rationale and how protection is to be achieved.

Financial Services Regulation in the EU

General Regulatory Framework

EU regulation is broadly separated by the concepts of macro and micro prudential supervision and regulation, conduct of business regulation and specific product control. Prudential supervision of the financial services market is based in co-ordination and co-operation with national supervisors[10] under a strengthened supervisory framework, through an EU system of Financial Supervisors. There are 3 European Supervisory Authorities: the European Banking Authority ('EBA'), the European Insurance and Occupational Pensions Authority ('EIOPA'), and the European Securities and Markets Authority ('ESMA'). The European Systemic Risk Board ('ESRB'), with support from the European Central Bank ('ECB') has the task of monitoring the system at a macro-prudential level. The latest developments are the agreement on and adoption of the single supervisory mechanism for credit institutions,[11] and the 'single rule book',[12] in effect aiming for further harmonisation

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flexibility consumer protection and a well functioning market HM Treasury *Transferring Consumer Credit to the Financial Conduct Authority*, *supra* n. 2 para. 1.5.

[8] HM Treasury *Consultation on Reforming The Consumer Credit Regime, supra* n. 1 Executive Summary.

[9] Sarah Brown, *European Regulation of Consumer Credit: Enhancing Consumer Confidence and Protection from a UK Perspective?* in James Devenney & Mel Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (CUP 2012).

[10] As stated in a recent press release this is on the basis this will deliver consistent rule application and allow efficient monitoring of developments and risks within the system. The new EU supervisory bodies also have the authority to develop and impose standards and rules and have a dispute resolution and co-ordination role if relevant http://europa.eu/rapid/press-release_IP-11-49_en.htm (last accessed 14 Mar. 2014).

[11] Led by the ECB in conjunction with national supervisors. This is the creation of a Banking Union, underpinned by single supervisory and regulatory mechanisms, compulsory for Member States within the euro area, and optional for other Member States, and the single rule book, applicable to banks and large investment firms across all Members States: Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63; Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European

within financial regulation of banks and investment firms by creating the Banking Union. The single rule book has been produced as a result of both Regulation and Directive (in force from January 2014, and being phased in over a 5 year period)[13] covering BASEL III and the amendments to the Capital Requirements 'package of regulation' (CRD IV)[14] together with further powers for supervisory bodies.[15] The changes aim to ensure a robust financial system able to proactively defend against future crises.[16] The recent review on the operation of the new supervisory framework[17] is positive, but suggests further changes, both legislative and non-legislative may be required. As part of this, one area highlighted as needing improvement is the attention given to consumer protection by the European Supervisory Authorities.[18]

Beyond the capital requirements of credit institutions, other prudential regulation[19] and/or conduct of business in relation to financial services in the European Union are covered by numerous directives and Regulations: for example the Market in Financial Instruments Directive, ('MiFD '),[20] the Payment Services Directive,[21] the

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Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013, OJ L 287/5. http://ec.europa.eu/finance/general-policy/banking-union/index_en.htm (last accessed 2 May 2015)

[12] Being one of the main proposals of the Report of the high level group on financial supervision in the EU, chaired by Jacques De Larosiere (25 February 2009) http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf (last accessed 14 Mar. 2014).

[13] http://www.wba.europa.eu/regulation-and-policy/implementing-basel-iii-europe (last accessed 14 Mar. 2014).

[14] These legislative packages provide minimum capital requirements and rules as to publication of e.g. capital and risk management for credit institutions and investment firms.

[15] ECB, 'Financial Integration in Europe' (April 2013) at 44, 48 http://www.ecb.europa.eu/pub/pdf/other/financialintegrationineurope201304en.pdf (last accessed 14 Mar. 2014).

[16] http://europa.eu/rapid/press-release_IP-11-915_en.htm?locale=en (last accessed 14 Mar. 2014) ECB 'Financial Integration in Europe' 28 April 2015.

[17] Required by the Regulations founding the various supervisory bodies. The review is contained in the commission report *Report from the commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision* COM (2014) 509 final

[18] Ibid 8.

[19] Whether macro or micro- for a discussion as to how regulation can be defined as serving either, see Itai Agur & Sunil Sharma *Rules, Discretion, and Macro-Prudential Policy* (IMF Working Paper 2013) http://www.imf.org/external/pubs/ft/wp/2013/wp1365.pdf (last accessed 14 Mar. 2014).

[20] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, OJ L 145. The Directive covers securities exchanges and investment firms whose occupation/business is to provide investment services and perform investment activities on a professional basis e.g. investment banks and portfolio managers.

[21]Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC, OJ L 319. The Directive

Acquisitions Directive,[22] the Re-insurance Directive,[23] the Insurance Mediation Directive, ('IMD'),[24] the SOLVENCY II Directive,[25] Undertakings for Collective Investment in Transferable Securities Directive ('UCITS'),[26] the Alternative Investments Fund Managers Directive, ('AIFMD')[27] the European Markets Infrastructure Regulation, ('EMIR'),[28] the Distance Marketing of Financial Services Directive ('DMFSD')[29] and the Consumer Credit Directive ('CCD').[30] There are

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provides for conduct and prudential requirements in relation to payment institutions. Reform is underway via the Payment Services Directive II -http://europa.eu/rapid/press-release_IP-13-730_en.htm?locale=en (last accessed 3 May 2015)

[22] Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector, OJ L 247/1. This Directive governs acquisitions in the financial sector with prudential and procedural controls.

[23] Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, OJ L 323/1. This Directive regulates reinsurance firms with harmonised supervision rules.

[24] Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, OJ L 9. This Directive provides regulation of the sales of insurance products by agents and brokers, from motor insurance to life insurance and insurance related investment products.

[25] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 335/1. This Directive provides prudential regulation in relation to standards on for example risk management, disclosure and asset valuation. Revisions were made in March 2014, see http://ec.europa.eu/internal_market/insurance/solvency/future/index_en.htm (last accessed 14 Mar. 2014) via the Omnibus II Directive: Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) OJ L153/1

[26] Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as regards depositary functions, remuneration policies and sanctions OJ L 257/186. This Directive provides the basis of regulation of collective investment schemes establishing investor protection through conduct of business, authorisation and operational requirements.

[27] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ L 174/1. This Directive provides for the regulation of the marketing and management of investments vehicles such as hedge funds, private equity and investment trusts (i.e. those not covered by UCITS).

[28] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201/1. This provides for organisational and transparency requirements for entities that enter into any form of derivative contract.

[29] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council

current reform initiatives, much of it prompted by the financial crisis, with, for instance amendments to the IMD, to ensure proper regulation of insurance sales, advice and transparency, with further conduct of business rules[31] and recent amendments to UCITS, to ensure clear liability and duties in relation to investors.[32] This is connected to the Packaged Retail Investment Products Initiative, (known as 'PRIPS') which has resulted in the proposal and adoption of a Regulation on key information documents for investment products, the idea behind the initiative being to reduce fragmentation and inconsistency, particularly in relation to pre-contract transparency and sales regulation in this sector.[33] In addition, the MiFD is replaced by MiFD II,[34] together with updated rules[35] ('MIFR') mostly applicable from January 2017, which aim to ensure transparency, adaptation to changing products, reinforced supervisory powers and stronger protection for investors.[36] SOLVENCY II has also been reviewed with further changes coming into force.[37] These directives attempt to bring a unified approach to the regulation of financial services, and it is for this reason that PRIPS and the SOLVENCY II projects were launched.[38]

At their heart, all this legislation, shares similar aims of overall efficiency of the financial system, an efficient competitive single market and consumer protection. Take, for example, the aim of the MiFD, which is framed as the creation of a coherent and risk sensitive framework which protects investors,[39] or the SOLVENCY II

Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271/16.

[30] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133.

[31] IMD 2 Proposal for a Directive of the European Parliament and of the Council on Insurance Mediation (recast)' COM (2012) 360/2 http://ec.europa.eu/internal_market/insurance/consumer/mediation/index_en.htm (last accessed 14 Mar. 2014), now called the Insurance Distribution Directive.

[32] http://europa.eu/rapid/press-release_IP-12-736_en.htm?locale=en (last accessed 14 Mar. 2014); Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (2012/0168 (COD).

[33] EU Commission *Communication from the Commission to the European Parliament and the Council: Packaged Retail Investment Products* COM (2009) 204 final. Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) OJ L352

[34] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU OJ L 173/349. This repeals the previous Directive of 2004- Directive 2004/39/EC

[35] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 OJ L 173/84 OJ L 12/1

[36] http://europa.eu/rapid/midday-express-12-06-2014.htm?locale=en

[37] Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). See also Omnibus Directive II supra fn 25.

[38] http://europa.eu/rapid/press-release_IP-12-736_en.htm?locale=en (last accessed 14 Mar. 2014); EU Commission *Communication from the Commission to the European Parliament and the Council: Packaged Retail Investment Products* COM (2009) 204 final, 2;

[39] Repeated in MiFD II Recital (4).

Directive, part of the SOLVENCY II project, where here the main objective of insurance/re-insurance regulation and supervision is the protection of policy holders and beneficiaries.[40] There are however distinctions to be made between these various pieces of legislation, in relation to underlying purpose. For although as a group, they have similar targets, most are bounded in their regulation, each dealing with a specific type of financial product and/or the service that offers it. Whilst there is some overlap,[41] investment services offering certain types of financial products (e.g. shares/bonds/derivatives) are primarily covered by the MiFD, insurance is covered by SOLVENCY II and the IMD, insurance special purpose vehicles are covered by the Re-insurance Directive, collective investments schemes by UCITS, and so on. A further categorisation can be made in terms of the basis of regulation. There are those that primarily provide prudential control, such as the SOLVENCY II and the Financial Conglomerates Directive,[42] and those that primarily provide conduct regulation, for example the IMD, and the DMFSD. The MiFD is however an example of a Directive which could be seen as a conjunction of these approaches. Whilst it does not provide prudential regulation in the form of detailed capital requirements,[43] it does contain organisational requirements in relation to compliance, risk management, and internal control as well as its conduct of business provisions, based in general principles. The regulation of consumer credit also sits as a separate area of regulation.[44] However it is firmly based in conduct of business rules, without any attempt at micro prudential control. This may be set to change, at least in some degree, with the introduction of CARRP.

Regulation of Credit

In 2007 the single market review was launched. The commission document 'A Single Market for a 21st Century Europe'[45] both celebrates the progress and success of the single market and highlights the difficulties that arise from attempting to establish a unitary market across a number of jurisdictions. Evolution of markets in effect underlies much of the problem facing this goal,[46] whether through innovation in

[40] Directive 2009/138/EC Recitals (16); see also http://ec.europa.eu/internal_market/insurance/docs/solvency/solvency2/faq_en.pdf (last accessed 14 Mar 2014).
[41] For example the DMFSD covers a number of different financial services offered at a distance, certain investments are covered both by MiFD and UCITS, certain types of derivatives are covered by the EMIR and MiFD, and the regulation of investment management is covered by MiFD and AIFMD.
[42] Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council, OJ L 35, 11.2.2003.
[43] Apart from initial capital requirements in relation to authorisation, see Article 12. Otherwise MiFD firms are generally covered by CRD IV.
[44] Although it should be noted the DMFSD does also cover distance credit agreements
[45] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Single Market for 21st Century Europe* COM(2007) 724 final.
[46] Commission of the European Communities Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions *A Single Market for Citizens: Interim Report to the 2007 Spring*

relation to products, external global factors, such as the financial crisis, or social 'realities' of the Member States' citizens.[47] However, implementation, enforcement, and simplification, are all concepts mooted as the way forward. The aim is to 'foster flexibility and adaptability while maintaining the legal and regulatory certainty necessary to preserve a well-functioning single market.'[48]

The Green Paper on Retail Financial Services[49] sets out how these aims are to be achieved in retail financial services. Lack of effective competition and fragmentation of markets are seen as problems that should be 'dealt' with to allow the opening of markets.[50] Prudential regulation at an EU level is seen as aiding delivery of a single market allowing consumer and investor protection.[51] Further objectives are to reduce prices, increase choice, enhance consumer confidence and empower consumers, with mention of a fair open competitive market. There should be 'appropriate' regulation of new products, and creation of a level playing field whilst maintaining quality of products.[52] This entails a 'global approach' to consumer rights across the EU[53] and access to quality retail financial services. Interestingly at this time emphasis seems as much centred on ensuring the better functioning of markets, as providing further regulation. That being said, it seems that the means of achieving improved functionality is felt, potentially, to lie in harmonising regulation, integration and co-operation rather than freedom from regulation.

Retail financial services include consumer and mortgage credit. At the time of the Green Paper, as far as consumer credit was concerned, the reform to the original consumer credit directive, was to 'promote the emergence of a genuine single market in consumer credit while ensuring a high level of consumer protection.'[54] The CCD was adopted in 2008 and should by now have been fully transposed into national laws. In terms of mortgage credit however, reform has taken longer. The White Paper on Mortgage Credit, referred to as a planned initiative in the earlier Green Paper,[55] was produced later that year.[56] Its aim was to 'facilitate the creation of an integrated market for mortgage credit'[57] so promoting cross border activity, product diversity, and improved consumer confidence.[58] However, secured credit, whilst the subject of initiatives such as a voluntary code of conduct,[59] a Green Paper on Mortgage Credit[60]

European Council COM(2007) 60 final, at 3.
[47] Commission *A Single Market for 21st Century Europe supra* n. 45, at 3.
[48] *Ibid.* at 4.
[49] Commission of the European Communities *Green Paper on Retail Financial Services in the Single Market* COM (2007) 226 final.
[50] *Ibid*. at 6.
[51] *Ibid.* at 4.
[52] *Ibid.* at 9,12.
[53] Something that features in the EU Commission's earlier White Paper in 2005, see Commission of the European Communities *White Paper Financial Services Policy 2005-2010* (COM(2005) 629 final),at 16.
[54] Commission *Green Paper on Retail Financial Services, supra* n.49, at 12.
[55] *Ibid.* at 10.
[56] Commission of the European Communities *White Paper on the Integration of EU Mortgage Credit Markets* COM(2007) 807 final.
[57] Commission *Green Paper on Retail Financial Services, supra* n.49, at 10.
[58] Commission *White Paper on Mortgage Credit*, *supra* n.56, at 4-5.
[59] see http://ec.europa.eu/internal_market/finservices-retail/home-loans/code_en.htm (last accessed 14 Mar. 2014).

and mortgage dialogue[61] did not have its own regulation until last year. This is as a result of the Proposal for a Credit Agreements Relating to Residential Property Directive being adopted by the Commission in 2011[62] and, after detailed consideration, CARRP being finally adopted by the European Parliament on 4 February 2014.[63] The Directive has a targeted approach to harmonisation, with some measures being of a full harmonisation nature, whilst in relation to others, Member States are free to be more restrictive.[64] Transposition is to take place by March 2016 in most respects.

The stated incentive for introducing regulation in relation to secured lending on the home, is the financial crisis, tackling irresponsible lending,[65] with the underlying rationale to create an internal market for mortgage credit offered on residential property, whilst providing a high level of consumer protection.[66] The Directive covers most credit,[67] which is secured on residential immovable property or a right related to such property. It would therefore include any charge over property whatever its priority.[68] There are detailed requirements as to information provisions (advertising, general information, pre- contract, information relating to credit intermediaries and appointed representatives, adequate explanations, the basis of APR calculation, changes in borrowing rates)[69] and other requirements such as assessment of creditworthiness,[70] rights of early repayment[71] and a guaranteed period of reflection before being bound by the agreement.[72] However, it is not just the mechanics of the transaction itself that are covered. There are also clear targets for financial

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[60] Commission of the European Communities *Green Paper: Mortgage Credit in the EU* COM(2005) 327 final.
[61] http://ec.europa.eu/internal_market/finservices-retail/docs/home-loans/miceg/tor-en.pdf (last accessed 14 Mar. 2014).
[62] Commission of the European Communities *Proposal for a Directive of the European Parliament and of the Council on Credit Agreements relating to Residential Property* (COM(2011) 142 final).
[63] Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ L 60/34.
[64] Preamble para. 7.
[65] Preamble para. 4.
[66] Preamble para. 5. See also Commission of the European Communities *Commission Staff Working Paper: Summary of the Impact Assessment: Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property* SEC (2011) 355 final. For a detailed discussion of the development of policy underlying recent EU consumer credit regulation see Iain Ramsay *Changing Policy Paradigms of EU Consumer Credit and Debt Regulation* in Stephen Weatherill and Dorota Leczykiewicz *The Images of the Consumer in EU Law: Legislation Free movement and Competition Law* (Oxford Hart) (2015) (forthcoming)
[67] Some specific types of lending are excepted, for example equity release vehicles, Art. 3(2)(a) or where the credit is interest free Art. 3(2)(c).
[68] The CCD does not cover secured lending on property at all. However the UK CCA covers second charge mortgages on residential property, first mortgages on residential homes being covered by the Financial Services and Markets Act 2000. Regulation of second charge mortgages is now the responsibility of the FCA along with other consumer credit.
[69] Arts 10–11, 13–17, 27.
[70] Art. 18- 20.
[71] Art. 25.
[72] Art. 14(6).

education,[73] detailed measures relating to the competence of credit providers,[74] supervision[75] and restrictions on certain practices.[76]

In some respects, the proposals of CARRP follow the structure of the CCD, with strengthened provision in relation to assessing creditworthiness, enhanced information requirements, and greater emphasis on education of consumers. However CARRP indicates a change in approach, which stretches beyond simply including another form of credit (i.e secured lending) within regulation. As was mentioned above, current consumer credit regulation is not framed on the same basis as many other financial services, in that there is no reference to prudential matters, other than 'appropriate supervision' of creditors.[77] Whilst not part of the consumer acquis, the CCD's approach, like the DMFSD, has much in common with the other regulation within the acquis, focusing on traditional methods of consumer protection from conduct and, indirectly, through information provision, from terms, that may be harmful.[78] Emphasis in transparency, for example, is evidenced in the CCD by the requirement for detailed pre-contract and agreement information, and the creditor's duty to give adequate explanations about the credit to the borrower, and distributive measures are included via the fourteen day right of withdrawal.[79] The deviation demonstrated by CARRP lies in the *basis* of the regulation. For whilst the CCD is in effect 'rules-based', CARRP includes a 'principles-based' approach. This is demonstrated through general conduct of business principles enunciated in Article 7, where it is stated Member States are to require creditors to act 'honestly fairly transparently and professionally' in relation to the consumer.[80] Furthermore fairness was not something directly addressed in the CCD but in effect left to the Unfair Commercial Practices Directive[81] ('UCPD') and Unfair Contract Terms Directive; it was otherwise indirectly addressed, primarily through information provisions. This is not the case in relation to CARRP. The Article then gives further guidance, making specific reference to consumer circumstances and assumptions of risk, and to remuneration policies, which are consistent with these principles. In addition prudential measures are included through indemnity insurance requirements[82] and Member States'

[73] Art. 6.
[74] Art. 9.
[75] Arts 5, 9(4)–(5).
[76] Namely tied practices Art. 12.
[77] CCD Preamble para. 44, Art. 20.
[78] Through means of information disclosure and withdrawal provisions.
[79] The same as, for example, the Consumer Rights Directive, which replaces the Distance Selling and Doorstep Sales Directives. The Consumer Rights Directive contains detailed information requirements and a cancellation period together with other protection against specific unfair practices such as overcharging for methods of payment. Other examples are the Council Directive 90/314/EEC on package travel, package holidays and package tours, which also employs information provisions and rights of cancellation. Of course in terms of conduct and terms the 'over-arching' Unfair Commercial Practices Directive and Unfair Contract Terms Directive will also be relevant.
[80] This includes, in relation to advisory services- 'in the best interests of consumers' Art. 23(3)(d).
[81] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133/66, Preamble para. 18.
[82] For credit intermediaries Art 29(2)(a).

monitoring of markets.[83] These differences indicate an interesting development in protection for the credit consumer, as it demonstrates a more 'comprehensive' approach to control, encompassing more than the provision of conduct and information rules.[84]

The Proposal through the various stages of discussion and amendment, was, needless to say, subject to criticism, for example by the Committee on Legal Affairs, Member States such as the UK, and the industry. Serious doubts were raised as to the extent of powers delegated to the Commission,[85] whether the proposed directive would be effective in addressing the financial crisis, and whether an internal market in credit agreements secured on residential property can, in reality, be established.[86] Mortgage markets are regarded as endemically local in nature,[87] with cross border demand being low, and there was some concern the Proposal would not effectively address this issue.[88] This however was not the only criticism of the proposed new Directive. A 'blanket bomb' approach to information provision is no longer seen as the way forward. As the FCA has pointed out,[89] in relation to its own re-visitation of mortgage lending rules, the information provision should reflect what the consumers actually want/need, in order to make an informed choice, with less emphasis on transparency as protection, and concentration on affordability assessments and sales standards. Consistency with the CCD is also seen as essential, in order to avoid burdensome administrative costs,[90] particularly as some Member States already apply provisions of the CCD to mortgage lending.[91]

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[83] Art. 26, Preamble para. 26: the prudential nature of the requirements are specifically referred to in Art. 1 and Preamble para. 8.

[84] This distinction is identified by Ramsay as a symptom of the changing political landscape. Ramsay *Changing Policy Paradigms* supra fn 66

[85] European Parliament, Committee on Legal Affairs *Opinion of the Committee on Legal Affairs for the Committee on Economic and Monetary Affairs on the proposal for a directive of the European Parliament and of the Council on Credit Agreements Relating to Residential Property* (2011/0062(COD), 3.

[86] *Ibid.* at 3.

[87] See for example the view of the UK FCA: http://www.fca.org.uk/firms/markets/international-markets/eu/mortgage-credit-directive (last accessed 14 Mar. 2014). See also Ramsay supra fn 66

[88] European Banking Federation *Preliminary EBF Position on the Proposal for a Directive on Credit Agreements Relating to Residential Property* (31 Jan 2012) http://www.ebf-fbe.eu/uploads/D0962B-2011-EBF-Preliminary%20position%20on%20the%20Proposal%20for%20a%20Directive%20on%20credit%20agreements%20relating%20to%20residential%20property_f.pdf (last accessed 14 Mar. 2014).

[89] FCA Mortgage Credit Directive 'Questions Answered' http://www.fca.org.uk/firms/markets/international-markets/eu/mortgage-credit-directive (last accessed 14 Mar. 2014).

[90] This is especially important as a number of Member States already provide the CCD provisions to some secured lending EBF *Preliminary EBF position supra* n.88 para 8.1. See for example the UK's CCA and secured lending on land, where whilst excepted from the provisions, creditors were given the option to apply various provisions if they wished e.g. Consumer Credit (Disclosure of Information) Regulations 2010/1013.

[91] As specifically allowed by the Directive. For recent judicial confirmation of this see *SC Volksbank România SA v Autoritatea Naţionalăpentru Protecţia Consumatorilor –*

Upon observing the adopted directive, whilst now generally seeming to be welcomed, although with some reservation, (certainly in the UK),[92] it is not clear that these concerns have been met. The information provisions remain extensive, and whilst in many respects reflect what is already contained in the CCD, it is not clear how this will interact with the current SECCI contained in CCD provisions, which may have already been applied to secured lending by some Member States.[93] There are minor differences, for example the definition of consumer[94] and a less prescriptive approach to compensation allowances on early repayment.[95] These may be regarded as insignificant, but the Directive is still potentially problematic in other respects. For example, Article 7(3)(b) requires remuneration policy of creditor staff to be in line with the 'business strategy, objectives, values and long-term interests of the creditor..' but can this in truth be completely consistent with a high level of consumer protection? Whilst there is a qualification that any remuneration policy should include 'measures to avoid conflict of interest' there will always in truth be an element of tension between the objectives and interests of supplier and consumer. Furthermore in relation to pre-contract information the obligations fall back on requirements of 'without undue delay' and 'in good time'[96] – how are these to be measured? The provision of adequate explanations is heavily qualified within Article 16 (2) in that Member States 'may adapt the manner by which [the explanations are] given…to the circumstances of the situation in which the credit agreement is offered…'. This seems a sensible compromise but will potentially generate different levels of protection in different Member States. This could also be said about other derogations, such as the flexibility in the advertising content,[97] the time period (beyond a minimum of seven days) for consumer reflection[98] or indeed the approach of targeted harmonisation as a whole. Perhaps most surprisingly, one area where consumers can suffer more detriment than any other i.e enforcement of the loan and foreclosure, has little protection beyond a general statement that Member States are to '*encourage*' (my emphasis) creditors to 'exercise reasonable forbearance before foreclosure proceedings are initiated'.[99]

Comisariatul Judeţeanpentru Protecţia Consumatorilor Călăraşi (CJPC) (Case C-602/10) [2012] C.M.L.R. 45.

[92] http://www.cml.org.uk/cml/media/press/3494 (last accessed 14 Mar. 2014) although this may be because in effect little will change in relation to the UK regulation. See also HM Treasury *Implementation of the Mortgage Credit Directive Summary of Responses* Jan 2015

[93] See for example the concerns of Austria: Council of the European Union *Item Note, Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property (Mortgage Credit Directive- MCD)- Approval of final compromise text'* 2011/0062 (COD) http://register.consilium.europa.eu/pdf/en/13/st08/st08894.en13.pdf (last accessed 14 Mar. 2014).

[94] The Directive adopts the definition contained in the CCD (natural consumer acting outside his trade, business or profession) but the Preamble specifically refers to dual-purpose contracts as eligible-Preamble para. 12.

[95] Art. 25.

[96] Art. 14.

[97] Art. 11(3).

[98] Art. 14(6).

[99] Art. 28. This does not really reflect the more detailed concerns outlined in the Premble at

These issues prompt the question as to whether the Directive will be able to fully achieve its objectives. Whilst the provision on adequate explanations and assessment of creditworthiness go some way towards ensuring responsible lending, these will only be effective if suitable sanctions are in place. Similar requirements are already contained in the CCD, but as experience in the UK has shown, for example in relation to payday lending, levels of compliance are not assured.[100] Of course, unlike the CCD, which referred to 'optimum conditions' for both suppliers and consumers, 'optimal' consumer protection is not the goal being chased here, only 'high' consumer protection. It could be argued this is, indeed, attainable. However, it may be that problems lie not so much in the potential inconsistencies that emerge from the Directive's provisions themselves, but from underlying premises on which it is based. Creating a smoothLY functioning market, [101] may not be the same as achieving a truly efficient market, internal or otherwise, unless the rights and interests of all market actors are to be considered. There seems to be an attempt to accommodate this, but it has to be recognised that these interests are not always compatible. Whilst 'confident' consumers are more likely to participate, which naturally is to the advantage of suppliers, there is inevitably a point at which the supplier's ultimate interest (making a profit) will impinge upon complete consumer protection, seen as the answer to consumer under-confidence in the market. After all, in one sense at least, 'profit' of one party will inevitably be at the expense of another.

Current Drivers in relation to Regulatory Reform

As has been mentioned, there appear to be three issues that have and continue to dominate rationale for regulation of financial services; the financial crisis,[102] cross border shopping, and closely connected to both these, consumer confidence (all of which, of course, impact on the stability and efficiency of the internal market). The basis of current reforms rely heavily as their justification on the recent financial turmoil[103] with a harmonised approach to regulation and supervision being presented as the best form of control. Promotion of cross border shopping is used as a reason for new initiatives, particularly in relation to consumer confidence.[104] To a certain extent

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para 27. Of course it is hoped that the provisions providing for responsible lending in the Directive will reduce the need for foreclosure in any event. Commission of the European Communities *Commission Staff Working Paper National measures and practices to avoid foreclosure procedures for residential mortgage loans Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property* SEC(2011) 357 final

[100] OFT, *Payday Lending Compliance Review Final Report* (March 2013), at 10. The industry has been subject to detailed review and investigation since the FCA has taken over the OFT's role. This has resulted in specific rules and price controls see FCA Policy Statement *Detailed Rules for the FCA Regime for consumer credit Including feedback on FCA QCP 13/18 and 'made rules'* PS14/3 (Feb 2014) ch 5 and *FCA Detailed rules for the price cap on high-cost short-term credit - Including feedback on CP14/10 and final rules* PS14/16 (Nov 2014)

[101] Preamble para. 5.

[102] Although there has been some cynicism from industry as to the EU mortgage credit market's role in the crisis http://www.eurofinas.org/uploads/documents/press/pr-110331%20Mortgage%20Credit.pdf (last accessed 2 April 2014).

[103] Ramsay *Changing Policy Paradigms* supra fn 66

[104] Thomas Wilhelmsson, *The Abuse of the ''Confident Consumer'' as a Justification for EC Consumer Law* 27 Journal of Consumer Policy 317-337 (2004) at 318. A good

a unitary framework across the EU is compatible with these aims-as the Green Paper on Financial Services Interim Report stated cross border shopping has made it important to empower consumers effectively and reduce fragmentation.[105] There are however potential difficulties in achieving efficient unification in order to realise these aims. A truly unified framework, it is argued, comes through harmonisation. Whilst minimum harmonisation provides a baseline, maximum harmonisation has been seen as the tool by which the internal market can truly be achieved.[106] Arguably, however, harmonisation is not working.[107] Permitted regional approach to implementation and transposition reduce the ability of directives to effect coherent change to national laws,[108] and ambiguities in the legislation lead to diversity in national courts' interpretation of provisions.[109] The concept of 'targeted' full harmonisation, (in effect a compromise) merely adds to this problem, whereby in certain respects, or in relation to certain provisions, Member States are in effect left to their own devices.

Certainly maximum harmonisation is not universally popular. Counterarguments are founded in the view that minimum harmonisation is sufficient[110] and that maximum harmonisation is supplier orientated[111] and that it may actually result in lower protection for some consumers, if not utilised appropriately.[112] From a prudential regulation point of view maximum harmonisation is also seen as inflexible in terms of

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example of this is the promotion of consumer empowerment framed as one of twelve 'levers' needed to boost growth and strengthen confidence *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions Single Market Act Twelve levers to boost growth and strengthen confidence "Working together to create new growth"* COM (2011) 206 final. (April 2011) para. 2.4.

[105] EU Commission *Green Paper on Retail Financial Services* supra n 49, 2, 3, para. 4.3.

[106] On the basis of Art. 95- EC (Art 114 TFEU) Hans W Micklitz, *The Targeted Full Harmonisation Approach: Looking Behind the Curtain* in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law,* 51-52 (Sellier European law Publishers 2009). The regulation of credit is a good example of this. The Preambles to both the CCD 2008 and CARRP refer to maximum harmonisation as the tool to be used to 'create' an internal market: CARRP Preamble para. 7, CCD 2008 Preamble para. 9.

[107] For an argument in favour of Regulations rather than Directives (but only in relation to cross-border transactions) see Christian Twigg-Flesner, *Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation? — A Way Forward for EU Consumer Contract Law* 7 E.R.C.L. 235-256 (2011)

[108] For example national terminology inevitably invites divergence, see Twigg –Flesner, *Good-Bye Harmonisation by Directives supra* n. 107 at 244.

[109] Elizabeth Hall, Geraint Howells & Jonathon Watson *The Consumer Rights Directive: An Assessment of its Contribution to the Development of EU Consumer Contract Law* 8 E.R.C.L. 139-166 (2012) at 166

[110] Certainly as a base line: Geraint Howells and Thomas Wilhelmsson, *EC Consumer Law: Has It Come of Age?* 28 E.L. Rev. 370-388 (2003) at 378 and in relation to consumer confidence in contracting Geraint Howells & Reiner Schulze, *Overview of the Consumer Rights Directive* in Geraint Howells & Reiner Schulze, *Modernising and Harmonising Consumer Contract Law*, 8 supra n 106.

[111] Sefa M Franken, *The Political Economy of the EC Consumer Credit Directive* in Johanna Niemi, Iain Ramsay and William C Whitford (eds), *Consumer Credit Debt and Bankruptcy: Comparative and International Perspectives* 129-152 at 130-131 (Hart, 2009).

[112] For example in relation to contractual remedies Howells & Schulze, *Overview of the Consumer Rights Directive supra* n. 101 at 24.

being able to react to changing circumstances in individual Member States.[113] Further, EU wide rules are seen as too unwieldy and unyielding in relation to smaller national institutions.[114] Demonstration of these problems was evidenced in the negotiations surrounding the Consumer Rights Directive. The initial aim was to replace four directives in the consumer acquis, namely the Unfair Contract Terms Directive, the Sale of Consumer Goods and Associated Guarantees Directive, the Distance Selling Directive and Doorstep Sales Directive. The eventual product fell far short of the initial vision, covering only the latter two Directives, as there were deep concerns raised by a number of Member States;[115] the fact the proposed Directive was founded in full harmonisation had much to do with this.[116] These same problems arose in relation to CARRP, which was subject to a lengthy negotiation process[117] before final agreement in April 2013, with approval of the text by the EU Council in May 2013, [118] and finally adoption by the European Parliament and Council nearly a year later.

Whilst it cannot be said maximum harmonisation is seen as inappropriate for all types of control, [119] it seems there is only qualified confidence in such measures delivering effective consumer protection. However it is not just the confidence of Member States that is at issue but the confidence of consumers themselves. Diversity lies not just in regulation but in more integral aspects of the consumer market, the most obvious being culture and language. The Green Paper on Financial Services targeted 'differing regulatory and consumer protection frameworks' as creating 'legal and economic barriers to market entry', but it also recognised consumer behaviour and preferences limit market integration.[120] There is certainly evidence to support the notion that culture and language will inevitably prevent true integration of consumer markets;[121] harmonisation will be ineffective in changing this, as this is an identity issue that cannot be resolved by imposing a single set of rules across the board.[122] This is not

[113] The single rulebook, proposed by the De Larosiere report had run into some difficulties, with Member States wanting to retain a degree of flexibility in relation to national markets.
[114] The proposed answer to this is to allow proportionality of approach with lighter touch application of rules as appropriate Andrea Enria, *Banking Supervision- Towards an EU Single Rule Book*, Speech to Belgian Financial Forum (5 Dec 2011), Brussels, at https://www.eba.europa.eu/documents/10180/27032/Belgian-Financial-Forum-Banking-Supervision---Towards-an-EU-Single-Rulebook---Brussels-5-Dec-2011.pdfhttp://www.financieelforum.be/FinancialForum/DOC/1049.pdf (last accessed 1 April 2014).
[115] Sarah Brown, *European Regulation of Consumer Credit, supra* n. 9, at 58.
[116] Hall, Howells & Watson, *The Consumer Rights Directive: An Assessment, supra* n. 109.
[117] Commissioner Michael Barnier acknowledged the process as not always being an easy one http://europa.eu/rapdi/press-release_MEMO-13-365_en.htm (last accessed 1 April 2014).
[118] Council of the European Union Mortgage Credit: Council confirms agreement with EP (8 May 2013) http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/137053.pdf (last accessed 1 April 2014).
[119] For instance the final agreed draft of CARRP that went to the European Parliament contains agreed maximum harmonisation measures, such as pre-contractual information and disclosure of the APR.
[120] EU Commission *Green Paper on Retail Financial Services*, *supra* n. 49 at 6, Ramsay *Changing Policy Paradigms* supra n 66
[121] Niamh Moloney *How to Protect Investors: Lessons from the EC and UK,* 20-21 (CUP 2010).
[122] Twigg-Flesner, *Good-Bye Harmonisation by Directives, supra* n. 107 at 240; Indeed it has been argued the 'core' of EU identity lies in the important contribution of the diversity of

only a consumer phenomenon; the behaviour of banks themselves in interbank lending at the end of 2011 demonstrated a 'parochial' approach.[123]

The whole question of consumer behaviour is a tricky one in terms of providing real protection and to what extent it is possible to guard consumers against bad, or perceived to be bad decisions. [124] The conundrum however, perhaps, is not only how to change that behaviour, but whether we should.[125] Consumers do not necessarily see the need to purchase financial products cross border;[126] there is no guarantee that changes to the rules will change this status quo. However these are not the only aspects to reform that raise questions. The framework of control is also an important ingredient and introduction of a general principles-based approach, rather than reliance on formulaic rules, to questions of conduct are now in evidence in relation to consumer credit. Prima facie the introduction of a baseline of good behaviour will provide fairness for the consumer and confidence in service providers. However, whether a principles- based approach can achieve the high level of consumer protection desired is not clear-cut. It is this approach however that is now being adopted in the UK in relation to consumer credit, it already being the basis of regulatory control for other financial services.

Regulation of Financial Services in the UK

Regulatory and Supervisory Structure

The regulation of financial services in the UK currently operates under two distinct schemes. Most types of financial services come under FSMA,[127] whereby if a supplier engages in a regulated activity it must be authorised, unless exempt.[128] Activities such as deposit taking, investment services and some forms of secured lending are included. The form of control here is 'principles' based, i.e. the regulatory control is based in a set of general High Level Principles, with detailed rules covering specifics, contained within rulebooks designed for particular types of activity; for example the

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'languages, social structures and cultures' Cristina Poncibo, *The Challenges of EU Consumer Law* (EU Working Papers MWP 2007/24), EU Institute MaxWeber Programme http://cadmus.eui.eu/bitstream/handle/1814/7359/MWP-2007-24.pdf (last accessed 1 April 2014); generation of confidence needs more than simply rules, rather it is dictated by 'a complex social construction' Cristina Poncibo, *Some Thoughts on the Methodological Approach to EC Consumer Law Reform* 21 Loy. Consumer L. Rev. 353-371 (2009) at 362.

[123] Enria, Speech, Belgian Financial Forum *supra* n. 105.

[124] Alemanno argues that behavioural science should be integral to policy making. LSE blogs http://blogs.lse.ac.uk/europpblog/2012/06/26/eu-behavioural-insights-policies/ (last accessed 1 April 2014).

[125] Ramsay *Changing Policy Paradigms* supra fn 66.

[126] EU Commission Special Barometer 373, *Retail Financial Services Report* (Mar 2012), at 5.

[127] As amended by the FSA 2012 and the Financial Services (Banking Reform) Act 2013.

[128] The exemption relates to particular individuals or organisations engaging in regulated activities without needing to be authorised- this includes for example investment exchange and dealing houses (s. 285), appointed representatives (s. 39) and members of designated professionals (s. 327).

Insurance Conduct of Business Sourcebook 'ICOBS'[129] and the Mortgage and Home Finance Conduct of Business Sourcebook ('MCOB'). The conduct regulator is the FCA. Consumer credit, until the transfer to the FCA, was supervised by the OFT and primarily regulated by the Consumer Credit Act 1974 ('CCA'), as amended by the Consumer Credit Act 2006, and CCD together with the relevant secondary regulation dealing with inter alia, exemptions,[130] advertising and details on information provision. Secured lending on land is, at present, covered by the CCA unless exempt.[131] Specific provisions for such lending are provided in Pt VIII, which relate to form, content and provision of copy documentation. However, for some secured lending on the home, (primarily first mortgages that constitute regulated mortgage contracts under the FSMA), the provisions of FSMA apply, such lending being seen as a regulated activity. As such then, secured lending straddles both sets of regulatory framework.

Reform of the regulatory and supervisory framework underpinning consumer credit is underway, as part of a wider reframing of financial services regulation, as the current system is regarded as allowing duplication of regulation and fragmentation of control.[132] This brings consumer credit, including second charge lending, under the umbrella of the new regime now in place for all other financial services, in order, it is stated, to simplify the regime and bring flexibility, in terms of products and reaction to market changes.[133] The new financial services regulatory regime consists of a macro-prudential authority, the Financial Policy Committee (within the Bank of England) and a micro prudential supervisor- the Prudential Regulation Authority. Conduct is dealt with by the FCA (which also has some prudential functions). These two bodies have replaced the Financial Services Authority, so introducing a 'twin peaks' regulatory model,[134] and the FCA has taken over supervision of consumer credit from April 2014. This means that, for example, responsibility for licensing has

[129] Other conduct of business rulebooks, include COBS (Conduct of Business Sourcebook), MCOB (Mortgage Conduct of Business Sourcebook) and BCOBS (Banking Conduct of Business Sourcebook)- all to be found in the FCA Handbook.

[130] Here exemptions are based in what rules do not apply to the credit provision- for example business lending over £25,000 is exempt.

[131] As originally allowed for by ss 16-16C of the CCA 1974 and relevant secondary regulation, now by the Financial Services and Markets Act 2000 (Regulated Activities Order) 2001/544. Exempt agreements will however be subject to other regulation for example FSMA.

[132] HM Treasury BIS, *A New Approach to Financial Regulation: Transferring Consumer Credit to the Financial Conduct Authority, supra* n. 2 at 3.

[133]HM Treasury, *Consultation on Reforming the Consumer Credit Regime, supra* n. 1 Exec summary at 5; HM Treasury *Transferring Consumer Credit to the Financial Conduct Authority, supra* n. 2 para. 1.4.

[134] There has been much detailed commentary on the new system and regulation, see for example, Eilis Ferran, *The Break Up of the FSA* 31OJLS 455-480 (2011); Laura Cox, Betsy Dorudi, Liz Gordon, John Newsome, Gerald Stadelmann, Andrew Strange, Vincent O'Sullivan, *United Kingdom Regulatory Reform: Emergence of the Twin Peaks* 95 C.O.B. 1-33 (2012); Iain MacNeil, *Regulatory Reform Takes Shape* 5 L.F.M.R. 161–163(2011); Lista M Cannon, Paul Adams, *Twin Peaks Regulation* 162 NLJ 440 (2012); James Smethurst, *Twin Peaks: Bridging the Gap. Co-ordination under the New Regulatory Framework* 1 B.J.I.B. & F.L. 33 (2012); Graeme Baber, *A New Approach to Financial Regulation: A Step in the Correct Direction?* 33 Comp. Law. 3–12 (2012).

transferred to the FCA, translating into Pt IV permissions for authorised activity.[135] One purpose of reform is presented as provision of a 'new credible regime for conduct regulation',[136] with 'intensive issues-based supervision', 'proactive intervention' and 'credible deterrence through enforcement', [137] underpinned by 'judgment-led, focused and effective regulation'.[138]

Inevitably, perhaps, these revisions raise questions as to whether they can really achieve the stated aims of the reform agenda in terms of supervision. The challenges are seen as being able to effectively 'police entry into the market' and be proactive within a responsive regime with improved 'market oversight'.[139] Certainly there were problems with the licensing system under the CCA, which relied on ex post action by the OFT, through incomplete or imperfect information gathering.[140] The authorisation process of the FCA is regarded as more robust in that it relies not only on more vigorous examination before deeming a provider suitable, but also on continued monitoring though regular reporting requirements.[141] However, there is no guarantee the authorisation process will protect the consumer any more than the licensing procedure- recent events have taught us authorisation does not necessarily deliver good behaviour.[142] Whilst the new regime will deliver ongoing monitoring in a way the previous framework did not, it depends for its success both on the skills of the regulator, the relationships established with product providers and reliance on the suppliers of services 'buying in' to the obligations introduced via the High Level Principles;[143] the potential weaknesses that arise have been demonstrated by the mis-selling scandal of PPI in the UK.[144]

It is not however simply the supervisory structure that is going through what has the potential to be major change. There is also a complete reworking of the consumer credit regulation, with much of the consumer credit legislative regime now replaced with a FSMA style rule-book, ('CONC') which will regulate the conduct of the industry. These reforms should provide uniformity and coherence[145] within financial

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[135] HM Treasury, *Transferring Consumer Credit to the Financial Conduct Authority, supra* n. 2 Ch. 3.
[136] HM Treasury/ BIS, *A New Approach to Financial Regulation: Building a Stronger System* (Cm 8012) para. 1.13.
[137] *Ibid.* para. 1.14.
[138] *Ibid.* para. 1.15.
[139] HM Treasury, *Consultation on Reforming the Consumer Credit Regime supra* n. 1 Executive Summary, at 5.
[140] *Ibid.* at 11.
[141] *Ibid*; FSA, *CP13/7 Consumer Credit Regulation – Our Proposed Regime* 14 http://www.fca.org.uk/your-fca/documents/consultation-papers/fsa-cp137 (last accessed 1 April 2014).
[142]The mis-selling of PPI in the UK being a prime example. For a discussion of this see Eilis Ferran, *Regulatory Lessons from the Payment Protection Insurance Mis-Selling Scandal in the UK* 13 E.B.O.R. 247-270 (2012).
[143] Julia Black, Martyn Hopper & Christa Band, *Making a Success of Principles-Based Regulation* Law and Financial Markets Review 191-206, 200 (May 2007).
[144] Ferran, *Regulatory Lessons, supra* n. 142. For a case study of regulation of PPI within the context of G20 principles and neo-liberalism policies see Toni Williams, *Continuity not Rupture: The Persistence of Neo-liberalism in the Internationalisation of Consumer Finance Regulation* in Therese Wilson *International Responses to Issues of Credit and Over-indebtedness in the Wake of Crisis* (Farnham, Ashgate 2013)
[145] HM Treasury, *Transferring Consumer Credit Regulation, supra* n. 2 at 6.

services as a whole, by reflecting a similar approach within one regulatory structure. Many aspects of the two regimes can be reconciled relatively easily,[146] although accountability mechanisms, such as joint and several contractual liability,[147] and unenforceability of agreements where there is found to be an unfair credit relationship,[148] are a little more problematic. FSMA, relies on disciplinary sanctions rather than individual redress (although this is allowed where rules have been breached via breach of statutory duty action)[149] and this is an issue yet to be dealt with. [150] The other major change, prompted by CARRP, is the transference of second charge lending from the general provisions of consumer credit, to the mortgage lending rules under MCOB.[151] Here uniformity and coherence are indeed served, in that all secured lending, whether a first or second charge on residential property will now be regulated by one set of rules, and CARRP, whilst attracting some cynicism,[152] aligns with the UK Government's approach in this respect. This does not mean to say however, that the reform will be trouble free. Protections not covered by the Directive, and peculiar to the CCA, such as unenforceability where an unfair credit relationship exists,[153] will no longer apply.[154] However, whilst it is recognised there are differences between first and second charge markets, the amalgamation of secured lending for the purpose of regulation seems to have been welcomed.[155]

Principles versus Rules-Based Regulation

FSMA is principles and outcomes based; CCA is rules based. Regulation under FSMA operates on the foundation of a set of high level principles which are designed to underpin the more detailed controls provided by the detailed Rules contained in the FCA handbook. Sanctions are uniform with disciplinary action for breach of Principles and a private action for breach of statutory duty where rules are contravened. A rules-based regime however, is not informed by stated principles but addresses individual issues in a more compartmentalised way. This is perhaps best illustrated by means of an example. The CCA tackles transparency by providing self-sufficient rules on what should be provided at various stages of the transaction process, with specific sanctions for transgression. The FCA handbook contains business standards (Rules) within its various conduct of business source books,

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146 As reflected in the CCD, some of these protections are based in information provision: advertising, detailed information requirements both pre-contractual and at the inception of the agreement together with ensuring access to agreement information during the life of the loan.

147 S. 75 CCA which allows for creditor liability upon breach of contract of the supplier goes further than the equivalent contained in Art. 15 of the CCD

148 Allowed by ss 140A-C CCA

149 E Lomnicka *The Future of Consumer Credit Regulation; a chance to rationalise sanctions for breaches of financial services regulatory regimes?* 34 Comp. Law 1 13-21 at 16, 20-21, (2013)

150 HM Treasury, *Transferring Consumer Credit to the Financial Conduct Authority*, *supra* n. 2 paras 2.8–2.9, Annex B.

151 Buy-to-let lending is also affected by transposition of CARRP but this is primarily via legislative amendment -HM Treasury Summary of Responses ch 4 supra fn 92

152 HM Treasury *Summary of Responses* supra n 92 para. 1.3

153 Supra fn 148

154 Although loans already granted at the time the new Rules come into force will be allowed to retain availability of this protection HM Treasury *Implementation of the Mortgage Credit Directive* Sept 2014, para 2.3

155 HM Treasury *Summary of Responses* supra fn 92

('COBS') which include requirements in relation to, for example, provision of information. These Rules however are interpreted in accordance with the underlying Principles termed as 'fundamental obligations' of firms.[156] These extend beyond the Principle that firms must communicate information in a fair and clear way which is not misleading, (PRIN 2.1.1(7))but might also involve conducting business with integrity (PRIN 2.1.1(1)) due skill and diligence (PRIN 2.1.1(2)) proper standards of market conduct (PRIN 2.1.1(5)) or treating customers fairly (PRIN 2.1.1(6)). Furthermore, compliance with the Rules does not necessarily mean the Principles have been observed.[157]

The principles-based approach is promoted as more flexible and protective, in that it does not allow for 'loopholes' or creative compliance.[158] However it relies on providers being willing to observe the Principles[159] and the regulator ensuring they are observed. In contrast a rules-based approach provides a more specific structured approach to consumer protection, and could be argued to provide more certainty, particularly for suppliers.[160] However, it can prove to be unwieldy and by its nature is less flexible; filling the gaps leads to piecemeal reform and layering of rules.[161] The CCA is a good example of this, with successive reforms, leaving the legislation in a confused state not least in relation to small business borrowing.[162] One might argue therefore that the principles-based approach provides a simpler, more adaptable system. However, the reality of principles-based regulation is that in practice, it looks very like a rules–based approach. Interpretation of the Principles, have to be addressed by rules, which in turn have to be addressed by further guidance. The Rule-book therefore ends up as a detailed document, with a mixture of enforceable rules, and 'non-enforceable' guidance to assist interpretation. Whilst it is true it is easier to amend these Rules to reflect the changing nature of markets, as opposed to amending legislation which must go through a parliamentary process, these 'clarifications' of the Principles provide almost as voluminous a set of requirements to be observed as legislation; the amended MCOB, produced as a result of the Mortgage Markets Review[163] is a good example of this, and much of the OFT guidance being incorporated within the CONC, [164] only reinforces this impression; as rules and

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[156] PRIN 1.1.2.
[157] *Regina (British Bankers Association) v. Financial Services Authority and another* [2011] EWHC 999 (Admin) 1570.
[158] Black et al, *Making a Success of Principles-based Regulation, supra* n. 143 at 193.
[159] Iain MacNeil *An Introduction to the Law on Financial Investment,* 97-98 (2nd ed, Hart 2012).
[160] *Ibid.*
[161] Black et al, *Making a Success of Principles-based Regulation, supra* n. 143 at 193.
[162]Sarah Brown, *Protection of the Small Business as a Credit Consumer: Paying Lip Service to Protection of the Vulnerable or Providing a Real Service to the Struggling Entrepreneur?* 41 C.L.W.R. 59-96 (2012).
[163] Prompted by concerns about risky lending practices, the FSA undertook a comprehensive review of the mortgage market. The result was a reform to the rules regulating mortgage lending, with for example moving responsibility for assessing affordability to lenders and amended 'consumer friendly' information requirements. These new rules to all intents and purposes came into effect in April 2014.
[164] FCA, *CP 13/7 High-level Proposals for an FCA Regime for Consumer Credit Consultation Paper* para. 2.4 http://www.fsa.gov.uk/static/pubs/cp/cp13-07.pdf (last accessed 1 April 2014).

guidance become more expansive, this inevitably makes inroads into flexibility.[165] There is some recognition of this potential problem. The UK Government consultation paper accepted that there needs to be a graduated and adapted approach to consumer credit, with a 'tailored' assessment of risk approach to the application of requirements.[166] However in many respects it is reasonable to conclude that in effect the only real difference between the current framework 'based' on Principles and that 'based' in rules, is not the volume, or simplicity/flexibility of obligations and requirements, but the remedies and sanctions available.

Questions of Coherence and Convergence

As we have seen the UK is moving towards a single approach, not quite a one size fits all, but an attempt to rationalise the law in relation to consumer protection and financial services including credit. In contrast, regulation in the EU in respect of the credit market, is seemingly being subjected to yet more sector specific control. This creates duplication with the CCD, and yet at the same time, the potential for conflict. Whilst to a certain extent this could be dealt with via exemptions, duplication created by sector specific directives is something already observed as a potential problem in other financial services regulation at an EU level, as is demonstrated by the recent ECON consultation on ensuring the coherence of EU financial services legislation.[167] Piecemeal reform only exacerbates this problem. The answer may be to merge CARRP's new requirements with the CCD; in effect this would provide a move closer to the new regime being introduced in the UK. However the UK is going much further than this- bringing the control of consumer credit under the umbrella of all financial services. Whilst there are separate Rules for mortgage credit and unsecured lending, this prima facie will provide a simpler more coherent regime, clearing up anomalies created by, for example, second charge lending and overdrafts.

There are however questions that arise as to how far this single approach is suitable. As one UK consultation paper accepts, the balance and risk between consumer and supplier in the consumer credit market is different[168] from other financial services providers as lenders 'bear the capital risk' unlike for example consumers as depositors, although of course if creditors fail, this will have an effect on the market, and competition, potentially leading to consumer detriment. Certainly there are arguments for treating financial services separately from other consumer products and indeed for recognition of distinct business model within the financial services market

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[165] Black et al, *Making a Success of Principles-based Regulation, supra* n. 143 at 198, which in itself raises issues of uncertainty in relation to stakeholders internal compliance mechanisms.

[166] For example a tiered approach to the grant of permissions, lower requirements for lower risk firms and the recognition prudential requirements are not always appropriate HM Treasury, *Transferring Consumer Credit Regulation, supra* n. 2 at para. 1.26.

[167] European Parliament Committee on Economic and Monetary Affairs- Public Consultation *Questionnaire for the public consultation on the coherence of EU financial services legislation* at http://www.europarl.europa.eu/committees/en/econ/subject-files.html?id=20130314CDT63219#menuzone (last accessed 1 April 2014); Linklaters *MiFID II. Key Interactions between MiFID/MiFIR II and other EU and US Financial Services Legislation* (July 2012) http://www.linklaters.com/Publications/MiFIDII/Pages/MiFIDII.aspx (last accessed 1 April 2014).

[168] HM Treasury, *Transferring Consumer Credit to the Financial Conduct Authority*, *supra* n. 2 para. 1.23.

itself.[169] It has been suggested there is a difference between consumers and investors,[170] or that they are treated separately by the law.[171] In a recent report on consumers and investment,[172] it was made clear that it was not just limited available information or literacy that caused consumer detriment but also instinct driven choices, such as 'herding' or inertia, falling back on traditional methods of purchasing products (such as relying on advisors) with little appetite for switching providers or cross-border purchase.[173] These could be seen as sector specific dangers requiring tailored protection. Does this however extend to compartmentalisation within financial services to the extent of a separate regulatory regime for credit? Dangers in relation to investment that have been highlighted lie in the unique nature of consumer needs and behaviour and the inherent risk involved, with 'opaque' pricing, product complexity[174] and long duration of agreements.[175] This is also characteristic of consumer credit, yet there is a difference in the nature of credit; the multi- faceted purpose of this particular subset of finance makes it potentially more difficult to control. This is not in the sense of regulation keeping up with innovation (although this can be a problem) but rather the fact that the consumer takes on credit for a variety of reasons. Unlike investment products (where essentially the goal is to make money 'work' for the investor), or insurance, where the purpose is protection against specified risks, or even basic banking services, where the aim is to provide a safe deposit of money, credit is taken out for any number of reasons, from the pursuit of pleasure to dire need. The careful balance to be had between allowing consumers to pursue advantages (however fleeting) that they can afford, with protecting those who

[169] In the responses to the European Parliament's public consultation on enhancing the coherence of European financial services legislation, insurance providers expressed some concern at imposition of banking regulatory initiatives on the insurance industry- see for example the ABI response http://www.europarl.europa.eu/document/activities/cont/201306/20130624ATT68248/20130624ATT68248EN.pdf, The German Insurance Association (GDV) http://www.europarl.europa.eu/document/activities/cont/201306/20130625ATT68446/20130625ATT68446EN.pdf (last accessed 1 April 2014) and Insurance Europe http://www.europarl.europa.eu/document/activities/cont/201306/20130625ATT68454/20130625ATT68454EN.pdf (last accessed 1 April 2014).

[170] For a discussion of investors as consumers see e.g. Cristina Amato, Chiara Perfumi *Financial Investors as Consumers: Recent Italian Legislation from a European Perspective* in James Devenney, Mel Kenny (eds), *Consumer Credit Debt and Investment in Europe* (CUP 2012); Niamh Moloney, *The Investor Model underlying the EU's Investor Protection Regime: Consumers or Investors?* 13 E.B.O.R. 2 169 (2012); Dimity Kingsford Smith, *Financial Services Regulation and the Investor as Consumer* in Geraint Howells, Iain Ramsay & Thomas Wilhelmsson, with David Kraft (eds), *Handbook of Research on International Consumer Law* (Edward Elgar, 2010).

[171] Peter Cartwright, *Banks Consumers and Regulation,* 4 (Hart, 2004); cf Amato & Perfumi *Financial Investors as Consumers supra* n. 176 ; Moloney, *The Investor Model, supra* n. 176 at 169-193.

[172] Nick Hater, Stefan Huck & Roman Inderst, *Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective Final Report* (Decision Technology Ltd, November 2010) ec.europa.eu/**consumers**/strategy/docs/**final_report**_en.pdf (last accessed 2 April 2014).

[173] See also EU Commission, *Retail Financial Services Report supra* n. 126.

[174] Hater et al, *Consumer Decision-Making in Retail Investment Services supra* n. 172 at 582-585.

[175] Jacqueline Minor, *Consumer Protection in the EU: Searching for the Real Consumer* 13 E.B.O.R. 163–168 (2012).

have no choice, is a difficult one to be made. Consumer credit raises wider issues of financial exclusion and vulnerability, (whatever that may mean)[176] arguably justifying a more 'bespoke' approach. Acknowledgement of this is seen in the Preamble to CARRP which openly refers to the 'specificity of credits related to residential immovable property'.[177]

There have been many recent developments in consumer protection law at the EU level. Generally, the reforms seek to bring together various aspects across the consumer spectrum, distilling rules that are perceived as successful into one regulatory instrument. The Consumer Rights Directive is an example of this, by bringing together the doorstep selling and distance selling regulations, and the Common European Sales Law demonstrates attempts to use this approach in relation to contract law. The desire for a single coherent market and high level of consumer protection are the driving forces behind these initiatives, although to what extent these initiatives have or will be successful remains to be seen. However consumer credit as a financial service is excluded from these 'umbrella' measures, in the same way it stands alone within financial services regulation. Interestingly there is now a call for retail banking to be separated from investment banking activities for the very reason that the separation is required to protect consumers. [178] Nevertheless, within mortgage credit provision, the basis of regulation is showing a greater level of coherence with other financial services regulation and the changing nature of regulation within the UK. CARRP introduces a principles-based approach and fairness as a stated element to consumer protection, closer to the principles- based approach adopted by other financial services directives, promoted by the Lamfalussy Report,[179] where general expectations of behaviour were presented as an underlying basis to control.

This also reflects the changing nature of regulation in the UK, where principles-based regulation is to apply to financial services as a whole. There is also some similarity in terms of the underlying rationale of regulation. Whilst a high level of consumer protection is evident as an aim, the Recitals to the latest draft of CARRP demonstrate the driving force is the promotion of the internal market and cross border activity. Consumer confidence (and therefore protection) are required to achieve this. It is interesting to note that whilst an earlier draft of the proposed directive adopted by the EU Commission, required creditors and their intermediaries to act in 'honestly fairly and professionally in the best interests of the consumer'[180] this appears to have been qualified in the latest text finally agreed with the EU Parliament, where now lenders are required to 'take account' of these 'rights and interests' in Article 7(1) rather than purposively putting the consumer first. When considering the FCA objectives there is arguably a sense that the emphasis of consumer protection is in reality to help protect

[176] All consumers can be seen as vulnerable at some level, for example where there is a lack of transparency.
[177] Preamble para. 23.
[178] Committee on Economic and Monetary Affairs, *Draft Report on Reforming the Structure of the EU's Banking Sector,* Rapporteur Arlene McCarthy (8 Mar 2013) at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-506.244+01+DOC+PDF+V0//EN.
[179] Black et al, *Making a Success of Principles-Based Regulation, supra* n. 133 at 196.
[180] EU Commission *Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property* COM(2011) 142 final (31 March 2011) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0142:FIN:EN:PDF (last accessed 1 April 2014).

the market as opposed to protecting the market to ensure consumer protection. Indeed general language of UK policy papers often reflects that to be found in comparable EU documentation, for example the Green Paper and White Paper on Financial Services advocating a fair open and competitive market. Whilst it is arguable the objectives are complementary –there is always potential for conflict; ensuring the interest of consumers are met, can prove problematic for also ensuring the financial integrity of service providers.[181] The difficulty lies in getting the balance right.

Conclusion

What then is the observable trend in the latest developments of consumer credit regulation? There is no doubt that the financial crisis has spurred on reform to regulation of the financial services industry, both in the EU and the UK and within that, credit regulation. With this comes reform not only in relation to rules but how the protection is delivered. There is a new concentration on the role of supervision and the emergence of a drive towards unification of the supervisory structure. However whilst prudential requirements and control of credit institutions move towards a single overarching supervisory framework, sector specific treatment of financial services is still in evidence. This is particularly illustrated by the latest amendments to the general consumer credit regime, with the introduction of CARRP. For whilst the Directive introduces elements of regulation familiar to other financial services, it does so within the confines of secured lending, rather than to consumer credit as a whole.

The rationale of introducing CARRP is to instigate change by ensuring an internal market in secured lending, to curb irresponsible lending and to allow consumers to borrow cross-border with confidence. However, although initially being met with some resistance, it seems after much deliberation and negotiation the resultant product is regarded as having little potential to create much impact on the UK mortgage market. Whilst the 'jury may still be out' for some industry stakeholders, on balance it seems the prevailing view is little will change.[182] This however may be because the approach in the UK has already gone through a process of reinvention, reflected in the approach being taken in Europe. The further regulatory reform of the UK consumer credit market may however itself prove to be tricky, for whilst consumer credit regulation in the UK has been prescriptive in nature, and rules-based, financial services regulation is principles-based. Reconciling these approaches, particularly in relation to remedies, is a delicate task if consumer protection is to be maintained and enhanced. It is arguable the move towards principles-based regulation raises a question of potential inconsistency, but it is not just here that problems may arise. The competing goals of creating an efficient market that is fair for all its participants create a tension that is difficult to manage. As the UK Government itself recognises, delivering a coherent and inclusive policy is desirable but challenging,[183] and it is not easy to see how a policy based so deeply in a 'proportionate' approach, can truly say it has consumer protection at its heart.

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[181] C Briault, *Revisiting the Rationale for a Single Financial Services Regulator* (FSA Occasional Paper Series),16 at 18 http://www.fsa.gov.uk/pubs/occpapers/op16.pdf (last accessed 2 April 2014).

[182] HM Treasury *Summary of Responses* supra fn 92

[183] Although it should be noted this was expressed in relation to dual regulatory regimes HM Treasury, *Consultation on Reforming the Consumer Credit Regime, supra* n. 1 para 1.17.

This opportunity for a new regime allows for a rationalisation of the law and in terms of allocation of supervisory responsibility this is to be welcomed. The regulatory framework itself however may be a different matter. By its very nature, there may be justification in treating consumer credit differently to other financial services. Consumer credit reflects consumer's vulnerabilities to a greater extent than other financial services: essential but expensive for the poor, potentially dangerous for the unwary. If it is serious about comprehensive consumer protection, it must retain a focused approach to unfairness and a range of remedies that will allow this. In terms of the EU push for reform in secured lending, fair treatment of the consumer is framed within credit legislation for the first time. Whilst the CCD did not address unfairness directly, CARRP now enunciates the requirement to treat consumers fairly, by means of the establishment of a general principle under Article 7. In this sense it moves away from the regulatory basis of the CCD by providing a mixture of general principles that Member States should ensure creditors observe, as well as prescriptive rules. Furthermore it introduces basic micro-prudential requirements, which again reflect the approach of the High Level Principles in the UK and also bring it closer to the model of other financial services directives.

EU regulation of credit, certainly in relation to secured lending, seems to be changing direction, its inclusion of micro-prudential control and general principles of conduct more closely reflecting similar developments in the UK and the goal of providing a level playing field for all consumers in relation to secured lending on residential property may be seen as a valiant one. The question is whether, in the quest for an internal market, this will necessarily enhance consumer protection. There are firm arguments for the supervisory role to be rationalised, but beyond this it must be recognised various sectors within financial services exhibit differences that should be accommodated in any regulation. Conversely whilst the sector specific nature of directives remains, there will always be the potential for clash of policy and incoherence in regulation, with duplication and complexity real dangers. These same arguments apply to the changes being brought about in the UK. Whilst there is indeed an observable convergence of approach in terms of regulation of credit with respect to the changing EU and UK landscape, policies and reform must be progressed with care.