

**A summary of responses to the DTI's
consultation on Enabling and Facilitating
the Conclusion of Credit and Hire
Agreements electronically under the
Consumer Credit Act 1974**

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CONTENTS		
1.	EXECUTIVE SUMMARY	1
2.	ANALYSIS OF RESPONSES	3

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1. EXECUTIVE SUMMARY

In December 2002, Melanie Johnson, as Minister for Consumer Affairs launched a consultation on amending the Consumer Credit Act and its regulations, where necessary, to enable and facilitate the conclusion of electronic contracts. The Electronic Directive 2000 requires member states to ensure that their law allows contracts to be concluded by electronic means. The Directive has been transposed, for the most part, by the Electronic Commerce (EC Directive) Regulations 2002.

Some of the provisions of the Consumer Credit Act 1974 and its regulations either preclude or raise doubts or difficulties for the conclusion of electronic contracts. The Government gave a commitment to tackle any remaining obstacles to the recognition of electronically concluded contracts on a case by case basis.

We therefore consulted on the following main options:

- ❖ Whether there should be a single regime within the CCA encompassing the requirements of the Electronic Commerce Directive (“ECD”) and the Distance Marketing of Consumer Financial Services Directive (“DMFSD”), including the different breach sanctions which apply under the two Directives;
- ❖ By making it possible, but not mandatory to contract electronically, there are issues surrounding whether the lender and the consumer are able to do so technically, whether they have consented and how that consent is captured (should it ever be challenged) and the general reliability of electronic communications.
- ❖ Consideration of the transposition of the provisions within the Act into the electronic world, particularly in relation to signatures.
- ❖ whether the concept of copies of unexecuted and executed agreements is appropriate for electronic contracts.

In determining the way forward, we have taken full account of the current proposals in the European Union to revise the Consumer Credit Directive.

[If reading on line click here for a copy of the draft Consumer Credit Directive](#)

or visit http://www.dti.gov.uk/ccp/topics1/consumer_finance.htm

We received 38 responses from a wide range of lenders, consumer groups and other interested parties. Three were confidential but the others are available for viewing in the DTI Library at 1 Victoria Street, London, SW1H 0ET (call the Open Government and Data Protection Unit - 020 7215 6618).

In summary, the responses showed:-

- ❖ Majority support for the new regulations to be as ‘future proof’ as possible to reflect the constant changes to technology.
- ❖ Majority support for a single regime where possible which encompasses the requirements of the ECD and DMFSD.

- ❖ Widespread support that concluding an agreement online, did not necessarily require a 'digital signature'. This was caveated by the requirement that appropriate safeguards should be placed around the way in which confirmation/consent is provided online to ensure consumers do not 'inadvertently' enter into a binding agreement.
- ❖ General agreement that there should be a process to ensure that consumers receive important documents, such as the final copy of the agreement, default, cancellation and termination notices. This may involve paper copies being supplied by post where the consumer does not confirm receipt.
- ❖ Widespread agreement that lenders should be able to communicate with consumers in the medium they have chosen (with the exception of the above notices), provided consumers have consented to this medium being used at the outset of the agreement.
- ❖ A clear split on whether lenders should be able to levy charges for additional paper documents where agreements have been concluded online.

There was agreement between most parties on many of the issues and some useful suggestions with regard to ways of implementing some of the requirements which will be covered under the current work on the revision of form and content of credit agreements. Finally, there was near universal support for key information to be provided to the consumer in a prominent and legible way online.

3. Analysis of Responses

The consultation paper was published in December 2002 and was sent to a wide range of lenders, trade associations, consumer bodies, regulatory and Government bodies plus other interested parties.

3.1 Breakdown of Responses

In total 38 responses were received, the breakdown of which was:

- Trade Association/bodies – 10
- Lenders – 10
- Regulatory/Supervisory bodies inc. Trading Standards – 3
- Consumer Organisations – 4
- Legal/academic – 7
- Others – 2 individuals, 1 research company and 1 consultancy firm

Questions 1, 2 and 3

Should we seek to apply a single regime to all credit agreements, applying the DMFSD and ECD Regulations despite their different coverage?

- Almost all respondents indicated that they were in favour of a single regime applying the DMFSD and ECD, as it was preferable to have one regime to refer to rather than three separate ones. They accepted that the sanctions within the CCA need to be retained and should simply be enhanced by the sanctions contained within the ECD and DMFSD.
- A couple of lenders indicated that attempting to implement one regime could create a lack of clarity.
- However, some of the lenders indicated that they did not want the 14 day right of withdrawal within the DMFSD to be extended to businesses and one lender indicated that the right of withdrawal was not appropriate for online agreements.

Do you think the sanctions contained in the ECD Regulations give consumers completing an electronic agreement sufficient protection? (a) If not, which sanctions contained in the CCA should be retained?

- Most respondents indicated that they considered that the sanctions contained within the ECD were sufficient, but should **not** replace the sanctions contained within the CCA. In particular, the respondents representing the consumer groups indicated that the CCA sanctions should be retained, in particular the enforceability provisions obviously go much further than the sanctions contained within the ECD.

Are there any other significant issues, not dealt with in this paper, which might affect the possibility of electronic contracting under the CCA?

- Some of the respondents referred to an increased risk of fraud and money laundering.

Questions 4, 5, 6 and 7

Do you consider that it is necessary to make specific provision to ensure legibility of electronic communications?

- Most respondents indicated that there should be a general 'legibility' requirement and not be too prescriptive as this does not necessarily comply with the aspiration to ensure that the revisions to the legislation are 'technology neutral' and 'future proof'. Minimum font size would not be helpful and if introduced, may cause problems between the electronic and paper based regimes.
- Lenders were of the view that they should not have to check whether the consumer has received a legible document, it should be sufficient for the consumer to confirm that the document has been read and understood.

**Do you consider that the proposals achieve the right balance between providing minimum regulation and necessary protection for both the consumer and the lender?
(a) In what circumstances might additional protections be required?**

- Some respondents representing consumer bodies indicated that there should be confirmation from the consumer that they have received the communications from the lender and can read, store them etc.
- Overall, respondents indicated that proposed regulatory requirements should not be too prescriptive, as they should allow for an element of future proofing.

Do you envisage all media (including mobile phones or television) to be capable of enabling electronic credit agreements?

- Almost all respondents indicated that the legislation should not be prescriptive and should allow for future proofing and therefore no media should be excluded.
- However, some respondents acknowledged that the majority of mobile phone screens are too small to enable the borrower to view all of the terms in a reasonable way. Respondents indicated that there is a need to think about how we address the different media that could be used to effect electronic agreements. It was suggested that stipulating a minimum size of screen may be appropriate for effecting electronic agreements.

Can you give examples of media we may not have thought about that could now, or in the future, be used to enable the conclusion of agreements?

- Three respondents referred to Personal Digital Assistants, one respondent referred to voice synthesis.
- In addition, a couple of responses referred to the need to break down the communication into two separate categories, one being the media carrying the communication and the other being the media reading the communication.

Questions 8 and 9

How should the lender ensure the consumer is able to store and/or reproduce documents? (a) Should the lender ask specific questions about the consumer's hardware and software and whether or not the consumer's access to the Internet is limited to, for example, a particular pc or Internet café?

- Lender respondents indicated that the onus should not be placed upon the lender to establish whether the consumer is able to store/reproduce documents. It was suggested that the lender should include information within its site making it clear that the responsibility for ensuring that information could be stored/printed should be with the consumer, although the lender should also have the capability to store/reproduce the agreement.
- The consumer groups who responded were of the view that consumers should confirm that they are able to reproduce and store documents. In addition, lenders should be able to produce a copy at any time requested.
- In addition, there should not be a requirement for lenders to ask about consumers' hardware or software or whether they are using a private or public Internet pc. This is a matter for consumers to deal with and if a consumer decides to transact on a public computer (in an internet café for example) then this should not be the lender's responsibility.

Do you agree that the lender should not be entitled to charge for supplying a paper copy of the agreement and other documents relating to the contract? If not in which circumstances should the entitlement apply? If a charge is to be permitted, should it be left to the lender, prescribed for in legislation, or subject to a limitation?

- Most respondents considered it reasonable for a fee to be charged as charges are currently provided for within the Act. However, consumer groups were of the view that a hard copy of the agreement should be available at the outset at no additional cost. These may need to be clarified, but the overwhelming response to the issue of charges was that they should be prescribed within the legislation so that there is a level playing field between lenders.
- Several responses indicated that the borrower should have the option of requesting a hard copy at the outset of the agreement.
- Some respondents indicated that collecting a £1 fee would not be cost effective and the cost savings made by being able to transact electronically negates the need to recover a fee.

Questions 10, 11, 12 and 13

Where the parties have agreed to contract and communicate electronically is it appropriate for the legislation to require certain documents, such as default notices or cancellation notices to be sent by post in addition to electronic means?

- (a) If "yes" to what documents should these requirements apply?**
- (b) Is requesting an acknowledgement of receipt a satisfactory alternative to a requirement that certain messages are sent by post?**
- (c) What should happen if no acknowledgement is received by a lender to a message sent out requesting a read receipt?**

- The view of the majority of respondents was that default and cancellation notices should not simply be sent by electronic means, but should be issued by post as well, due to the unreliable nature of email and that there was not always a message

acknowledging receipt of an email. Some respondents did suggest that a 'fall back' position could be adopted whereby if a lender did not receive an acknowledgement/read receipt, then, at that stage, they would be required to issue a notice by post.

- Some respondents indicated that where the lender and customer expressly agree, all notices can be issued electronically.

Is it appropriate to provide deemed receipt rules for electronic communications and, if so, what should they consist of?

(a) Is "next working day" the correct time span for deemed receipt?

(b) How should difficulties such as breakdowns and consumers having limited access to PC's be dealt with?

- Deemed receipt rules were not considered appropriate for electronic communications dealing with default. Although several respondents suggested that there are currently no deemed receipt rules for postal communications. It was accepted, however, that in relation to normal communications (i.e. sending out an agreement to a consumer) deemed receipt rules could apply as the consequences of these communications did not place the recipient in a detrimental position. In these cases, respondents indicated that deemed receipt should be 'next working day' and should be dependent upon notification of inbound failure where the lender would then need to follow up with an alternative form of communication. It was acknowledged that those consumers who use public Internet should not receive different treatment.

Alternatively should the question of deemed receipt and notification be left to the lenders to stipulate in their agreements?

- Most lenders indicated that they would prefer there to be requirements to be set out in the legislation, as this will maintain consistency.

Should there be a duty on the lender to follow-up "no responses" by attempting to communicate with the consumer by different means?

- Most respondents suggested that this duty should only be imposed where the message is returned undelivered. The consumer responses were very much in favour of a requirement to follow-up no responses as there could be potential detriment to the consumer if not (particularly in the case of default notices).

Questions 14, 15, 16 and 17

Which provisions of the CCA, relating to the form and content of the agreement and cancellation notices, do you consider either prevent electronic contracting, or cause doubts or difficulties for electronic contracting? Please explain why.

- Provisions of the CCA which respondents referred to as precluding electronic contracting were as follows; copies of documents requirements, colour of terms and paper to be used for agreements, 'together as a whole' requirements, signature boxes, notices 'in writing', 'sent' references need to be amended, definitions widened to refer to all types of media and references to information on the reverse of the agreement.
- Lenders indicated that additional copies of documents are not necessary when dealing with electronic agreements.

Do you believe that consumers contracting electronically should be required to scroll through the entire agreement, and/or should the emphasis be on the prominence of the key information?

- Some respondents indicated that prominence should be afforded to key information and not just a general requirement to scroll through the terms of the agreement.
- Consumers should be required to scroll through and then click a button confirming that the terms have been read. Some respondents referred to Schumer boxes being included and that this will require differentiating between electronic and paper contracting. Almost all respondents referred to there being an emphasis on key information being highlighted where possible.
- Lenders indicated that as there is currently no way of ensuring that a consumer has read a paper agreement, no additional requirements should be placed upon reading an electronic agreement.

Do you consider that the differences between paper and electronic media suggest that some different form requirements might be necessary for the respective media? If so, please explain which requirements might be different and the reasons why they should be.

- Almost all respondents indicated that there should be no difference between electronic and paper format. Although some did indicate that prominence was a key issue. Overall the view was that differences should be kept to a minimum where they are necessary.

How should we deal with the requirement in the ECD Regulations, which gives consumers the opportunity to identify and correct input errors prior to the conclusion of the contract, in its application to credit agreements?

- Input errors should be correctable where the information is personal data. Other respondents suggested that there should be a general requirement for lenders to provide consumers with a list of their 'inputs' for checking. Some respondents stated that a fresh agreement should be issued and amendments should not be permitted. Once submitted, errors should be dealt with by cancellation and re-submission.

Questions 18, 19, 20, 21 and 22

Do you agree that the four policy objectives of "signature" requirements, described under "Issues", provide necessary consumer protection?

- Respondents indicated that it is not clear how the regulations could be amended to ensure that the consumer gives their full attention to the document (particularly as the current paper based regime does not cater for this). It will also be necessary to look at issues of identity and how this can be verified when concluding agreements on line.
- One respondent doubted that electronic signatures could replace paper copies and that postal copy should always follow them up.

Which of the current signature requirements of the CCA either preclude, or raise doubts or difficulties for, electronic contracting or signatures? How should such requirements be modified; or should any be removed?

- Suggestions included the use of electronic pens and PINs or simply a method of capturing the consumer's consent. Some respondents were concerned that there would be higher instances of fraud if such a process was introduced.

How does a lender make sure a consumer has not "clicked" or "signed" on an electronic agreement by mistake or before having had the opportunity to read all the detail in the agreement?

- Some of the suggestions were to use more than one 'click box' (some respondents even suggested up to three click boxes) to ensure that the customer does not inadvertently click. One suggestion involved a requirement that the borrower types the word 'confirm' rather than just clicking a box. A further suggestion was that lenders could ask the consumer to input the answer to a security question or ask for letters of a password to confirm.

How will lenders ensure they are dealing with the person identified on the application form or agreement?

- Overriding view was that money-laundering requirements should still continue to apply here as they currently do for paper-based applications. Money laundering regs are separate to the CCA, although some respondents did suggest that in addition to the current money laundering regs, PIN numbers could be used.

Do you consider a single regime for signature requirements on paper or electronic transactions would be desirable? If not, how should the requirements differ between paper and electronic transactions?

- Overall, the respondents favoured a single regime, although some lenders did indicate that there should be separate regimes for paper and electronic transactions. Definitions of 'sign' and 'signature' need to be kept as wide as possible.

Questions 23 and 24

Do you agree that the requirements for unexecuted and executed copy agreements could be dispensed with for all transactions – paper based and electronic? If not, to which should they apply and why?

- Most respondents proposed separate regimes for paper and electronic transactions on the basis that there is still a need for additional copies to be sent to the consumer.
- Respondents indicated that the regime would need to ensure that the consumer had the capability to save the agreement and the lender would also need to have systems capability to save and store the executed agreement, should it be requested from the borrower or required for default proceedings in the future.

Is it necessary, even when the consumer has completed an agreement electronically, for the lender to send to the consumer a final copy of the completed agreement?

- It was agreed that the lender should always forward a final copy of the agreement to the borrower for his/her records.

Questions 25, 26 and 27

Bearing in mind the Consumer Credit Directive and the proposal that all credit agreements should be subject to 14 days cooling off period, are there any credit agreements where a cancellation period is not appropriate?

- Respondents indicated that cooling off periods are problematical where agreements involve security being taken over land. Some lenders raised concerns about credit agreements where cars are involved as they can depreciate in value in 14 days. However, the cooling off period will only apply to the credit element of the transaction and not to the goods.
- Most lenders who responded indicated that they were not in favour of the 14 days cooling off period being extended to all types of agreement (i.e. extending the requirements of the Directive to all agreements, rather than just distance agreements). The consumer groups were in favour of cooling off periods for all types of loans.

Is it appropriate for notice of cancellation rights or a cancellation notice to be sent electronically only?

- Most respondents indicated that the cancellation notice could be sent electronically where the rest of the agreement has been concluded electronically and the customer has expressly agreed to receive such notices electronically. However, some respondents did suggest that it should still be sent in hard copy, particularly when notice of acceptance has not been received.

Should a final or second notice of cancellation rights always be sent to the consumer after the conclusion of the agreement?

- Where agreements have been concluded electronically, then this medium can be used for future communications. Most respondents indicated that it was not necessary for a second notice of cancellation rights to be sent electronically. Some respondents did suggest that the current process should be retained for both electronic and paper transactions.

End.