

Gambling Commission Call for Evidence on Remote Customer Interaction

Financial Ombudsman Service response

8 February 2021

Introduction

Role of the Financial Ombudsman Service

The Financial Ombudsman Service was set up by Parliament under the *Financial Services and Markets Act 2000* to resolve individual complaints between financial businesses and their customers – fairly and reasonably, quickly, and with minimal formality.

Since 1 April 2019, our remit has included more complaints made by small and medium-sized enterprises (SMEs) about financial businesses, and complaints made by customers of claims management companies (CMCs). The highest amount we can tell a business to pay is adjusted each year in line with inflation, as measured by the Consumer Prices Index (CPI). In 2020/21 it's £355,000, although different limits may apply depending on when the problem happened. Our [website](#) explains the types of compensation we can award and the limits that apply.

If a business and their customer can't resolve a problem themselves, we can step in to sort things out. Independent and unbiased, we'll get to the heart of what's happened and reach an answer that helps both sides move on. And if someone's been treated unfairly, we'll use our powers to make sure things are put right. This could mean telling the business to apologise, to take action or to pay compensation – in a way that reflects the particular circumstances.

In resolving hundreds of thousands of complaints every year, we see the impact on people from all sorts of backgrounds and livelihoods. We're committed to sharing our insight and experience to encourage fairness and confidence in the different sectors we cover.

Although our role isn't to set regulation or to instruct firms on how they should conduct themselves in general, we can make directions on a case-by-case basis as to what action we think a firm should take to put things right for their customer when something has gone wrong. And we feed back to firms, as well as to other stakeholders including the Financial Conduct Authority (FCA), when we see systemic issues causing complaints to be referred to us. Firms are also required under the FCA's DISP rules to learn from our ombudsmen's final decisions, which are legally binding if the consumer accepts them.

Summary of our response:

- The Gambling Commission is consulting on whether it should ask gambling merchants to carry out affordability checks to assess whether consumers can afford to carry out certain gambling activities.
- It is also consulting on the frequency of these affordability checks, and asks what the trigger should be for a gambling merchant to carry out further checks.
- We have a lot of experience in looking at complaints against financial firms about the carrying out of affordability checks, and we think this insight could be of interest to the Gambling Commission, helping to inform its conclusions.
- In particular, we think that the framework such as that set out in the FCA's Consumer Credit Sourcebook – CONC – could be a useful framework for the Gambling Commission to consider when and if it develops its own framework.
- In resolving complaints about the affordability of borrowing we often find:
 - firms have failed to carry out proportionate checks to ensure a consumer can afford a loan or credit product. We've shared a case study in the annex at the conclusion of this submission which illustrates the potential impact on consumers when this happens.
 - instances of repeat lending, where consumers continue to borrow higher amounts of money from the same lender but the lender doesn't carry out further checks. Again, we have shared a case study which illustrates the potential impact on consumers.
- The insight and commentary we share in this response is based on our experience of resolving complaints about the affordability of lending. As we note, gambling is a relevant factor in a small proportion of these complaints, primarily where consumers have spent some or all of the money they've borrowed on gambling activities. We're able to investigate these complaints as the ombudsman covering financial services, including lending.
- However, it's worth noting that some consumers tell us they feel they've been treated unfairly not only by the lender, but by the gambling merchant that has allowed them to spend money they believe they couldn't afford to. As our remit is limited to the actions of financial businesses, we can't consider these aspects of consumers' concerns.
- We'd be happy to have a further discussion about any of the issues we've highlighted.

Background

In 2019/20 we received 182,005 complaints about banking and credit, of which 111,820 were about credit products ranging from credit cards and hire purchase to payday and guarantor loans.

Some complaints we receive from borrowers relate to administrative issues – for example, how businesses have managed customers’ accounts. However, a significant proportion (26,219 in 2019/20) centre on consumers’ concerns that they’ve been lent money that they can’t afford to pay back, and often that the business in question was irresponsible to lend them money in the first place.

A small proportion of these consumers have spent money they’ve borrowed on gambling activities – telling us either that they took out a loan to fund their gambling or that, less commonly, they have been gambling in order to generate money to repay a loan. In our experience, where gambling is at the forefront of a complaint about affordability, it’s often had a part to play in the consumer’s financial difficulties.

Our quarterly complaints data, which is publicly available [on our website](#), shows that complaints about credit products consistently have some of the highest uphold rates of all the products we consider. For example, in Q2 2020, our uphold rate averaged across all products (excluding PPI) was 41%, but the uphold rate for credit products was 61%. Where we uphold a complaint, it means that, in our view, the business concerned hasn’t done enough to resolve their customers’ concerns.

When investigating consumer lending cases, we ultimately find the business to have been at fault when: it had information which showed the lending was unaffordable, and it didn’t act on it; or it didn’t ask the consumer for reasonable information that would have indicated that the lending they were offering was unaffordable. We include some examples in the case studies in our annex below.

The financial services framework for assessing affordability

We’ve been able to deal with complaints about credit cards, overdrafts and unsecured loans offered by banks since we were set up in 2001. In April 2007, our jurisdiction was extended to more credit providers that were at that time licenced by the Office of Fair Trading (OFT). Between March 2010 and April 2014, our approach to complaints about affordable lending was underpinned by the OFT’s irresponsible lending guidance (ILG). From 2014 onwards, the regulation of consumer credit transferred to the FCA, and since that time firms providing credit have had to follow the Consumer Credit sourcebook (CONC) in the FCA Handbook.

As with every case, our answer to a complaint will reflect what’s fair and reasonable in the circumstances. And in considering what’s fair and reasonable, we’ll consider relevant law and regulation, regulators’ rules, guidance and standards, codes of practice, and what we consider to be good industry practice at the time. Our information for businesses on our website goes into more detail about how we look at these types of complaints, but in summary our approach to complaints about affordability continues to be underpinned by these regulations and well-established guidance and good practice. One of these rules is that checks carried out by the business before agreeing to lend must be proportionate.

We think that CONC could potentially provide a useful model for gambling companies in assessing whether a consumer can afford a level of gambling spend. The rest of our submission sets out the way we approach disputes around the affordability of borrowing generally. In particular, we hope that our explanation helps to inform your consideration of the issues raised by questions 18, 19 and 20 in your consultation.

Our insight from complaints about affordability

Section 5.2A.12 of CONC¹ sets out what firms need to consider when assessing consumers' ability to make repayments on any agreement. In particular, firms need to check that consumers can make repayments without having to borrow further, and without the repayments having a significant adverse impact on their financial situation.

Section 5.2A.4 of CONC says that a firm "*must undertake a reasonable assessment of the consumer's creditworthiness before significantly increasing the amount of credit provided under a credit agreement.*" This means that whenever further loans are offered, authorised overdrafts approved or an existing credit limit is increased, a new creditworthiness assessment needs to be carried out.

Section 5.2A.20 of CONC says that the extent and scope of a firm's creditworthiness assessment "*should be proportionate to the individual circumstances of each case.*" This means that the level of checks carried out will be dependent on the amount borrowed by the consumer.

Where we see poor lending decisions, it's often because the lender in question failed to carry out proportionate checks on the consumer before offering the loans they did. In some examples, our case handlers said that if the lender had carried out sufficient checks – such as checking the consumer's bank statement to confirm their income and expenditure – they would have spotted issues (such as persistent gambling) that would have suggested the consumer couldn't afford the loan.

Where consumers repeatedly take out loans with the same provider, we find that if the lender had increased the level of checks they would have found that the consumer wasn't in a position to afford the new repayments.

Of course, any type of affordability check requires disclosure by the consumer, and in their determination to get a loan they can sometimes misstate information, for example their income. But this in itself doesn't take away the onus from the business which should have carried out checks using available information.

Based on what we see, where things go wrong it's because businesses fail:

¹ <https://www.handbook.fca.org.uk/handbook/CONC/5/2A.html>

- to verify the consumer's declared income and expenditure using, for example, bank statements.
- to check the status and repayment history of historical loans the consumer had taken out with them.
- to check bank statements, which would have highlighted potential vulnerabilities and/or financial difficulties related to problem/excessive spending, and continuous borrowing with other lenders.
- to increase the level of affordability checks on the borrower despite the fact that they were borrowing larger amounts of money or increasing their credit limit.

In our role, we can find that we're unable to put things right for a consumer where they haven't been shown a due level of care by a non-financial firm – because we can only look at what the financial business has done to put things right. For example, a consumer may tell us that a gambling merchant allowed them to gamble higher amounts of money that they couldn't afford, but it's not within our remit to look into those complaints.

We hope the insight we've shared in this submission proves useful, and would be happy to discuss our response with the Gambling Commission further if that would be helpful. We have included two case studies illustrative of complaints we've seen in the Annex below.

Annex: Case studies

Case study 1: A lender doesn't carry out proportionate checks for a guarantor loan

Alex asked for our help after complaining that a lender irresponsibly sold him a guarantor loan of £5,000. At the time he took out the loan, Alex also had several debts with other lenders and owed money to friends and family. On top of this, he was also heavily gambling beyond his financial means adding further pressure to his financial situation.

The lender disagreed it had lent irresponsibly to him. It explained that a thorough affordability assessment had been carried out and it had relied on the information Alex provided about his income and expenditure at the time, which included a copy of his most recent payslip. The lender said that Alex's income meant that he was in a position to comfortably repay the loan, which was why it had agreed. Unhappy with the lender's response, Alex asked us to look into things.

What we found

In order to determine whether the loan was affordable, we looked at the level of affordability checks carried out by the lender before offering the loan and also asked Alex for a copy of his credit file and bank statements.

Before offering the loan, the lender had asked for details of Alex's income and expenditure and also obtained a copy of his credit report. Although Alex's income in isolation suggested he would have been able to afford the monthly payments, his credit file showed that he already had several other forms of credit in his name. When we looked more closely, we saw that a number of accounts on his credit file were already in arrears, including a mortgage. Some accounts were also subject to County Court judgments as well, suggesting he was in a lot of financial difficulty at the time. Because of this, we felt that the lender should have carried out further checks to see whether Alex was in a position to repay the loan it offered.

We also looked at Alex's bank statements to see whether this would have helped the lender get a better idea of his financial situation at the time of applying for the loan. At the time, Alex had two bank accounts, one appeared to be for repaying debts to his friends and family, and the other was mainly used for gambling. The statements showed that Alex was spending over £2,000 a month on online gambling sites, including online poker and casinos, which was not sustainable considering his income and other debts.

Overall, we didn't think the lender had carried out sufficient affordability checks and asked them to refund any interest and charges on the loan, plus interest.

Case study 2: A financial firm repeatedly lends to a consumer without carrying out further checks

Karim told us he was unhappy that he was able to take out 17 home credit agreements with the same lender. Karim was a carer for his disabled wife at the time and his only income was his carer's allowance. He added that whenever his loans fell into arrears, his lender told him to take out a top-up loan to help clear the balance, pushing him into further debt.

Karim felt that the fact he kept falling into arrears should have led the lender to stop continuing to offer any more loans. The lender disagreed, saying that Karim completed an income and expenditure form for each application that showed he had sufficient funds available to comfortably make repayments. Because of this, they said that the loans were affordable to him.

What we found

We looked at the application for all 17 loans taken out by Karim with the lender. Although the initial loans were relatively low in value and appeared affordable, we didn't think loans 15-17 should have been approved.

When looking at the repayment history of the loans, we found evidence that Karim struggled with his repayments on some of the loans, with a number of payments either arriving late or not at all. It was clear that a lot of the new loan applications were to help clear the arrears on the previous loans, so Karim was already becoming persistently reliant on them.

Loans 15-17 were still outstanding at the point the complaint came to us and Karim was having to pay off more than one loan with the lender at the same time. We felt the lender should have realised that there was a significant risk that Karim would not be in a position to repay the remaining loans.

Although Karim's income and expenditure form showed that he had some disposable income available to pay back the loans, this would have left him with very little remaining funds meaning it would have been very difficult to repay the loans if any further unforeseen debts came about – something a lender needs to take into account. Because of this, we didn't think that the lender should have carried on lending to him and asked it to refund the final three loans, including all interest and charges that had been applied.