



**Submission to Ministry of Justice Call for Evidence on the Review of the
Balances of Competences between the United Kingdom and the European
Union**

1 July 2014

For any queries please contact:

Emma Thomas
Head of Government and Public Affairs
Experian
Riverleen House
Electric Avenue
Nottingham NG80 1RH
Tel: 0115 492 2505
Mobile: 07814 290969
Email emma.thomas@experian.com

Introduction

1. Experian is a leading global information services company, providing data and analytical tools to clients in more than 80 countries. The company helps businesses to manage credit risk, prevent fraud, and automate decision making. Experian also helps individuals to check their credit report and credit score, and protect against identity theft.
2. Experian plc is listed on the London Stock Exchange (EXPN) and is a constituent of the FTSE 100 index. Total revenue for the year ended 31 March 2011 was US\$4,840 million. Experian employs approximately 16,000 people in 41 countries and has its corporate headquarters in Dublin, Ireland, with operational headquarters in Nottingham, UK; California, US; and São Paulo, Brazil.

Credit Reference and Data Protection

3. A comprehensive and well-functioning data protection system in the UK is essential for the functioning of the UK economy. Credit reference plays a vital role in ensuring that lenders are able to make comprehensive lending decisions, to put in place processes to guard against over-indebtedness and consumers can achieve suitable products and credit.
4. In addition the credit reference sector provides vital identification and fraud prevention services, which assist in beneficial impacts upon the wider UK economy.
5. Recent legislation and policy drivers both at EU and UK level has demonstrated the core role that credit reference can play in providing information to assist in fulfilling existing regulatory objectives, a key factor of which is the provision of information to enable adequate credit worthiness assessment.

Evidence box 1:

Examples of recent legislation which demonstrate the core role that credit reference can play in providing information to assist in fulfilling existing regulatory objectives:

- i. The EU Consumer Credit Directive and its UK implementing instrument through the Consumer Credit Act which requires a clear evaluation of an individual's ability to maintain and afford credit, and ensure product suitability
- ii. The EU Directive on Credit Agreements relating to Residential Property and its

forthcoming UK implementing instrument which will require an evaluation of a consumers' creditworthiness and assessment of mortgage suitability to avoid over indebtedness

Evidence box 2:

Examples of recent policy drivers which demonstrate the core role that credit reference can play in providing information that assists in fulfilling existing policy objectives:

- i. EU policy driver into supporting SME businesses and the beneficial role credit scoring can play to support the flow of responsible credit
- ii. UK policy review of the payday lending industry and the role CRAs are able to offer in the provision of a real time credit bureau

Evidence box 3:

Example of the way the EU's competence and the way it has used it (principally the Data Protection Directive) has been advantageous to individuals, business, the public sector or any other groups in the UK:

One useful benefit of the current framework (in having a Directive that sets out the legal rules required for Data Protection, as opposed to a Regulation) is that it offers a degree of flexibility to Member State Governments, to allow for the adoption of new EU rules in the best way that aligns with existing domestic legislation and with particular existing industry requirements. We consider that there have been benefits from the existing Data Protection legislation being a Directive. Below is an example from the credit industry:

Subject Access requirements: The EU Data Protection Directive makes it a requirement for every Member State to guarantee to their data subjects the right to obtain from data controllers (across all organisations and business industries, irrespective of any differing industry practices or any additional industry rules or regulations) information about the data that is relating to that data subject which is being processed (**Article 12 Right of access**).

This EU-set legal right is not particular to the credit reference industry, but it placed an

obligation of data access on the UK credit reference industry that was in addition to a national right which UK consumers had already received the benefit of for a number of years under UK consumer credit legislation – (i.e. the right and ability for UK consumers under the UK 1974 Consumer Credit Act to obtain a copy of their credit file). Whilst in some Member States the EU Data Protection rules may have presented the first opportunity for EU citizens to have a legal right of access to their data, this was not the case in the UK where national consumer credit legislation had, for a number of years, already benefited UK citizens in having a legal right of access to their consumer credit file.

We consider that a benefit of the Data Protection Directive (“**DPD**”) has been that it has allowed UK Government to give clarity to the credit reference industry how to apply this EU legal right of data access. It could have led to confusion over how the UK rule ought to have been applied in the context of the new EU right (e.g. could this have presented a new burden on UK consumers to have to clarify for the first time whether they are invoking their UK right or their EU right? Could the EU right have led to confusion for consumers who thought they were getting their credit report, but instead asked for all their data, having to pick through all information held by a CRA to understand that which is included in their credit file?). Instead, by virtue of the DPD being a Directive, the UK Government was able to apply the Directive in national implementing data protection law, to clarify how these two rights work together (s9(3) of the Data Protection Act. This section is specific to UK national Data Protection legislation and not wording found in the DPD). This allows UK consumers clarity on their access rights and choice of access right where the data controller is a credit reference agency. To the best of Experian’s knowledge, whilst the UK is not alone in implementing additional domestic requirements into its national data protection legislation¹, UK consumers are amongst the only EU consumers who are able to take advantage of the right to have a choice of legal rights, having both a full data access right, and the choice to specifically request only their credit report from UK Credit Reference Agencies.

The EU DPD has given UK consumers a benefit in having the option of this choice, the advantage

¹ The UK is not alone in implementing additional national requirements into domestic data protection law. E.g. in Germany there are specific “credit rating” provisions, in Spain there are specific legal provisions that permit processing of data that is shared with creditors regarding payment or non-payment of monetary debts and in Denmark there is specific provision regarding Credit Information services.

of being able to specifically only request their credit file (and to allow for CRAs to consider this the scope of their request if not clear) and allows UK consumers to pay less for this right in paying a fee the UK Government is able to set at its discretion. This is less than the minimum required under EU law and paying a fee also has benefits, for example in allowing an additional verification check to be possible on the person requesting their credit file). This form of national discretion has been possible under the DPD as a Directive allows Member States the ability to choose their form and methods of implementation. It would not have been possible under a Regulation which has direct applicability in all Member States.

6. Experian, along with other UK credit reference agencies, process data which has been provided from a variety of sources, including credit agreements to ensure that a consumer is able to attain a comprehensive financial profile, which is accessed when the consumer seeks to attain products and services.
7. As Experian handle and process data on behalf of customers, it is essential to us that the legislative framework in the UK provides for a comprehensive and secure framework for data, which protects the privacy of customers, whilst permitting lenders and others to fulfil their regulatory obligations.
8. Experian welcomes the opportunity to be able to provide feedback relating to the call for evidence.

Questions

1. ***What evidence is there that the EU's competence and the way it has used it (principally the Data Protection Directive) has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?***

The UK Data Protection Act 1998, which implements the EU Data Protection Directive, has enabled a comprehensive and innovative approach to the use of data within the United Kingdom. The flexibility for the UK Government to establish and modify Data Protection law to suit the UK economy has promoted a strong growth in online and digital industries and services, which has undoubtedly been beneficial to consumers and the public sector.

It can appear that at times the EU has not approached policy making in the area of data protection in a balanced and informed approach, this has led to many misconceptions and ambiguity in draft forthcoming Regulation. Engagement with consumers and businesses in a more sustained and considered manner may have led to the generation of new policy proposals which are more practicable and considered in approach of the variety of data uses, existing regulatory obligations and consumer detriment challenges.

2. ***What evidence is there that the EU's competence and the way it has used it (principally the Data Protection Directive) strikes the right balance between individuals' data protection rights and the pursuit of economic growth?***

The Data Protection Directive is an excellent demonstration of where the EU's competence has attained a balance between individuals' data protection rights and the pursuit of growth. The nature of the Directive encompasses the opportunity for stakeholders (both consumer and industry) to positively engage with both the Government and Regulator, to ensure a workable regime best suited to the UK. To give two examples:

- i. By the UK regime permitting activities such as credit scoring in a controlled and responsible manner within the legal framework relating to automated profiling, consumers have benefitted from a regime which helps prevent over- indebtedness and financial exclusion.
- ii. The unique access to credit data which UK consumers have compared to general access rights provides a second example of where there is a positive impact of having the ability to have a flexible regime. This is described in more detail in Evidence Box 3 above.

3. *What evidence is there that the EU's competence and the way it has used it (principally the Data Protection Directive) is meeting the challenges posed by the increasing international flow of data, technological developments and the growth of online commerce and social networks?*

Since the implementation of the Data Protection Directive, technology has evolved and the use of the internet by consumers for a variety of services has developed beyond recognition. As such there is a case, which Experian supports, for updating the data protection framework to one which is more reflective of the current environment. In updating this framework the EU's competence should seek to ensure not only an update of the framework as it currently stands, to one which is able to cope with technological change and is sufficiently future-proofed, but in addition seek to ensure an innovative and balanced environment.

Most recently the EU competence of updating the data protection legislative framework has manifested in the draft proposals for a European Data Protection Regulation. Experian feels that this proposal did not sufficiently encompass the challenges, future development and practicalities which a data-led economy (which has evolved rapidly and which continues to evolve) requires.

4. *What evidence is there that proposals for a new EU Data Protection Regulation will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

Experian is concerned that the new draft proposals for a European Data Protection Regulation will lead in many areas to a disadvantageous outcome for both consumers and business in the UK. By

seeking to attain a 'one size fits all' approach, the European Commission and subsequent amendments by the European Parliament, have resulted in a proposal which fails to capture the dynamic needs or future-proofing which would be advantageous to the UK in such an update.

There exist a number of core areas in the draft EU Data Protection Regulation which may cause significant negative impacts for consumers and businesses in relation to the processing of credit data, if implemented in the final form at national level. These include provisions such as the restriction of use the legitimate interest as a basis for processing, the right to erasure and profiling restrictions. Such provisions may impact the ability of a consumer to attain suitable credit which may lead to over-indebtedness and could lead to increases in fraud and/or financial exclusion. In addition, businesses may find monitoring of a consumer's financial situation more complex, have complications with adhering to regulatory obligations and issues with verification of individuals' identities and personal details.

Rather than permitting and empowering Member State Governments to take a pragmatic approach to Data Protection law as we currently see in the UK, the Regulation seeks to bind all industries into one set of rules which simply cannot, by their nature, encompass the regulatory needs of each sector in the UK and EU economy.

The approach which is being taken by the EU in such a revision may indicate there may be a disadvantage to the UK as a result of the nature of the blanket approach in the legislation of the new framework. Only by setting out high level principles and enabling Member State governments to have a level of flexibility, will a well-formed and future-proofed proposal be put into practice.

5. *What evidence is there that the right to access documents of the EU institutions has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

During the procedure of drafting and amending legislation at EU level, a number of documents at Council level remain classified as 'LIMITE' or for limited circulation. Whilst it can be appreciated that some discussions may be sensitive in nature because of national interests, we would encourage an approach of transparency with such documentation. Only by understanding the legislative process,

and positioning of certain countries, can there be an increase in the level of transparency through the process.

6. *How would UK citizens' ability to access official information benefit from more or less EU action?*

No comment

7. *How could action, in respect of information rights, be taken differently at national, regional or international level and what would be the advantages and disadvantages to the UK?*

No comment

8. *Is there any evidence of information rights being used indirectly to expand the competence of the EU? If so, is this advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

No comment

9. *What is the impact on EU competence of creating an entirely new legal base for making data protection legislation that is not expressly linked to the EU's single market objectives?*

Under the Lisbon Treaty the power to create legislation under the Article 16(2) is unclear as to whether it encompasses private sector and individuals' data, which would therefore make the basis obscure in nature. In addition the Article does not clarify that the basis of internal market provisions could be used to regulate private sector data as a part of this basis. Therefore this confuses the competence base from which the creation of new policy originates.

10. *What future challenges or opportunities in respect of Information Rights might be relevant at a UK, EU or international level; for example cloud computing?*

Due to the evolving nature of the sector it is important to have a balanced viewpoint on information rights provision in the area of Data Protection. As a result of the evolution of information services and new ways of using such services, there needs to be a clear understanding and subsequent 'future proofing' of any provisions which relate to information rights.

There are a number of forthcoming challenges, which could in addition provide opportunities for the UK in the coming period. Initiatives such as midata and Big Data may challenge the traditional viewpoint on information rights in the legislative framework and, as such, require the UK Government to take a viewpoint on both the consumer and industry benefits of such initiatives, whilst ensuring that existing regulatory obligations can be met. The Data Retention Directive at EU level will impact the existing regime in the UK and amend the rights which data subjects have over the use and storage of their information. In addition we see the development of new products which use technology such as geo-location data and device recognition technology. It will be of importance to ensure that any future framework is sufficiently adaptable to be able to encompass such developments.

Currently under the draft EU Data Protection Regulation there is a lack of clarity concerning the definitions of information rights provisions and how these relate to different business sectors. An example may be that the information rights in the financial services or credit sector differ in nature to similar provisions in the social networking sphere. This would be an assumption which would be broadly in alignment with data subjects' expectations.

11. Is there any other evidence in the field of EU Information Rights that is relevant to this review?

The UK Government would be advised to make consideration of forthcoming EU legislative initiatives which may have an impact upon UK government and business policy. An example of which could be the Big Data initiative at EU level, where consideration of the wider economic benefits and economic opportunity to promote an innovative and information led society would positively impact the UK.