

# GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMN: MARCH 2020

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In the March 2020 column, Thomas Samuels highlights the key considerations for consumer credit lenders over the coming months arising from the COVID-19 pandemic.

James Ross, Ruth Bala, Thomas Samuels and Lee Finch are all specialist consumer credit counsel at Gough Square Chambers. On a regular basis, they will share their views with Practical Law Financial Services subscribers on topical developments or key issues relating to consumer credit.

by *Thomas Samuels, Gough Square Chambers*

## HOW WILL COVID-19 IMPACT THE CONSUMER CREDIT INDUSTRY?

Like most people reading this month's column no doubt, I am writing from my flat where I have set up shop.

COVID-19 has had a seismic and inescapable impact on how we live, which is likely to continue over the coming weeks and months. One of the key concerns is the global economic impact of the outbreak. At the individual level, those issues manifest themselves as day-to-day money worries: an inability to work, earn income and cover the basic living costs. In the months to come, they may well result both in an increased reliance upon credit and, thereafter, difficulty in sustaining repayments.

In light thereof, this column aims to highlight a few of the key considerations for consumer credit lenders over the coming months that arise from the pandemic.

### Specific considerations under CONC 7

Perhaps the most important obligations for lenders to consider at this time are those found in the FCA Handbook in chapter 7 of the Consumer Credit sourcebook (CONC) (Arrears, default and recovery).

CONC 7.2.1R requires firms to "establish and implement clear, effective and appropriate policies and procedures" for dealing with customers in arrears and those reasonably suspected as vulnerable. Although all firms will have such policies and procedures for the normal course of events, the present situation is unprecedented. As such, it would be appropriate for firms to consider stress-testing their policies to ensure that they can continue to be applied "effectively" and "appropriately" for the purposes of CONC 7.2.

In particular, it is likely that far greater number of customers may now be properly categorised as either physically or economically vulnerable. For example, because they or family members have contracted COVID-19, or because they are required to self-isolate through age or the existence of an underlying health condition. For example, a borrower who previously had a steady income in the entertainment or hospitality sector may now constitute a high default risk and should be treated accordingly. That being so, it would be appropriate for firms to review their definition of what constitutes "vulnerability" and any system flags used to help identify such customers.

CONC 7.3 reminds firms of their general obligation under Principle 6 of the FCA's Principles for Businesses to treat customers fairly. Specifically, customers in "arrears or default difficulties" must be treated with "forbearance and due consideration" (CONC 7.3.4R). Given the huge uncertainty that currently surrounds public and private life, a

#### RESOURCE INFORMATION

##### RESOURCE ID

w-024-6562

##### RESOURCE TYPE

Article

##### PUBLISHED DATE

26 March 2020

##### JURISDICTION

United Kingdom



“reasonable time and opportunity to repay” (CONC 7.3.6G) is likely to be a far longer period than might have been the case a few weeks ago. The same is true for the obligation to not pressurise customers into repayment “within an unreasonable short period of time” (CONC 7.3.10(2)R). When considering timescales, firms should be conscious that there are likely to be knock-on effects for many months, even after daily life returns to relative normality.

CONC 7.4.1R requires firms to provide customers or those acting on their behalf “with information on the amount of any arrears and the balance owing”. In present circumstances, given the uncertainty and concern likely to be experienced by many customers, that may mean that firms should proactively contact customers (whether in arrears or not) to inform them of the proposed approach to arrears and collections activity. For example, if a repayment holiday is to become available to all customers as of right, or interest and other charges are to be suspended or waived for a period (as may be appropriate pursuant to CONC 7.7.1G). However, in making such communications, the general requirements of CONC 7.9 as to the content, timing and disclosure of information to third parties, continue to apply.

### FCA and FOS guidance

The FCA is issuing regular guidance and information for firms during the COVID-19 outbreak on a [webpage](#). Firms should obviously keep abreast of such updates and apply them as best as they are able in the circumstances. (For more information on FCA work relating to COVID-19, see [COVID-19: financial services aspects tracker: FCA](#).)

While extensive guidance has been issued for mortgage lenders (perhaps understandably given the potential consequences of non-payment), there is comparatively little available in relation to unsecured borrowing. Generally-speaking, however, the FCA is clear that treating customers fairly now requires increased emphasis on customer support and encouragement to contact firms in the event of any difficulty. Particularly in relation to persistent credit card debt, the FCA has stated that it expects firms to show “greater flexibility”. Further, customers should be given a longer period in which to respond to firms’ communications. The current suggestion is an extension until around 1 October 2020.

In addition, the FCA acknowledges that many firms have now elected to go above and beyond their usual practices to support customers. In doing so, it encourages them to notify it of such action so that it can “consider the impacts and offer support as appropriate”. Thus, Principle 11, which requires firms to “deal with regulators in an open and co-operative way”, is particularly important while things remain liable to such sudden and dramatic change.

The FCA has also issued some limited guidance on other potential impacts for authorised firms. It notes that firms may be experiencing staff shortages and other operational difficulties. Its general view is that firms must do what they can to maintain “operational resilience” by reference to contingency plans and risk-management systems that should already be in place. As a result, it has not formally waived the eight-week requirement for issuing final responses to customer complaints as provided for in the Dispute Resolution: Complaints sourcebook (DISP) by DISP 1.6.2R. Its current advice where firms are unable to meet the deadline, is limited to the suggestion that they “write to the customer explaining why they have not met the deadline”.

In addition, the Financial Ombudsman Service (FOS) has issued limited guidance, on a [webpage](#), dealing with its complaints-handling process and trends emerging from the outbreak.

The FOS guidance states that, at least so far, very few complaints have been made specifically in relation to the pandemic. However, it is monitoring trends as they emerge. In the context of consumer credit, at this early stage it has warned of an increase in “connected lender liability” claims under section 75 of the Consumer Credit Act 1974 (CCA) concerning the mis-selling of travel and medical insurance. In addition, FOS has flagged the FCA’s general guidance that there is an increased risk of fraud and scams (for example in relation to insurance, pensions transfers and the promise of high-return investments).

### What should lenders do?

The above hopefully provides some illustration of how COVID-19 may impact regulated consumer credit firms over the weeks and months to come. Particular areas to consider include:

- Having adequate systems in place to properly manage with day-to-day operational difficulties caused by illness and increased remote-working.
- Considering amending policies to address the likely increase in defaulting accounts and vulnerable customers.
- Considering potential future liabilities arising from the crisis.

As is generally true in the current climate, it is impossible to provide absolute answers. Perhaps the best advice is for firms to remember their overriding obligations to “treat customers fairly” and to communicate in a way which is “fair, clear and not misleading”. Thus, for the time being, flexibility and an emphasis on clear and open communication with the regulator and customers are crucial.

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### GOUGH SQUARE CHAMBERS' CONSUMER CREDIT COLUMNS

For previous consumer credit columns written by barristers at Gough Square Chambers, see [Practice note, Gough Square Chambers' consumer credit column](#).