

complaint

Miss G has complained about short-term loans granted to her by Elevate Credit International Limited trading as Sunny.

Miss G complained to Sunny that it didn't carry out appropriate affordability checks and so lent irresponsibly to her. In response to our earlier findings on this complaint, Miss G says that the number of loans Sunny agreed for her and the length of time she borrowed from it show that she was dependent on its credit.

background

I attach my provisional decision of 6 November 2018, which forms part of this final decision and should be read in conjunction with it. In my provisional decision I explained why I intended to partially uphold Miss G's complaint. I invited both parties to provide any further comments they may have had by 6 December 2018 before I reached a final decision.

Sunny responded to say it had nothing further to add. Miss G agreed with my provisional decision.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. As neither party has asked me to consider further information or arguments, I see no reason to depart from the conclusions set out in my provisional decision. It follows that I partially uphold Miss G's complaint.

what Sunny should do to put things right

I've concluded that Sunny was irresponsible to lend to Miss G between 20 May 2015 and 10 May 2016. In order to put Miss G back in the position she would have been in, had it not agreed to this number of loans over this length of time, Sunny should:

- refund all interest and charges for Miss G's loans agreed in this period;
- pay interest on these refunds at 8% simple* per year from the dates of payment to the dates of settlement;
- and remove all information about these loans (10 to 24) from Miss G's credit file**.

*HM Revenue & Customs requires Sunny to take off tax from this interest. Sunny must give Miss G a certificate showing how much tax it's taken off if she asks for one.

**Putting Miss G back into the position she would have been in had she not been impacted by repeat lending requires the record of these loans to be completely removed from her credit file.

my final decision

For the reasons set out above and in my provisional decision, I'm partially upholding Miss G's complaint. Elevate Credit International Limited (trading as Sunny) should put things right as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss G to accept or reject my decision before 17 January 2019.

Michelle Boundy
ombudsman

COPY OF PROVISIONAL DECISION

complaint

Miss G has complained about short-term loans granted to her by Elevate Credit International Limited trading as Sunny (“Sunny” or “the lender”).

background

Sunny agreed 24 loans for Miss G from December 2014 to May 2016. The lending was continuous, with a couple of gaps of about two months. The amounts agreed ranged from £50 to £500. Each loan was to be repaid over six months, apart from the first loan which took the form of an open-ended credit facility (which was actually repaid and closed within a matter of weeks). Some of the loan terms overlapped. I have included an appendix to this decision ([Appendix 1](#)) which sets out some of the loan information Sunny provided.

Miss G complained to Sunny that it didn’t carry out appropriate affordability checks and so lent irresponsibly to her. In response to our earlier findings on this complaint, Miss G says that the number of loans Sunny agreed for her and the length of time she borrowed from it shows that she was dependent on its credit.

Sunny disagrees that it irresponsibly lent to Miss G. It says it conducted creditworthiness checks and considered how she was managing other debts before offering her credit. It says its checks were proportionate and responsible.

Our adjudicator didn’t uphold Miss G’s complaint because they determined that she could afford to meet her repayments and so didn’t find that Sunny was irresponsible to lend to her.

I am sending out a provisional decision to explain why I disagree in part with our adjudicator’s recommendation. This will also allow both parties to comment further on this matter before I make my final decision.

my provisional findings

I’ve considered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint. I have also taken into account the law, any relevant regulatory rules and good industry practice at the time.

Sunny agreed all of Miss G’s loans in the period after the 31st of March 2014. It needed a standard licence from the Financial Conduct Authority (FCA) in order to carry out consumer credit activities. Prior to this, firms were regulated by the Office of Fair Trading (OFT). The rules and guidance issued by the FCA were in close alignment with those of the OFT, and specifically noted and referred back to sections of the earlier guidance.

As I’ve said above, I have thought about everything to come to a view about what is fair and reasonable in this case. I have set out part of the relevant legal and regulatory framework that Sunny was subject to over the period it lent to Miss G in [Appendix 2](#) at the end of this decision. This includes some of the provisions of the Consumer Credit Act including later amendments, guidance and rules provided by the OFT and the FCA, and industry codes of best practice.

Under this framework, in order to hold a consumer credit licence Sunny was obliged to lend responsibly. As set out by the FCA in its Consumer Credit Handbook (CONC), this meant that Sunny needed to make a reasonable assessment as to whether or not a borrower could afford to meet its loan repayments in a sustainable manner. The FCA rules say that in assessing affordability a lender needs to consider what's appropriate in the circumstances for example "*the type and amount of credit being sought and the potential risks to the consumer.*" Neither the law nor the FCA specified how the assessment was to be carried out but, whatever the method, it needed to be enough to assess the sustainability of the arrangement for the consumer.

It's important to note that this means the assessment needed to be consumer-focussed. It was not an assessment of the risk to the lender, but of the risk to the consumer. And it needed to be proportionate to both the circumstances of the lending and the circumstances of the consumer. Therefore, a lender's assessment of creditworthiness would need to be flexible – what was sufficient for one consumer might not be for another, or indeed what might be sufficient for a consumer in one circumstance might not be for the same consumer in other circumstances.

As mentioned, the OFT was the regulator before the FCA took over in 2014. In section 3.13 of its *Irresponsible Lending Guidance*, the OFT said that short-term loan products are "*unsuitable for supporting sustained borrowing over longer periods, and would be expensive as a means of longer term borrowing.*" It points to repeated refinancing of such loans as an example of irresponsible lending. The FCA's rules echo and refer back to this and CONC 6.7.21G states that "*a firm should not refinance high-cost short-term credit where to do so is unsustainable or otherwise harmful.*"

Highlighting these behaviours specifically in the guidance suggests that a lender needed to consider the risk to the consumer of such lending behaviour. And it seems logical to me that the more instances of repeated lending, the greater the potential risk to the consumer of the credit being unsustainable.

what should have happened when Miss G applied for credit and did Sunny get this right?

Bearing the above in mind, I would expect an assessment of creditworthiness to vary with circumstance. In general, I'd expect a lender to require more assurance, the greater the potential risk to the consumer.

So, for example, I'd expect a lender to seek more assurance by carrying out more detailed checks

- the higher the loan amount,
- the lower the consumer's income; or
- the longer the lending relationship.

In coming to a decision on Miss G's case, I have considered the following questions:

- did Sunny complete reasonable and proportionate checks when assessing each of Miss G's loan applications to satisfy itself that she would be able to repay the loan in a sustainable way?
 - if not, would those checks have shown that Miss G would have been able to do so?

- taking into account the short-term purpose of the loans provided, did the overall pattern of lending increase Miss G's indebtedness in a way that was unsustainable or otherwise harmful?
- did Sunny act unfairly or unreasonably in some other way?

Having done so, I've concluded that Sunny was irresponsible to lend to Miss G from her tenth loan onwards. I plan to uphold her complaint in part and ask Sunny to refund the interest and charges she paid for this and all her subsequent loans. I appreciate that this will be disappointing for Sunny and I'll explain in some detail why I've reached this conclusion.

did Sunny carry out reasonable and proportionate checks when assessing Miss G's loan applications to satisfy itself that she would be able to repay the loan in a sustainable way?

the information Sunny obtained

Sunny asked Miss G for information about her income and expenses each time she applied for credit. It provided a record of this for all except her first loan and I'm satisfied that it did as it says each time.

Sunny also said that it checked Miss G's credit file through a third-party credit reference agency and has provided some of the information it obtained in this way (for loans 2 to 5 and 22 to 24). It seems from this information that Sunny would have been aware that Miss G had some history of borrowing from short-term lenders. However, I can't see any adverse financial management information reported such as arrears or defaults.

the information Sunny should have sought

I've started by looking at the lending history between Sunny and Miss G. As set out above, the regulations require lenders to assess the risk to consumers of loans impacting adversely on them in a way that is appropriate to the circumstances. On investigation, it seems Sunny didn't vary its checks for Miss G over the 17 months she borrowed from it. Logically, with that approach, Sunny's checks might be proportionate some of the time but it's unlikely that these checks would be proportionate each and every time Miss G applied for credit.

Sunny agreed a running credit facility for Miss G in December 2014. The credit agreement shows it had a £500 limit with a minimum monthly payment of £210 approximately, should she draw down the maximum amount. Sunny doesn't hold a record of Miss G's income and expenditure for this application but I think it's reasonable to assume that it would be similar to its record for the second loan, which was a monthly income of £1,800 and expenditure of £825. Given these figures and the lack of adverse information drawn from her credit file, I think the checks Sunny carried out were proportionate. Altogether, I don't find that Sunny lent irresponsibly here. And, as it happened, Miss G drew down £100 through this facility and repaid it within a week incurring less than £10 interest.

Miss G waited a couple of months before applying again for credit (see below table). This time she was granted an instalment loan of £100 to be repaid over six months with a monthly repayment of £29. Before she paid this off, Sunny agreed another loan of the same amount and term for her. When she paid loan 2 off, it then agreed another loan for a similar amount. The repayment amounts for loans 2, 3 and 4 were approximately £30. So even with some

overlap, the monthly commitment wasn't very high relative to Miss G's stated disposable income.

This was early on in the lending relationship between Sunny and Miss G. Although she'd asked for three loans in the space of a month, potentially her need for the credit could have stemmed from one-off or emergency shortfalls in her disposable income. Altogether, I think it was reasonable enough for Sunny to rely on what Miss G told it about her finances for loans 2 to 4 as it didn't have anything else to contradict this information or to lead it to suspect that it might not have the complete picture of her circumstances.

Although these three loans each had a six month term Miss G repaid them within a month. This could suggest that Miss G had sufficient disposable income to meet her repayments early. However, successfully repaying her loans doesn't mean she was able to do so in a *sustainable* manner i.e. out of her normal means without having to borrow further. Repaying early could mean that Miss G's finances were somewhat volatile and she was using this credit as a way to manage her available income. I can see from her bank statements that she paid £50 a month on average in unplanned overdraft charges around this time, in addition to her planned overdraft charges.

Miss G took out her fifth loan with Sunny before she had repaid her third or fourth (see below table). This was for £150. This was the largest amount she'd been granted so far. When she repaid her third and fourth loans, she took out a further two loans - loan 6 was for £100 and loan 7 for £200. Again, she repaid all of these three loans (5, 6 and 7) within a month.

I think Sunny should have done something more when Miss G applied for her seventh loan, if not before. This was the seventh time in the space of four months Miss G had asked for a loan – at this point she had two outstanding (5 and 6) and was asking for £200, double the value of some of her earlier loans.

If Miss G was using Sunny's loans as a way to meet her usual expenses because of ongoing shortfalls in her income then repaying its loans out of that same pot of money was not going to be sustainable for her. So I think Sunny should have independently verified information about Miss G's circumstances to satisfy itself that she had a sustainable level of disposable income to meet her repayments for this new loan and her outstanding loans when they fell due. It could have done this in a number of ways – by bringing these concerns to Miss G and asking further questions of her. Or asking to see bank statements, payslips, rent and bill records etc. I can't see that it did any of this, so I can't say the checks it did for this loan were proportionate to the circumstances.

Miss G continued this pattern of borrowing continuously from Sunny with some overlapping loans for another year. The loan amounts varied, reaching a maximum of £500 in August 2015. In a few instances, Miss G took a few months to repay her loan but most were repaid within a month. I think Sunny should have continued to enquire further into Miss G's circumstances each time she asked for more credit. As mentioned, it seems it didn't tailor its assessment at any point, and therefore I don't think the checks for her seventh loan and subsequent loans were proportionate. And so I've gone on to consider the consequences of this for Miss G.

as Sunny's checks weren't reasonable and proportionate, what would reasonable and proportionate checks more likely than not have shown?

I can see from Miss G's bank statements that what she told Sunny about her monthly income was broadly correct, though it fluctuated from less than £1,600 to over £2,300. Miss G's expenses were higher than she'd declared, generally around £1,000 to £1,200 a month. And she was borrowing from another short-term lender throughout 2015, which required repayments of on average over £300. I think it's likely Sunny would have learnt this had it carried out further checks from loan 7.

As I've mentioned, all the loans were to be repaid over six months apart from the first one. This means the amounts Miss G was contractually obligated to repay were relatively low, even when some of the loans overlapped. And I can see from her bank statements that loans 7, 8 and 9 would have appeared affordable for her, had Sunny carried out further checks on her financial situation before agreeing to them.

However, when the value of loans from Sunny increased to £450 in late May 2015 when Miss G asked for her tenth loan I think the lender should have been concerned about Miss G's ability to meet her payments for loans 10, 11 and 12 in a sustainable manner, given the fluctuations in her disposable income and her increasing use of other short-term lenders. And although Miss G didn't have to repay her loans in one payment, this seems to be how she was managing her finances. Altogether, I think it's likely that Sunny wouldn't have agreed to loans 10, 11 or 12, if it had understood more about her finances.

I could continue to look into the affordability of Miss G's remaining twelve loans but, as I will go on to explain, I don't think Sunny should have continued to lend to her beyond this point.

taking into account the short term purpose of the loans provided, did the overall pattern of lending increase Miss G's indebtedness in a way that was unsustainable or otherwise harmful?

Although I have explained that there were indicators of risks and dependency at an earlier stage, I think the point at which Sunny should have concluded that it was irresponsible to keep lending to Miss G should have come when she asked for her tenth loan on 20 May 2015. As I've concluded, proportionate checks would likely have shown this loan to be unaffordable. At this point Miss G had been borrowing from Sunny for almost five months continuously and it should also have been of concern to the lender that Miss G's need for credit was continuing beyond what could reasonably be interpreted as being for short-term purposes.

As mentioned earlier, the guidance from the OFT and the FCA states that the purpose of short-term credit is to act as a short-term solution. And that such loans are not appropriate for supporting sustained borrowing over longer periods, for which other products are more likely to be suitable.

Indeed Sunny's own website says:

"A 'short-term loan' is, as its name suggests, a loan with a relatively short repayment period. This can range from around as little as a week to a number of months depending on the lender. This is considered short-term compared to traditional personal loans which usually have a repayment period of a year or longer.

And also

*"A short-term loan should be used as a solution for a problem that needs resolving fast. This could be a something like a family or work emergency, or needing to pay for something in the house that needs urgently fixing. **It should not be used as a long-term solution to financial needs.**"* (my emphasis)

And

*"Most importantly, never borrow more money than you aren't fully confident you'll be able to pay back. **To avoid financial difficulty and debt building up, try to avoid taking out loans on a regular basis.** Borrowing money should be considered only when completely necessary."* (again, my emphasis)

The amounts Sunny agreed to lend to Miss G ranged from £50 to £500, with an average of about £150. She paid almost £3,200¹ to have access to this average amount from December 2014 to May 2016, a period of about 17 months. I think agreeing this number of loans over this length of time had the effect of unfairly increasing Miss G's indebtedness to Sunny by allowing her to take expensive credit – which the rules and guidance and Sunny's own website make clear was only intended for short-term use – over an extended period of time.

In addition, I think the number and frequency of these loans may have had and will, potentially, continue to have implications for Miss G's ability to access mainstream credit because the presence of these short-term loans on her credit file is likely to be viewed negatively by other lenders.

in summary

To sum up, I don't think Sunny gathered enough information to reasonably assess Miss G's ability to make her loan repayments in a sustainable way from loan 7 onwards. Had it done so, it would have discovered that she would likely have difficulty meeting her repayments when she applied for her tenth loan in May 2015. At that point, Sunny should have concluded that it was irresponsible to keep lending to Miss G because it should have understood that she was dependent on its loans for purposes other than to meet unexpected expenses and was probably in need of a longer-term solution.

As a responsible lender, Sunny wouldn't have agreed to any further credit for Miss G, given that this would increase her indebtedness and potentially impact negatively on her creditworthiness. Therefore, I think Sunny was irresponsible to have agreed to loan 10 and all further loans for her.

what Sunny should do to put things right

¹ Based on Sunny's account statements for Miss G.

As I've concluded, Sunny was irresponsible to lend to Miss G between 20 May 2015 and 10 May 2016. In order to put Miss G back in the position she would have been in, had it not agreed to this number of loans over this length of time, Sunny should:

- refund all interest and charges for Miss G's loans agreed in this period;
- pay interest on these refunds at 8% simple* per year from the dates of payment to the dates of settlement;
- and remove all information about loans 10 to 24 from Miss G's credit file**.

*HM Revenue & Customs requires Sunny to take off tax from this interest. Sunny must give Miss G a certificate showing how much tax it's taken off if she asks for one.

**Putting Miss G back into the position she would have been in had she not been impacted by repeat lending requires the record of these loans to be completely removed from her credit file.

my provisional decision

I intend to uphold Miss G's complaint for the reasons given above and require Elevate Credit International Limited (trading as Sunny) to put things right as I've set out.

I'll wait a month to see if either party has anything further to add – before considering my decision on this complaint once more.

Appendix 1 Miss G's lending history

* This was an open-ended rolling credit facility and the minimum monthly contractual repayment was £210 if the maximum amount of £500 was taken out.

Appendix 2 Some information on the legal and regulatory background to the lending the Consumer Credit Act 1974

Section 25(2) of the Consumer Credit Act 1974 set out the factors that regulators had to have regard to when deciding whether or not to grant a consumer credit licence to a lender. It said:

- (1) *In determining whether an applicant for a licence is a fit person for the purposes of this section the OFT shall have regard to any matters appearing to it to be relevant including (amongst other things)—*
- (a) *the applicant's skills, knowledge and experience in relation to consumer credit businesses, consumer hire businesses or ancillary credit businesses;*
 - (b) *such skills, knowledge and experience of other persons who the applicant proposes will participate in any business that would be carried on by him under the licence;*
 - (c) *practices and procedures that the applicant proposes to implement in connection with any such business;*
 - (d) *evidence of the kind mentioned in subsection (2A)*
- (2A) *That evidence is evidence tending to show that the applicant, or any of the applicant's employees, agents or associates (whether past or present) or, where the applicant is a body corporate, any person appearing to the OFT to be a controller of the body corporate or an associate of any such person, has—*
- (a) *committed any offence involving fraud or other dishonesty or violence;*
 - (b) *contravened any provision made by or under—*
 - (i) *this Act;*
 - (ii) *Part 16 of the Financial Services and Markets Act 2000 so far as it relates to the consumer credit jurisdiction under that Part;*
 - (iii) *any other enactment regulating the provision of credit to individuals or other transactions with individuals;*
 - (c) *contravened any provision in force in an EEA State which corresponds to a provision of the kind mentioned in paragraph (b);*
 - (d) *practised discrimination on grounds of sex, colour, race or ethnic or national origins in, or in connection with, the carrying on of any business;*
or
 - (e) *engaged in business practices appearing to the OFT to be deceitful or oppressive or otherwise unfair or improper (whether unlawful or not)*

Section 25(2B) set out an example of the type of practice referred to in Section 25(2A(e)) and said:

For the purposes of subsection (2A)(e), the business practices which the OFT may consider to be deceitful or oppressive or otherwise unfair or improper include practices in the carrying on of a consumer credit business that appear to the OFT to involve irresponsible lending.

section 140 of the Consumer Credit Act 1974

All of Miss G's loans were given to her after Section 140 of the Consumer Credit Act came into force on 6 April 2007. Section 140A sets out circumstances where the court may determine that the relationship between a creditor and a debtor is unfair to the debtor. Section 140A says:

140A Unfair relationships between creditors and debtors

- (1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following-
 - (a) any of the terms of the agreement or of any related agreement;*
 - (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;*
 - (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).**
- (2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).*
- (3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.*
- (4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.*
- (5) An order under section 140B shall not be made in connection with a credit agreement which is an exempt agreement [for the purposes of Chapter 14A of Part 2 of the Regulated Activities Order by virtue of article 60C(2) of that Order (regulated mortgage contracts and regulated home purchase plans)]*

Section 140B sets out the types of order the court could make should it determine that the relationship between the creditor and debtor is unfair to the debtor. Section 140B says:

140B Powers of court in relation to unfair relationships

- (2) *An order under this section in connection with a credit agreement may do one or more of the following—*
- (a) *require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);]*
 - (b) *require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;*
 - (c) *reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;*
 - (d) *direct the return to a surety of any property provided by him for the purposes of a security;*
 - (e) *otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;*
 - (f) *alter the terms of the agreement or of any related agreement;*
 - (g) *direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.*

section 55B of the Consumer Credit Act 1974

On 1 February 2011 the majority of the legislation implementing the provisions of the Consumer Credit Directive 2008 came into force. This included an additional requirement on a lender to carry out an “Assessment of creditworthiness” which was set out in section 55B of the Consumer Credit Act.

Section 55B said:

Assessment of creditworthiness

- 55B (1) *Before making a regulated consumer credit agreement, other than an excluded agreement, the creditor must undertake an assessment of the creditworthiness of the debtor.*
- (2) *Before significantly increasing—*
- (a) *the amount of credit to be provided under a regulated consumer credit agreement, other than an excluded agreement, or*
 - (b) *a credit limit for running-account credit under a regulated consumer credit agreement, other than an excluded agreement, the creditor must undertake an assessment of the debtor’s creditworthiness.*

(3) A creditworthiness assessment must be based on sufficient information obtained from—

(a) the debtor, where appropriate, and

(b) a credit reference agency, where necessary.

(4) For the purposes of this section an agreement is an excluded agreement if it is—

(a) an agreement secured on land, or

(b) an agreement under which a person takes an article in pawn.”.

regulation by the Office of Fair Trading

In March 2010, the OFT issued its guidance on the test for irresponsible lending for the purposes of section 25(2B) of the Consumer Credit Act 1974. The foreword to its 'Irresponsible Lending Guidance' (ILG) set out its purpose saying:

The primary purpose in producing this guidance is to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (OFT) considers may constitute irresponsible lending practices for the purposes of section 25(2B) of the Consumer Credit Act 1974. It indicates types of deceitful or oppressive or otherwise unfair or improper business practices which, if engaged in by a consumer credit business, could call into consideration its fitness to hold a consumer credit licence.

Whilst this guidance represents the OFT's view on irresponsible lending, it is not meant to represent an exhaustive list of behaviours and practices which might constitute irresponsible lending.

Section two of the guidance sets out the general principles of fair business practice. Section 2.1 says:

In the OFT's view there are a number of overarching principles of consumer protection and fair business practice which apply to all consumer credit lending.

Section 2.2 of the guidance says:

In general terms, creditors should:

- *not use misleading or oppressive behaviour when advertising, selling, or seeking to enforce a credit agreement*
- *make a reasonable assessment of whether a borrower can afford to meet repayments in a sustainable manner*
- *explain the key features of the credit agreement to enable the borrower to make an informed choice*

- *monitor the borrower's repayment record during the course of the agreement, offering assistance where borrowers appear to be experiencing difficulty and*
- *treat borrowers fairly and with forbearance if they experience difficulties*

Section 2.3 lists other expectations of lenders. Amongst other things, it says:

In addition to the above there should be:

- *fair treatment of borrowers. Borrowers should not be targeted with credit products that are clearly unsuitable for them, subjected to high pressure selling, aggressive or oppressive behaviour or inappropriate coercion, or conduct which is deceitful, oppressive, unfair or improper, whether unlawful or not*

Borrowers who may be particularly vulnerable by virtue of their current indebtedness, poor credit history, or by reason of age or health, or disability, or for any other reason, should, in particular, not be targeted or exploited.

Section four of the guidance is concerned with the assessment of affordability that lenders were required to carry out before granting credit. Section 4.1 says:

In the OFT's view, all assessments of affordability should involve a consideration of the potential for the credit commitment to adversely impact on the borrower's financial situation, taking account of information that the creditor is aware of at the time the credit is granted. The extent and scope of any assessment of affordability, in any particular circumstance, should be dependent upon – and proportionate to – a number of factors (see paragraph 4.10 of this guidance document).

'Assessing affordability', in the context of this guidance, is a 'borrower-focussed test' which involves a creditor assessing a borrower's ability to undertake a specific credit commitment, or specific additional credit commitment, in a sustainable manner, without the borrower incurring (further) financial difficulties and/or experiencing adverse consequences.

Section 4.2 of the OFT guidance says:

Whatever means and sources of information creditors employ as part of an assessment of affordability should be sufficient to make an assessment of the risk of the credit sought being unsustainable for the borrower in question. In our view this is likely to involve more than solely assessing the likelihood of the borrower being able to repay the credit in question.

We consider that before granting credit, significantly increasing the amount of credit, or significantly increasing the credit limit under an agreement for running account credit, creditors should take reasonable steps to assess a borrower's likely ability to be able to meet repayments under the credit agreement in a sustainable manner.

"In a sustainable manner" is defined in Section 4.3 of the OFT guidance. And Section 4.3 says:

The OFT regards 'in a sustainable manner' in this context as meaning credit that can be repaid by the borrower:

- *without undue difficulty – in particular without incurring or increasing problem indebtedness*
- *over the life of the credit agreement or, in the case of open-end agreements, within a reasonable period of time*
- *out of income and/or available savings, without having to realise security or assets.*

Section 4.4 goes on to describe “undue difficulty” and says:

The OFT would regard ‘without undue difficulty’ in this context as meaning the borrower being able to make repayments (in the absence of changes in personal circumstances that were not reasonably foreseeable at the time the credit was granted):

- *while also meeting other debt repayments and other normal/reasonable outgoings and*
- *without having to borrow further to meet these repayments.*

Building on the proportionality principle set out in section 4.1, section 4.10 deals with the issues that might influence how detailed the affordability assessment should be. It includes factors such as:

- *the type of credit product;*
- *the amount of credit to be provided and the associated cost and risk to the borrower;*
- *the borrower’s financial situation at the time the credit is sought;*
- *the borrower’s credit history, including any indications of the borrower experiencing (or having experienced) financial difficulty*
- *the vulnerability of the borrower*

Section 4.12 is a non-exhaustive list of the types and sources of information that a lender might use to assess affordability, including:

- *evidence of income*
- *evidence of expenditure*
- *records of previous dealings with the borrower*
- *a credit score*
- *a credit report from a credit reference agency*
- *information obtained from the borrower, whether or an application form or separately*

Section 4.16 specifically touches on the issue of proportionality in the context of short-term credit. It says:

Whilst the OFT accepts, as a general principle from a proportionality perspective, that the level of scrutiny required for small sum and/or short-term credit may be somewhat less than for large sum and/or long term credit, we consider that creditors should also take account of the fact that the risk of the credit being unsustainable would be directly related to the amount of credit granted (and associated interest / charges etc.) relative to the borrower's financial situation

Sections 4.18 to 4.33 of the ILG set out some examples of “specific irresponsible lending practices” relating to how businesses assess affordability. Section 4.20 says this would include where a lender is:

Failing to undertake a reasonable assessment of affordability in an individual case or cases

Section 4.21 gives another example:

Failing to consider sufficient information to be able to reasonably assess affordability, prior to granting credit, significantly increasing the total amount of credit provided, or significantly increasing the credit limit (in the case of a running account credit agreement)

And Section 4.26 says a business would be acting irresponsibly if:

Granting an application for credit when, on the basis of an affordability assessment, it is known, or reasonably ought to be suspected, that the credit is likely to be unsustainable.

Sections 4.29 and 4.31 deal with a lender's treatment of information disclosed by the customer. 4.29 says it would be an unsatisfactory business practice where a lender:

fail[s] to take adequate steps, so far as is reasonable and practicable, to ensure that information on a credit application relevant to an assessment of affordability is complete and correct.

And section 4.31 says it would be unsatisfactory for a lender to:

[Accept] an application for credit under circumstances in which it is known, or reasonably ought to be suspected, that the borrower has not been truthful in completing the application for credit with regards to the information supplied relevant to inform an assessment of affordability

Section 6 of the ILG sets out other “specific irresponsible lending practices” relating to lender behaviour once loan(s) have been agreed. Section 6.2 says it would be an unsatisfactory practice where a business is:

Failing to monitor a borrower's repayment record

Section 6.2 goes on to say:

The OFT considers that creditors should take appropriate action...when/if there are signs of apparent / possible repayment difficulties.

Section 6.25 focuses specifically on short-term credit products and says that it would be a “deceptive and/or unfair practice” where a lender is:

Repeatedly refinancing (or 'rolling over') a borrower's existing credit commitment for a short-term credit product in a way that is unsustainable or otherwise harmful.

Section 6.25 then goes on to say:

The OFT considers that this would include a creditor allowing a borrower to sequentially enter into a number of separate agreements for short-term loan products, one after another, where the overall effect is to increase the borrower's indebtedness in an unsustainable manner.

The general purpose of short-term loans, such as 'payday loans', is to provide borrowers with a cash advance until their next pay day and they are usually about 30 days, or just over, in duration. However, in certain circumstances, the borrower can elect to 'renew' the loan for a fee and delay payment for a further agreed period of time.

The purpose of payday loans is to act as a short-term solution to temporary cash flow problems experienced by consumers. They are not appropriate for supporting sustained borrowing over longer periods, for which other products are likely to be more suitable.

regulation by the Financial Conduct Authority (from 1 April 2014)

All of Miss G's loans were agreed when the FCA was the regulator for consumer credit. The FCA's Principles for Business ("PRIN") set out the high level standards which all authorised firms are required to comply with.

PRIN 1.1.1G, says

The Principles apply in whole or in part to every firm.

The Principles themselves are set out in PRIN 2.1.1R. And the most relevant principle here is PRIN 2.1.1 R (6) which says:

A firm must pay due regard to the interests of its customers and treat them fairly.

The FCA's Consumer Credit sourcebook (CONC) is the specialist sourcebook for credit-related regulated activities. The purpose of CONC is to set out the detailed obligations that are specific to credit-related regulated activities and activities connected to those activities carried on by firms. These build on and add to the high-level obligations, for example, in PRIN and the requirements in or under the Consumer Credit Act.

This handbook sets out the rules which apply to providers of consumer credit like Sunny. CONC Section 5 sets out a firm's obligations in relation to responsible lending. And CONC Section 6 sets out a firm's obligations after a consumer has entered into a regulated agreement.

There is a high degree of alignment between the OFT's Irresponsible Lending Guidance and the rules set out in CONC 5 and CONC 6. As is evident from the following extracts, the FCA's CONC rules specifically note and refer back to sections of the OFT's *Irresponsible Lending Guidance* on many occasions.

Section 5.2.1R(2) of CONC sets out what a lender needs to do before agreeing to give a consumer a loan of this type. It says a firm must consider:

- (a) *the potential for the commitments under the regulated credit agreement to adversely impact the customer's financial situation, taking into account the information of which the firm is aware at the time the regulated credit agreement is to be made; and*

[Note: paragraph 4.1 of ILG]

- (b) *the ability of the customer to make repayments as they fall due over the life of the regulated credit agreement, or for such an agreement which is an open-end agreement, to make repayments within a reasonable period.*

[Note: paragraph 4.3 of ILG]

CONC also includes guidance about 'proportionality of assessments'. CONC 5.2.4G(2) says:

A firm should consider what is appropriate in any particular circumstances dependent on, for example, the type and amount of credit being sought and the potential risks to the customer. The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer's financial situation.

[Note: paragraph 4.11 and part of 4.16 of ILG]

CONC 5.3 contains further guidance on what a lender should bear in mind when thinking about affordability. And CONC 5.3.1G(1) says:

In making the creditworthiness assessment or the assessment required by CONC 5.2.2R (1), a firm should take into account more than assessing the customer's ability to repay the credit.

[Note: paragraph 4.2 of ILG]

CONC 5.3.1G(2) then says:

The creditworthiness assessment and the assessment required by CONC 5.2.2R (1) should include the firm taking reasonable steps to assess the customer's ability to meet repayments under a regulated credit agreement in a sustainable manner without the customer incurring financial difficulties or experiencing significant adverse consequences.

[Note: paragraph 4.1 (box) and 4.2 of ILG]

In respect of the need to double-check information disclosed by applicants, CONC 5.3.1G(4) has a reference to paragraphs 4.13, 4.14, and 4.15 of ILG and states:

- (b) *it is not generally sufficient for a firm to rely solely for its assessment of the customer's income and expenditure on a statement of those matters made by the customer.*

And CONC 5.3.7R says that:

A firm must not accept an application for credit under a regulated credit agreement where the firm knows or ought reasonably to suspect that the customer has not been truthful in completing the application in relation to information supplied by the customer relevant to the creditworthiness assessment or the assessment required by CONC 5.2.2R (1).

[Note: paragraph 4.31 of ILG]

CONC 6.7 sets out a firm's obligations in relation to its post contract business practices. CONC 6.7.21R to 6.7.23R contains specific obligations for high-cost short-term credit providers like Sunny.

CONC 6.7.21G says:

A firm should not refinance high-cost short-term credit where to do so is unsustainable or otherwise harmful.

[Note: paragraph 6.25 of ILG]

CONC 6.7.22G says:

A firm should not allow a customer to enter into consecutive agreements with the firm for high-cost short-term credit if the cumulative effect of the agreements would be that the total amount payable by the customer is unsustainable.

[Note: paragraph 6.25 (box) of ILG]

CONC 6.7.23R says:

A firm must not refinance high-cost short-term credit (other than by exercising forbearance) on more than two occasions.

CONC 6.7.17R defines refinancing and says:

- (1) *In CONC 6.7.18 R to CONC 6.7.23 R "refinance" means to extend, or purport to extend, the period over which one or more repayment is to be made by a customer whether by:
 - (a) *agreeing with the customer to replace, vary or supplement an existing regulated credit agreement;*
 - (b) *exercising a contractual power contained in an existing regulated credit agreement; or*
 - (c) *other means, for example, granting an indulgence or waiver to the customer.**
- (2) *"Exercise forbearance" means to refinance a regulated credit agreement where the result is that no interest accrues at any time in relation to that agreement or any which replaces, varies or supplements it from the date of the refinancing and either:*

- (a) there is no charge in connection with the refinancing; or*
 - (b) the only additional charge is a reasonable estimate of the actual and necessary cost of the additional administration required in connection with the refinancing.*
- (3) The term “refinance” within paragraph (1) does not include where under a regulated credit agreement repayable in instalments a customer requests a change in the regular payment date and as a result there is no charge or additional interest in connection with the change.*

other relevant publications and good industry practice

The ILG (and following that the FCA’s Consumer Credit Handbook (“CONC”)) set out the regulatory framework that regulated/authorised consumer credit providers have to adhere to. But in making my decision, I am also required to take into account any other guidance, standards, relevant codes of practice, and, where appropriate, what I consider to have been good industry practice at the time of the events in dispute.

the OFT’s Payday Lending Compliance Review Final Report

The OFT published its “Payday Lending Compliance Review Final Report” in March 2013. The purpose of the review was “...to establish the extent to which payday lenders [were] complying with the Consumer Credit Act, other legislation and [were] meeting the standards set out in the ILG.”

The review sought to highlight examples of what the OFT considered poor practice and evidence of non-compliance with the relevant law and failure to meet the minimum standards expected. The analysis was also put together to help the FCA’s work on payday lending ahead of it assuming responsibility for regulating the sector from April 2014.

The report began with an overview section setting out the OFT’s concerns. Page two of the report says that the OFT:

...is particularly concerned by the evidence of irresponsible lending; too many people are given loans they cannot afford, and when they can’t repay are encouraged to extend them, exacerbating their financial difficulties This is causing real misery and hardship for a significant number of payday users

Page three of the report says:

Our evidence paints a concerning picture of the payday lending market. It appears that irresponsible lending is not a problem confined to a few rogue traders, but it has its roots in the way competition works in this market. The evidence suggests that many consumers are in a weak bargaining position, and that firms compete on speed of approval rather than price

It then goes on to say:

Additionally, firms describe and market their product to consumers as one-off short term loans (costing on average £25 per £100 borrowed for 30 days), but in practice around half the revenue comes from loans which last longer and cost a lot more because they are rolled

over or refinanced. Lenders do not need to compete hard for this source of revenue because by this time they have a captive market. This, and the misuse of continuous payment authorities to reclaim monies owed, may distort incentives for lenders, encouraging them to make loans to people who cannot afford to repay them first time.

the Consumer Finance Association Lending Code for Small Cash Advances

The principal trade association representing the interests of short-term lending businesses operating in the United Kingdom is the Consumer Finance Association (“CFA”). The CFA published a good practice charter entitled ‘Lending Code for Small Cash Advances’ in July 2012. I understand Sunny’s parent company became a CFA member in late 2013².

Section 1 of the code sets out its purpose. Section 1b says:

Members of the Consumer Finance Association offer small cash loans predominantly from high street outlets or online

Section 1c says:

This type of loan allows customers to borrow a relatively small amount of money, (usually between £50 and £1000) which they repay over a short period (typically one or two months). The loan is not designed for longer term borrowing, but to improve short term personal cash flow

And Section 1d says:

The purpose of this Code is to ensure compliance by members with the minimum standards set by the Association, as specified in the Code, and accordingly protects and benefit consumers

Section 3 sets out the general obligations expected of lenders. Amongst other things Section 3 says members shall:

b) trade honestly, responsibly and treat customers with respect.

l) ensure fairness in all dealings with customers including, but not limited to, their dealings with customers both before and after the making of the agreement and the manner in which those agreements are enforced.

Section 4 of the code sets out a lender’s specific lending obligations. Part (a) of this section is concerned with advertising and marketing and amongst other things, it says:

iii) members shall ensure all advertising is truthful and not misleading and raise awareness to the short term nature of the loan.

Part (d) of section 4 is concerned with pre-contractual information. And it, amongst other things, says:

² <http://cfa-uk.co.uk/cfa-welcomes-four-new-members-committed-to-responsible-short-term-lending>

v) members shall provide explanations to the customer, to enable them to assess whether the proposed credit agreement is appropriate to their circumstances by explaining...:

- *that small cash loans are intended to improve short term cash flow, and therefore not suitable for longer term borrowing.*

-END-