

Consultation on proposed regulation of consumer lending

Summary

The finance industry in Jersey is a well-regulated and reputable industry with high standards of consumer protection. One of the key objectives of the Government of Jersey is to uphold the standards of consumer protection and protect Jersey's international reputation through robust and proportionate regulation, legal controls and standards.

A well-functioning consumer lending market enables consumers to access goods and services and is vital to the economy. Except for in relation to anti-money laundering and the countering of the financing of terrorism, lending to consumers is not currently regulated in Jersey. There is however a voluntary Code of Practice which many companies involved in consumer lending activity adhere to.

Some protection is provided to consumers through the new Consumer Protection (Unfair Practices) (Jersey) Law 2018, and also through the proportion of lending in Jersey provided by regulated deposit-takers (banks) whose deposit-taking rather than lending activity is supervised by the Jersey Financial Services Commission (**JFSC**). As consumer lending activity is not currently overseen by a regulator, or subject to legally binding minimum standards of conduct, there is a significant risk of consumers being unfairly mistreated and the terms of lending activity being unfairly stacked against them. This could result in material financial hardship for consumers.

The purpose of this Consultation Paper is therefore to propose that consumer lending business, as explored in this consultation, be brought fully within the scope of financial services regulation and thereby directly within the oversight of the JFSC. The paper also seeks input on the exact scope of the proposals – who should be covered by regulation and what types of services and products should be in scope. Government invites feedback from all interested parties on the proposals which, if brought forward, will amend aspects of Jersey's regulatory laws and widen the regulatory scope of the JFSC and further clarify the role of the Channel Islands Financial Ombudsman (**CIFO**). This Consultation Paper also considers the high-level effects of regulating consumer lending.

Responses will be considered by Government to ensure that the proposals are proportionate while achieving the required protection for consumers. Government, in consultation with the JFSC, will take the responses into account when developing detailed proposals for implementing the regulation of consumer lending. There will be further consultation on the detailed proposals.

This Consultation Paper is a working document and does not prejudice any final decision to be made by the Government or the JFSC.

Date published:

19 November 2018

Closing date:

31 January 2019

How we will use your information

The information you provide will be processed for the purpose of consultation. The Chief Executive's Office will use your information in accordance with the Data Protection (Jersey) Law 2018 and the Freedom of Information (Jersey) Law 2011. We may quote or publish responses to this consultation but we will not publish the names and addresses of individuals. If you do not want any of your response to be published, you should clearly mark it as confidential. Confidential responses will be included in any summary of statistical information received and views expressed.

Who should respond and ways to respond

The Government of Jersey is interested in receiving responses from individuals and businesses that have an interest in the consumer lending industry.

Responses should be submitted by email to:

James Roberts

Lead Policy Adviser | Financial Services | Chief Executive's Office

Email: j.roberts3@gov.je

Alternatively, Jersey Finance will be collating an industry response and these responses should be sent to:

Lisa Springate

Head of Technical | Jersey Finance Limited

Email: lisa.springate@jerseyfinance.je

Responses sent to Jersey Finance will be shared with the Government of Jersey unless the respondent indicates that they wish to remain anonymous. Please indicate clearly on your response if this is the case.

This consultation paper has been sent to the Public Consultation Register.

Feedback on this consultation

We value your feedback on how well we consult or seek evidence. If you have any comments on the process of this consultation (as opposed to the issues raised) please email communications.unit@gov.je.

Introduction

1. Broadly speaking, lending is when a company or individual gives money or other goods to another company or individual in exchange for the amount being repaid at a later date, often with interest or charges added. This can be for relatively small amounts of money, for example to fund a car repair, or larger amounts of money, such as to buy a house. There are also activities associated with lending, such as arranging lending, helping people manage debt, and debt-collecting, amongst others.
2. Except for the requirements of Jersey's anti-money laundering and countering the financing of terrorism regime supervised by the JFSC, lending and the provision of consumer credit is not a regulated activity in Jersey. Whilst a proportion of lending activity in Jersey is carried out by regulated deposit-takers (banks) who are subject to the oversight of the JFSC for deposit-taking rather than lending, there is a segment of the lending market which is outside of the ongoing supervision of the JFSC.
3. Most unregulated lenders in Jersey conduct themselves with good standards and adhere to the voluntary Code of Practice for Consumer Lending (**Voluntary Code**), for which Government is grateful to the Jersey Consumer Council for maintaining and updating. There is concern, however, that without legally binding minimum standards and supervision some parts of the consumer lending industry may not uphold these standards. The 2017 CIFO annual report noted that complaints considered during 2017 "raised general concerns about market conduct and the existence of credit providers operating with what we [CIFO] concluded were unfair terms and conditions."¹ Government considers that Jersey consumer credit customers are not sufficiently protected from harm.
4. It is imperative for the protection of consumers and the reputation of Jersey's financial services industry that consistent, high standards of conduct and risk regulatory supervision measures are in place that facilitate competitive business. As an activity currently outside the 'perimeter' of regulated financial services business, unsupervised consumer lending could lead to material harm to consumers, and also present a reputational risk for Jersey.
5. It is also possible that an extended period of low interest rates has created an impression that borrowing is more affordable than it might be when interest rates rise. In order to

¹ Channel Islands Financial Ombudsman Annual Report 2017, Page 16: <https://www.ci-fo.org/wp-content/uploads/2018/06/11918%20Annual-report-2017.pdf>

address these concerns, it is proposed that consumer lending (both secured and unsecured) be made a regulated activity.

6. Government proposes to introduce proportionate regulation of both secured consumer lending, where the consumer offers an asset such as a house or car as security in case they cannot repay the loan in the future, and also unsecured consumer lending, where no asset is offered as protection.
7. The proposal to regulate consumer lending is in line with other jurisdictions. For example, in the United Kingdom (**UK**) the Financial Conduct Authority (**FCA**) has had responsibility for the regulation of consumer credit since April 2014, and it was previously regulated by the (now defunct) Office of Fair Trading. As a result of being brought in to FCA regulation, UK consumer credit firms must adhere to the standards and Principles for Businesses of the FCA. The UK regime regulates credit agreements made with individuals, sole traders, partnerships and other unincorporated entities, but does not generally apply to credit agreements with bodies corporate (including partnerships each member of which is a body corporate). There have also been moves in Guernsey to regulate lending, credit and finance.
8. It is proposed that legislative changes be brought forward requiring those engaged in lending, and also business ancillary to lending involving retail clients (on a secured or unsecured basis) to be authorised and regulated by the JFSC, and to apply standards and behaviours that are consistent with other leading jurisdictions. Complaints regarding credit are already within the scope of CIFO.
9. The proposals set out herein could be achieved by creating a new consumer lending law, adding to existing consumer protection laws, or by adding consumer lending as a class of financial service business within Article 2 of the Financial Services (Jersey) Law 1998 (**FSJL**). The purpose of this Consultation Paper, however, is to seek views on the scope of the proposed changes, i.e. “who” and “what” should be regulated, rather than “how” such regulation should be achieved. Potential methods of implementation are discussed solely to illustrate the effects that regulation may have.

Scope of activities

10. Consumer credit business has a definition within the Financial Services Ombudsman (Jersey) Law 2014 (**Ombudsman Law**) (where it is called “relevant credit business”) for the purposes of defining which activities can be the subject of complaints to CIFO. That definition is as follows:

SCHEDULE 4

(Article 9(1)(i))

RELEVANT CREDIT BUSINESS

1 Relevant credit business defined

Relevant credit business is any business so far as it comprises –

- (a) provision of credit under credit agreements;
- (b) credit reference agency business;
- (c) debt-adjusting;
- (d) debt-counselling;
- (e) debt-collecting; or
- (f) debt administration,

as those terms are defined by the following paragraphs of this Schedule.

2 Credit

Credit includes –

- (a) a cash loan;
- (b) a loan secured against immoveable property, whether by hypothecation or by mortgage or in any other manner;
- (c) the financial accommodation provided in the letting of goods (as defined in the Supply of Goods and Services (Jersey) Law 2009⁽⁴¹⁾) under a hire-purchase agreement (as so defined), or in the selling of goods under a conditional sale agreement (as so defined); and
- (d) any other form of financial accommodation.

3 Credit agreement

A credit agreement is an agreement under which credit is provided to a person (“the debtor”), being an agreement between that debtor and the person providing the credit (“the creditor”).

4 Credit reference agency business

Credit reference agency business is the furnishing of persons with information relevant to the financial standing of other persons, being information collected for that purpose by the person furnishing the information.

5 Debt-adjusting

Debt-adjusting is, in relation to debts due under credit agreements –

- (a) negotiating with the creditor, on behalf of the debtor, terms for the discharge of a debt;
- (b) taking over, in return for payments by the debtor, the debtor’s obligation to discharge a debt; or
- (c) any similar activity concerned with the liquidation of a debt.

6 Debt-counselling

Debt-counselling is the giving of advice to debtors about the liquidation of debts due under credit agreements.

7 Debt-collecting

Debt-collecting is the taking of steps to procure payment of debts due under credit agreements.

8 Debt administration

Debt administration is the taking of steps –

- (a) to perform duties under a credit agreement on behalf of the creditor; or
- (b) to exercise or to enforce rights under such an agreement on behalf of the creditor, so far as the taking of such steps is not debt-collecting.

11. This definition covers lending, but also activity associated with lending. For example, debt-adjusting involves making changes to a lending agreement to allow the borrower to repay the loan over a longer period of time. Debt counselling can involve assisting a consumer by restructuring their debt and agreements with creditors.

12. Further to the above, the Ombudsman Law includes relevant ancillary business. This includes:

introducing, directly or by one or more intermediaries, persons who seek services, the provision of which constitutes the main business, to other persons who carry on that business, or giving advice with a view to making such introductions.

In the context of credit business, this would include credit brokering.

13. Government proposes that the definition under the Ombudsman Law should be used as the starting point to define the scope consumer lending regulation.

Question 1:

- a) Do you agree with using the definition of relevant credit business from the Ombudsman Law to define the scope of activities caught for the purposes of regulating consumer lending?
- b) Would you propose any changes to the above definition before it is used to define the scope of activities caught for the purposes of regulating consumer lending?

Scope of customers

14. The UK consumer credit regime regulates credit agreements with customers who are individuals, sole traders, partnerships and other unincorporated bodies, but generally

excludes agreements with bodies corporate (including partnerships each member of which is a body corporate). Government shares the view that the regulation of consumer lending should generally be aimed at retail consumers rather than corporate lending. On the other hand, small business loans could be considered 'retail' in character. There may be merit in regulating small business loans up to a certain threshold, measured for example by the size of the loan or by the size of the business.

Question 2:

- a) Do you consider that regulation of consumer lending should include individuals, sole traders, partnerships and other unincorporated bodies?
- b) Do you consider that the regulation of consumer lending should extend to small business loans including to incorporated businesses? If yes, how would you define the extent of a small business loan: by reference to the size of the loan, the size of the business, etc.?

Scope of lenders

- 15. Consumer lending in Jersey is generally carried out by companies. There are also scenarios, however, where Jersey-resident individuals lend their own money to other individuals within Jersey. This could be through personal networks, or through a credit broker.
- 16. Clearly it would be inappropriate for the law to require individuals to be regulated before lending money to other individuals on a non-commercial basis, such as parental loans or similar personal arrangements. On the other hand, it may be appropriate to catch and regulate lending where it is carried out as a commercial activity, and to ensure that such lending is required to adhere to certain standards.
- 17. For example, it may be desirable to regulate lending consortiums and lending by individuals for commercial and profitable gain, notwithstanding some apparent similarities to personal lending arrangements. The balance between regulating commercial lending activity by individuals and ensuring that personal lending arrangements are not in scope would be a delicate task, however, requiring a workable legal test which can be applied consistently by in-scope and potentially in-scope lenders, their advisers, the JFSC and the judiciary alike. Even with interest and terms attached a parent lending to a child, for example, should not generally be within the scope of regulation.
- 18. Government's proposed approach to setting the threshold at which consumer lending is brought in to regulation is to apply the "by way of business" test currently set out in Article 2(1) of the FSJL (whether by adding consumer lending to the FSJL or by replicating the test elsewhere). "By way of business" is well-established in Jersey law as a flexible and effective

fact-based test which takes into account a range of factors, including the frequency of the activity or whether the entity is “holding itself out” as performing the activity. The entity does not have to meet all the factors to be acting by way of business. The test is also well understood internationally with helpful jurisprudence and legal commentary having reviewed the test and applied it in particular circumstances. For example, the test is also used in the UK in relation to consumer lending. Furthermore, changing the test and pursuing a different one will likely have a knock-on effect on those categories of regulated business which use the “by way of business” test.

Question 3:

- a) Do you agree that the “by way of business” test should be used to define the point at which lending activity is brought in to the scope of regulation?
- b) Do you consider that lending by individuals on a commercial basis should be within the scope of regulation? If so, is the “by way of business” test an appropriate threshold?

Jurisdictional scope

19. Similarly, Government considers that the use of the existing jurisdictional scope test in the FSJL should be used in relation to consumer lending, i.e. activities “carried on in or from within Jersey”. This is a well-established test which applies, based on the facts and various considerations of each particular case, regardless of the location of incorporation or offices of the lender. This would capture Jersey based lenders but also potentially lenders based outside of Jersey but providing services to a Jersey consumer.

Question 4:

- a) Do you agree that “carried on in or from within Jersey” is the correct test for the location of the consumer lending activity?
- b) In your view, should certain territorial exemptions be applied, for example where a lender is incorporated in the UK and carrying on lending in or from within Jersey but to regulated UK consumer credit standards?

Exemptions

20. The UK and other consumer lending regulation regimes set out various exemptions which carve agreements out from the requirement to be regulated, notwithstanding the scope principles. For example, business loans exceeding £25,000, agreements connected with import and export, agreements to enable the borrower to carry out certain forms of investment transactions (e.g. by granting security over an investment portfolio), nil interest

agreements with a set number of repayments over less than 12 months, and certain overdrafts.

21. The Government's preliminary view is that the following exemptions from the Jersey regime would be relevant and important: (i) business loans exceeding £25,000; (ii) loans secured over investment portfolios; and (iii) buy-to-let agreements.

Question 5:

- a) Do you consider that business loans exceeding £25,000 should be exempt?
- b) Do you consider that loans secured over investment portfolios should be exempt?
- c) Do you consider that other secured loans should be exempt?
- d) Should buy-to-let agreements be exempt?
- e) Are there any other exemptions which, in your view, are important and/or relevant for inclusion in the Jersey regime?

Effects of regulating consumer lending

22. One of the intended effects of these proposals is to bring consumer lending businesses within the oversight of the JFSC. For example, if this were achieved by adding consumer lending as a category of financial service business in Article 2 of the FSJL, businesses carrying on consumer lending would need to be authorised by the JFSC. This would empower the JFSC to apply requirements and standards, such as the "fit and proper" test in Article 9 of the FSJL, which would mean prior to the authorisation of the lender and on an on-going basis the JFSC would consider the integrity, competence, financial standing, structure and organisation of the lender and the principal persons employed by or associated with the lender. It would also permit the JFSC to set requirements through Codes of Practice which regulated firms must follow. It would also provide the JFSC with enforcement powers and other regulatory tools set out elsewhere in the FSJL and other legislation to take action where the lender did not meet the requirements. The purpose is to bring the experience and legislative force of the JFSC to bear in regulating the consumer lending industry and achieving the same standards and international reputation as has been achieved in other parts of the industry regulated by the JFSC.
23. Alongside the benefits of bringing consumer lending activity in to regulation there will also be costs, both direct and indirect. Government proposes that the cost of initial regulatory authorisation and ongoing supervision of consumer lending activity is met by fees paid for by those who fall within the scope of regulation. Also, where firms and individuals are brought in to regulation and are subsequently required to adhere to higher standards than

they currently apply, this is likely to incur compliance costs. The regulated entity may choose to absorb such costs, or pass them on to shareholders or consumers.

Question 6:

- a) Do you agree that consumer lending should be supervised by the JFSC? If not, which other authority should supervise consumer lending?
- b) Do you agree that the costs of authorising and supervising consumer credit activity should be levied through regulatory fees paid by those brought into the scope of regulation?

24. These proposals are also likely to have an effect on the enforceability of consumer lending contracts. For example, if brought into the scope of the FSJL, Article 22 of FSJL provides that financial service business contracts entered into by unregulated providers are unenforceable by the provider against the consumer and the consumer is entitled to recover any money paid by them under the contract together with compensation from the registered person for any loss incurred by parting from the contract. If the proposals were brought forward by other consumer protection legislation, it is reasonable to suggest that similar or equivalent provisions be included.

Question 7:

Do you agree that consumer lending agreements should be rendered unenforceable by the lender where they are entered into in contravention of the requirement to be regulated?

Transitional provisions

25. As with the introduction of any new law or regulation, it is necessary to consider how business will be brought into scope at the point of introducing the new law or regulation. For example, will the law apply to all existing loans, some of which may not mature for, say, ten or more years, as well as in-scope business at the date of introduction, or will it apply only to new loans made after the date the law comes into force? It is important that the transitional provisions avoid unintended consequences and help to ensure the introduction of the new law is smooth and not overly disruptive, while fully achieving its objectives.

Question 8:

In your view, should the law apply only to new loans made after the date it is introduced? Should it apply only to businesses creating new loans after the introduction of the law, or should it apply to businesses which wrote loans before the law is introduced?

Summary of questions

Question 1

- a) Do you agree with using the definition of relevant credit business from the Ombudsman Law to define the scope of activities caught for the purposes of regulating consumer lending?
- b) Would you propose any changes to the above definition before it is used to define the scope of activities caught for the purposes of regulating consumer lending?

Question 2

- a) Do you consider that regulation of consumer lending should include individuals, sole traders, partnerships and other unincorporated bodies?
- b) Do you consider that the regulation of consumer lending should extend to small business loans including to incorporated businesses? If yes, how would you define the extent of a small business loan: by reference to the size of the loan, the size of the business, etc.?

Question 3

- a) Do you agree that the “by way of business” test should be used to define the point at which lending activity is brought in to the scope of regulation?
- b) Do you consider that lending by individuals on a commercial basis should be within the scope of regulation? If so, is the “by way of business” test an appropriate threshold?

Question 4

- a) Do you agree that “carried on in or from within Jersey” is the correct test for the location of the consumer lending activity?
- b) In your view, should certain territorial exemptions be applied, for example where a lender is incorporated in the UK and carrying on lending in or from within Jersey but to regulated UK consumer credit standards?

Question 5

- a) Do you consider that business loans exceeding £25,000 should be exempt?
- b) Do you consider that loans secured over investment portfolios should be exempt?
- c) Do you consider that other secured loans should be exempt?
- d) Should buy-to-let agreements be exempt?
- e) Are there any other exemptions which, in your view, are important and/or relevant for inclusion in the Jersey regime?

Question 6

- a) Do you agree that consumer lending should be supervised by the JFSC? If not, which other authority should supervise consumer lending?
- b) Do you agree that the costs of authorising and supervising consumer credit activity should be levied through regulatory fees paid by those brought into the scope of regulation?

Question 7

Do you agree that consumer lending agreements should be rendered unenforceable by the lender where they are entered into in contravention of the requirement to be regulated?

Question 8

In your view, should the law apply only to new loans made after the date it is introduced? Should it apply only to businesses creating new loans after the introduction of the law, or should it apply to businesses which wrote loans before the law is introduced?

General comments

We invite general comments respondents may have on the proposals set out herein.

Data Protection (Jersey) Law 2018 Privacy Notice

How will we use the information about you?

We will use the information you provide in a manner that conforms to the Data Protection (Jersey) Law 2018.

We will endeavour to keep your information accurate and up to date and not keep it for longer than is necessary. In some instances the law sets the length of time information has to be kept. Please ask to see our retention schedules for more detail about how long we retain your information.

We may not be able to provide you with a service unless we have enough information or your permission to use that information.

We will not pass any personal data on to anyone outside of the States of Jersey, other than those who either process information on our behalf, or because of a legal requirement, and we will only do so, where possible, after we have ensured that sufficient steps have been taken by the recipient to protect your personal data.

We will not disclose any information that you provide 'in confidence', to anyone else without your permission, except in the few situations where disclosure is required by law, or where we have good reason to believe that failing to share the information would put someone else at risk. You will be told about this unless there are exceptional reasons not to do so.

We do not process your information overseas using web services that are hosted outside the European Economic Area.

Data Sharing

We may need to pass your information to other States of Jersey (SOJ) departments or organisations to fulfil your request for a service. These departments and organisations are obliged to keep your details securely, and only use your information for the purposes of processing your service request.

We may disclose information to other departments where it is necessary, either to comply with a legal obligation, or where permitted under other legislation. Examples of this include, but are not limited to: where the disclosure is necessary for the purposes of the prevention and/or detection of crime; for the purposes of meeting statutory obligations; or to prevent risk of harm to an individual, etc.

At no time will your information be passed to organisations for marketing or sales purposes or for any commercial use without your prior express consent.

Your rights

You can ask us to stop processing your information

You have the right to request that we stop processing your personal data in relation to any of our services. However, this may cause delays or prevent us delivering a service to you. Where possible we will seek to comply with your request but we may be required to hold or process information to comply with a legal requirement.

You can withdraw your consent to the processing of your information

In the few instances when you have given your consent to process your information, you have the right to withdraw your consent to the further processing of your personal data. However, this may cause delays or prevent us delivering a service to you. We will always seek to comply with your request but we may be required to hold or process your information in order to comply with a legal requirement.

You can ask us to correct or amend your information

You have the right to challenge the accuracy of the information we hold about you and request that it is corrected where necessary. We will seek to ensure that corrections are made not only to the data that we hold but also any data held by other organisations/parties that process data on our behalf.

You request that the processing of your personal data is restricted

You have the right to request that we restrict the processing of your personal information. You can exercise this right in instances where you believe the information being processed is inaccurate, out of date, or there are no legitimate grounds for the processing. We will always seek to comply with your request but we may be required to continue to process your information in order to comply with a legal requirement.

You can ask us for a copy of the information we hold about you

You are legally entitled to request a list of, or a copy of any information that we hold about you. However where our records are not held in a way that easily identifies you, for example a land registry, we may not be able to provide you with a copy of your information, although we will do everything we can to comply with your request.

You can ask us:

- to stop processing your information
- to correct or amend your information
- for a copy of the information we hold about you.

You can also:

- request that the processing of your personal data is restricted
- withdraw your consent to the processing of your information.

You can complain to us about the way your information is being used by contacting us at dataprotection2018@gov.je alternatively you can complain to the Information Commissioner by emailing enquiries@dataci.org.