

The Unfairness of Personalised Credit Pricing

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Overview

1. Main results of the paper
 2. Price personalization in consumer credit markets (PP)
 3. Problems with PP: horizontal and vertical dimensions
 4. Unfair Contract Terms (UCTD), Consumer Credit (CCD) Directives
 5. UCTD assessment: basic structure
 6. Case law UCTD
 7. Conclusions
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Main results

1. The lender's discretion to engage in PP is subject to ex ante price limits imposed by the CCD (2021) and ex post judicial control under the UCTD.
 2. The UCTD unfairness assessment applies to personalized price terms. The most pertinent elements are significant imbalance and good faith.
 3. The assessment is highly contextualized and goes *beyond consideration of the price-value ('quality/price') ratio* to include a host of circumstances.
 4. It is particularly unclear how personal circumstances of the borrower (e.g. wealth level) affect the good faith prong of the assessment.
 5. Lenders and consumers are thus left transacting in legal uncertainty.
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Personalized credit pricing

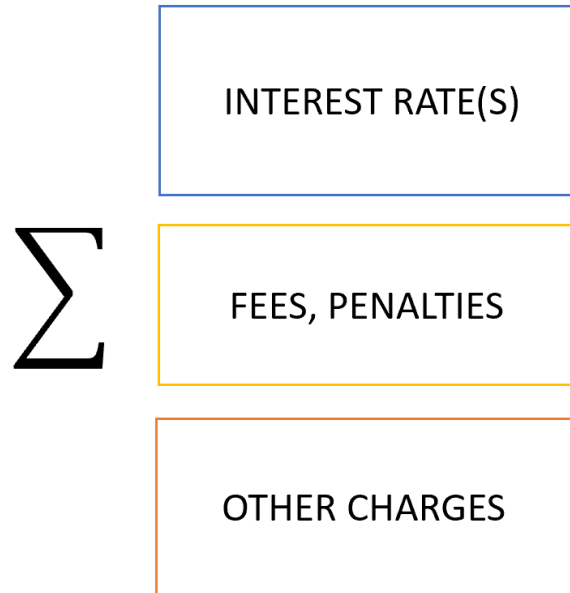
1. Charging different customers different *prices for the same credit product* (net of costs to serve).
 2. Form of *price discrimination* (Pigou: first-degree) using personal characteristics.
 3. Optimization goal: price equals estimated willingness-to-pay, also known as *value-based pricing*.
 4. Different from *group pricing* (Pigou: third-degree)
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Personalized credit pricing (2)

Three key types of personalisation

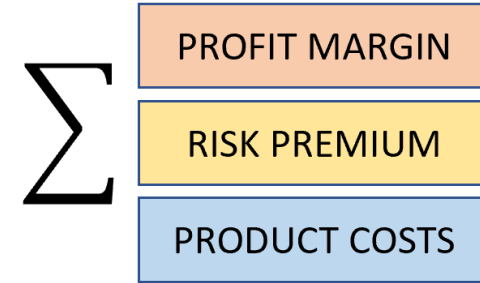
1. Type I: **level** (“The default interest rate is X”) (X: base rate + i)
 2. Type II: **calculation** method (“Interest rate = days / N”) (N: 360, 365)
 3. Type III: personal data as **variable**
 (“Default interest rate is X if Financial Behaviour is Class Y”)
 (Financial Behaviour: profile based on current account data)
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PRICE OF CREDIT

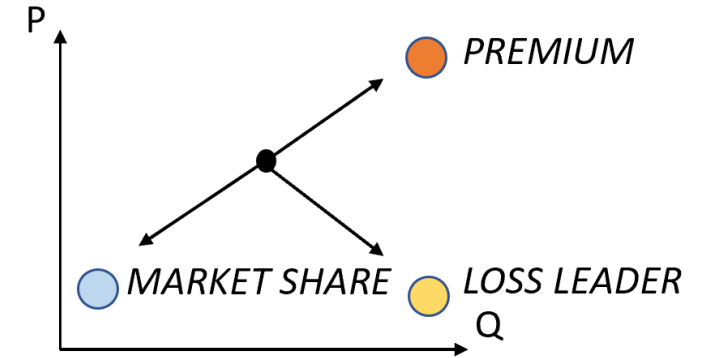


PRICING APPROACHES

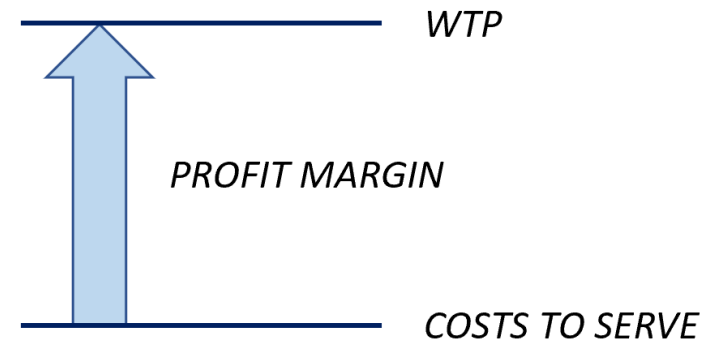
COST-PLUS PRICING



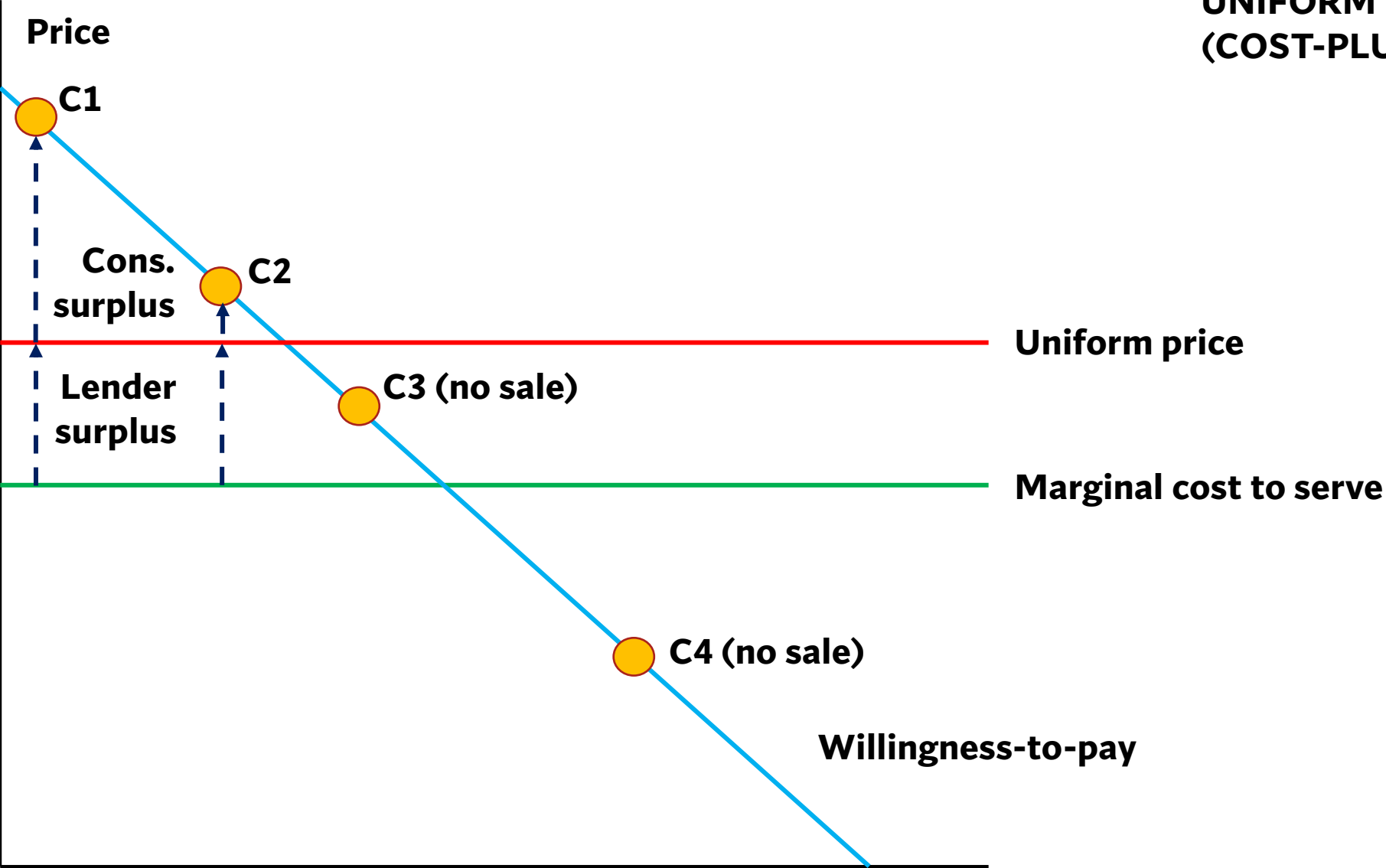
COMPETITIVE PRICING



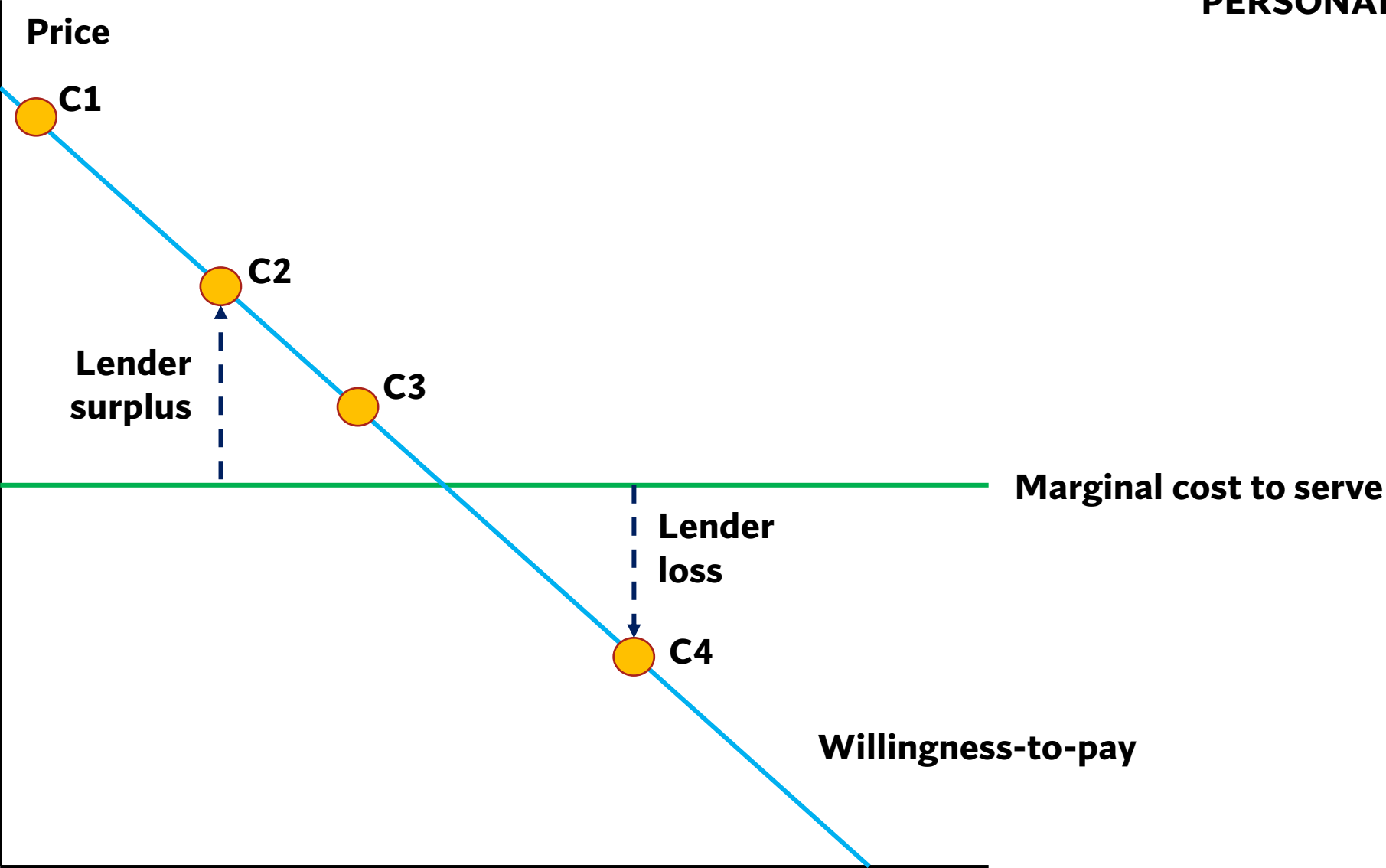
VALUE-BASED PRICING



**UNIFORM PRICING
(COST-PLUS)**



PERSONALIZED PRICING



Normative problems

1. Primacy of private ordering and market efficiency?
 2. Data protection: which data can be used, consumer control?
 3. Anti-discrimination: should consumers receive the same price?
 4. Distributive justice:
 1. Surplus absorption by lenders?
 2. Subsidisation wealthy consumers by vulnerable consumers?
 - 5. Price unfairness: how high can a lender set the price?**
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Price limits: UCTD and CCD

1. EU and national consumer law regimes impose limits on pricing
 2. *Ex ante* statutory limits
 1. National price caps (e.g. interest rates, fees)
 2. CCD (2021) fee rules, measures to limit *excessive pricing*
 3. *Ex post* price control
 1. National contract law regimes (e.g. UK unfair bargains)
 2. General assessment and lists UCTD on unfair terms
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Price limits: UCTD and CCD (2)

1. UK transposition
 1. CCD (2008): Consumer Credit Regulations 2010
 2. UCTD: Consumer Rights Act 2015, Part 2
 2. NL transposition
 1. CCD (2008): Dutch Civil Code, Book 7, Title 2a
 2. UCTD: Dutch Civil Code, Book 6, Title 5, Section 3
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UCTD assessment: basics

1. Unfair term: (1) causes **significant imbalance** in the parties' rights and obligations (2) contrary to the requirement of **good faith**, (3) to the **detriment** of the consumer.
 2. Moreover, contract terms must be grammatically and substantively **transparent** to the average consumer.
 3. Contextual test: **circumstances** surrounding conclusion of the contract, other contract terms, nature of contract, etc. matter
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UCTD assessment: procedure

1. CJEU **Aziz** (C-415/11): two steps,
 1. *Significant imbalance* – ‘rules of national law would apply in the absence of an agreement by the parties’ (**supplemental law**)
 2. *Good faith* – could lender ‘dealing fairly and equitably with the consumer’, ‘reasonably assume that the consumer would have agreed to such a term in individual contract negotiations’
 2. Recital 16: good faith → bargaining positions, inducement to agree
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UCTD assessment: significant imbalance

1. CJEU ***Constructora Principado*** (C-226/12): clarification of supplemental law test as *primary reference point*
 1. 'legal situation less favourable than ...national law in force'
 2. 'cannot be limited to a 'quantitative economic evaluation''
 3. 'sufficiently serious impairment of the legal situation in which the consumer is placed under national law'
 2. Supplemental law test applied in NL and UK (*ParkingEye v Beavis*)
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UCTD assessment: significant imbalance (2)

1. CJEU ***Banco Primus*** (C-421/14): **market practices** *auxiliary reference point* (in context of supplemental law test)
 1. ‘compare the calculation method and the actual sum resulting from that rate with the methods of calculation generally used, the statutory interest rate and the interest rates applied on the market [...] for a loan of a comparable sum and term [...]’
 2. Used in NL case law (*ING Bank*)
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UCTD assessment: significant imbalance (3)

1. CJEU ***Gyula Kiss*** (C-621/17) and CJEU ***Profi Credit Polska*** (C-84/19, C-222/19 and C-252/19) : **loan amount** and **provided services**
auxiliary reference points (in context of supplemental law test)
 2. Polska: If services provided not reasonably covered by granting or management loan, or if the amounts charged for granting and managing are clearly disproportionate (wrt loan), supplemental law test not met (*even if below price cap*)
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UCTD assessment: Good faith

1. Payment in foreign currency, consumer bears exchange risk
 2. CJEU **Andriuc** (C-186/16): national court must consider ‘expertise and knowledge of the bank’.
 3. CJEU **BNP Paribas** (C-82/20): national court must consider ‘bargaining positions’ and ‘inducement’ of consumer to agree. If risk ‘disproportionate’ in relation to services provided and loan amount, and transparency requirement not met, not in good faith.
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UCTD assessment: Good faith (2)

1. CJEU ***Profi Credit Polska*** (C-84/19, C-222/19 and C-252/19): if provided services not reasonably covered or costs disproportionate, then good faith not met, considering transparency requirement
 2. These cases show how CJEU:
 1. Connects good faith to transparency and significant imbalance
 2. Considers the particularities of the lender and the consumer in each specific case (subjectivity)
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UCTD assessment: Transparency

1. Article 4.2, CJEU *Matei* (C-143/13): price term is subject to assessment, but price adequacy (i.e. 'quality/price ratio') is excluded if the term is transparent
 2. 'Quality' of credit: reference points serve as proxies
 3. Consequence: personalized price term will not be evaluated against reference points as part of the assessment
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UCTD assessment: Transparency (2)

1. CJEU **Profi Credit Polska** (C-84/19, C-222/19 and C-252/19):
 1. full specification is not required for price adequacy exemption, just awareness and understanding by the ‘average consumer’, see also CJEU **BNP Paribas** (C-82/20)
 2. Non-interest cost terms do not fall in price adequacy exemption if they (1) do not specify nature of those costs or the relevant services, or (2) are formulated in a confusing way.
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Discussion

1. Detriment:
 1. difference between price and (a) costs under supplemental law, or (b) prices of competitors,
 2. price as proportion of loan amount,
 3. services provided in exchange
 2. Hypercontextual: many circumstances are relevant, *but not* prices for other borrowers, lender's costs/profits, CCD price caps.
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Discussion (2)

1. The assessment is particularly unclear when vulnerable consumers are involved (good faith) or alternative data are used (UCTD transparency, and CCD relevance criterion).
 2. As a result, the UCTD casts a cloud of uncertainty over price terms, especially if the lender's business model involves serious subsidisation or, more generally, generates prices on the high end of the market.
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Thank you

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