ME/6743/18 – EXPERIAN/CLEARSCORE

RESPONSE TO THE NOTICE OF POSSIBLE REMEDIES

1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1 This paper constitutes the response of Experian plc (***Experian***) to the CMA's notice of possible remedies published on 28 November 2018 (the ***Remedies Notice***) in relation to Experian's proposed acquisition, through its subsidiary Experian Limited, of Credit Laser Holdings Limited (***ClearScore***)[1] (the ***Merger***).

1.2 Experian welcomes the fact that the CMA's thinking in the provisional findings (the ***PFs***), has evolved from the Annotated Issues Statement, in particular as regards the impact of the Merger on the lender side of the market and the likelihood and timeliness of entry. However, Experian is disappointed with, and concerned by, a number of grave errors of fact and assessment in the CMA's thinking that have only emerged at this late stage of the process.

1.3 Experian shares the CMA's view that the "*markets in which the Parties operate – and markets for consumer financial products more generally – are dynamic*" (paragraph 13.55 of the PFs). Experian firmly believes that the CMA is wrong to dismiss the competitive consequences of Credit Karma's acquisition of Noddle and Moneysupermarket's (***MSM***) entry into the credit checking tools (***CCT***) "market". Both of these firms have entered and innovated in the relevant markets since the publication of the PFs. This demonstrates how dynamic the market is, how easy entry and expansion are, and ultimately how implausible the CMA's speculative innovation theory of harm is. In particular:

(a) The threat posed by MSM to the Parties is clear and obvious. MSM is the largest credit comparison platform (***CCP***) by a significant distance, around twice as large as the merged entity, and with many times the user base, marketing budget and revenue. The PFs acknowledge MSM's importance and the fact that it is a close competitor to the Parties in the CCP market, but fail to consider or measure how much the Parties will be constrained by MSM. This constraint will only increase in the near future, because since the publication of the PFs MSM has launched an app that provides free credit scores to consumers, which can only reinforce MSM's market position.

(b) Equally, the threat posed by Credit Karma, one of the global leaders in financial product lead generation (***FPLG***), acquiring a player of the size of Noddle cannot be dismissed on the basis of statements around Noddle's past track record. The CMA should be aware

[1] Experian and ClearScore are together referred to as the ***Parties***.

that since the publication of the PFs, Noddle has introduced weekly updates of its credit score for customers – i.e. an innovation that has improved the quality of its CCT for users.

(c) The rapid expansion of TotallyMoney, which has acquired 10-20% of new users in the first six months of the year despite only entering the market 9 to 12 months ago, further illustrates the dynamism of the market and the ability of new entrants to grow quickly.

(d) Consistent with the CMA's own finding of dynamism and as evidence of the significance of these entry/expansion events, Experian's economic advisors have estimated that, [✂], the share of new CCT user acquisitions of [✂].

1.4 The CMA has focused on how likely it is that these developments will be successful, but has failed to assess the implications of these facts on the Parties incentives to compete, which is the correct legal test. It is simply not credible for the CMA to claim that there are any barriers to the expansion of those players that would prevent them from acting as a very strong constraint on the Parties and incentivising them to continue innovating.

1.5 Experian notes that since the Annotated Issues Statement, and in the absence of evidence of market power in the traditional sense, the CMA has repositioned its concerns about the Merger around the Parties' future **incentives to innovate** in the CCP and CCT "markets". However, the CMA's analysis of this theory of harm is inadequate for two main reasons:

(a) the PFs fail to advance a framework for the assessment of the incentives to innovate, and in particular to determine whether any loss of incentive resulting from the Merger is sufficient to result in an SLC, which amounts to an error of law; and

(b) the PFs fail to carry out any empirical analysis of the relevant parameters which could sway those incentives, which in turn leads to material errors of fact and assessment. The diversion between ClearScore and Credit Expert has not been established; if that diversion existed today we would expect to see a continuing decline in CreditExpert user numbers, which is not the case.

1.6 The PFs assume that there could be a negative impact on innovation simply on the basis of the fact that statements made in historic Experian internal documents suggest concern about ClearScore's launch of free credit scores. This approach is clearly inadequate:

(a) *First,* those documents predate any indication of the entry of MSM and the acquisition of Noodle by Credit Karma and, therefore, are of no probative relevance in assessing the Parties' incentives in response to those events.

(b) *Second*, the Parties' future incentives are clearly articulated in their [✂] projections and in the fact that increasing innovation is one of the cornerstones of the transaction rationale.

(c) *Third*, there can be no presumption that the Merger is likely to lead to a reduction in the incentives to innovate. Indeed, it is just as likely that the Merger will increase both the ability and the incentive to innovate – i.e. by reducing the cost of innovation and expanding the user base to which innovations can be taken.

1.7 The reasoning is also manifestly deficient in relation to closeness of competition between the Parties and the competitive constraint exerted by competitors. The number of times one Party is mentioned in internal documents of the other Party is not a substitute for a proper and detailed analysis of the Parties' competitors.

1.8 The only piece of empirical evidence the CMA points to – the homing analysis – clearly shows that MSM is, at least, as close a competitor than either Party is to each other, if not more. It simply cannot be true that MSM – the largest CCP in the market by a significant margin – will not act as a constraint over the Parties, thus incentivising them to continue to innovate in CCP and CCT in the future.

1.9 The evidence that **ongoing and future entry and expansion** is sufficient to constrain the Parties is equally strong. After concluding that entry and expansion in the CCT market is timely and not improbable, the PFs contend that such entry would not be likely or sufficient to constrain the Parties, apparently based on the number of users which a competitor would supposedly need to be a significant free CCT player.

1.10 This conclusion, however, is incorrect as a matter of law and as a matter of fact. The question that the PFs should be answering is whether the threat of entry from all potential entrants in aggregate is sufficiently compelling to lead the Parties to continue to innovate, this being the identified SLC. In this context, the CMA should have concluded that entry is likely and sufficient had it given proper weight to recent entry and expansion events observed in the market (i.e., MSM, Noddle/Credit Karma and TotallyMoney) and considered the evidence on the ease of entry and expansion from neighbouring markets, which is the most likely scenario of entry, namely from CCPs with high user numbers, recognisable brands and much larger marketing budgets.

1.11 A balanced assessment of the evidence can only lead to the conclusion that the threat created by those entry and expansion events taken together is sufficient to ensure that the Parties will continue innovating in the future. The PFs reach a different conclusion by incorrectly assessing each entry/expansion event separately and wrongly discounting contemporaneous documents, public statements and observable facts in favour of competitors' opinions, which have not been put to Experian adequately to allow it properly to respond. On the balance of probabilities, the extent of entry, expansion and competitor innovation is evidently sufficient to defeat an SLC.

1.12 Furthermore, the CMA has failed to take into due account the competitive **constraint imposed by lenders** stemming from the fact that lenders have sufficient alternatives in the CCP channel (with or without CCTs), as acknowledged in the PFs. Lenders' main objective is to ensure that CCPs generate the highest possible volume of successful leads. This aim drives the negotiations with all CCPs and ensures that CCPs are constantly incentivised to increase the number of users. To achieve this growth the Parties simply must continue to invest in

innovation to attract new users. The CMA hypothesises that it might be possible for the Parties to innovate a little less with no damage to user take-up. This theory has no basis in the facts and is directly contradicted by the evidence quoted in the PFs confirming that monetising users is both critical and a challenge, and that the volume of leads generated by CCPs is key for lenders. Any reduction of innovation is likely to negatively impact the Parties' ability to monetise those users.

1.13 Finally, Experian is surprised with the **general paucity of evidence** used to support wide-reaching conclusions about the Parties' incentives. The evidence gaps are as glaring as they are numerous and the evidence presented in the PFs falls well short of the 'balance of probabilities' standard the CMA must adhere to in a Phase 2 review. Despite extensive evidence provided by the Parties, the Parties' internal documents continue to be interpreted in a partial and distorted way, and that interpretation is frequently accorded greater weight than the actual observable facts which are often contradictory.

1.14 Experian will provide in the remainder of this response:

(a) an explanation as to why a prohibition of the Merger would be a wholly disproportionate and unreasonable remedy to address the SLC provisionally identified by the CMA (Section 2);

(b) on a without prejudice basis, the specifications of a proportionate remedy proposal that Experian would be prepared to consider to offer (the ***Remedy Proposal***) to address the identified SLC (Section 3);

(c) an explanation as to why behavioural remedies would be appropriate in this case (if any remedy were needed) and why the Remedy Proposal would be an effective, proportionate and reasonable remedy (Section 4);

(d) concluding remarks explaining that the Remedy Proposal is the most appropriate form of remedial action if the CMA could justify a finding of harm (Section 5); and

(e) a detailed outline of the Remedy Proposal (Annex I).

2. Remedies must be reasonable and proportionate to the adverse effects identified

The CMA's provisional SLC

2.1 The CMA has provisionally concluded that the relevant merger situation may be expected to result in an SLC in the supply of CCPs for loans and credit cards in the UK, and in the supply of CCTs in the UK. The CMA has provisionally found that:

(a) *"the Merger is likely to lead to a substantial reduction in the rate of product development and improvements in the Parties' user-facing aspects of their CCPs, in particular their free CCTs; and/or*

(b) *the Merger is likely to lead to a substantial reduction in the Parties' incentives to reduce prices or improve the quality in relation to Experian's paid-for CCT."*[2]

Prohibition of the Merger would be disproportionate and unreasonable as a remedy given the nature of the SLC identified

2.2 As will be explained in the Parties' response to the PFs, the CMA should conclude that no SLC is likely to arise as a result of the Merger and, consequently, that a remedy is unwarranted. However, even if the CMA considered that it could reach an SLC finding in connection with reduced incentives in product development and improvement in free CCTs and/or in connection with the price or quality of Experian's paid-for product, a prohibition remedy would be wholly unreasonable and disproportionate on the specific facts and circumstances of the case.

2.3 The CMA has a discretionary power under the Enterprise Act 2002 (the ***Act***) to determine whether it should take action to remedy an SLC and, if so, what remedy is appropriate. It follows that Parliament recognised that there could be cases in which, in the context of a particular conclusion on harm, and in a particular context, it was not appropriate or justifiable to take intrusive action. In exercising its discretion under the Act, the CMA has a duty to act in a manner that is reasonable and proportionate as a matter of public law.

2.4 The Remedies Guidelines also make clear that the fundamental consideration when assessing potential remedies is that they must be directly related to the adverse effects identified and provide a solution to them. Any debate on the appropriate nature of a remedy must necessarily be framed by reference to this consideration.

2.5 The dynamism and fast-moving pace of the FPLG market is particularly relevant in this case. The SLC provisionally identified relates to the rate of product development and improvement of the Parties' free and paid-for CCTs in response to competitive pressures. In the PFs, the CMA expressly "*acknowledge[s] that the wider financial services industry is dynamic and undergoing a considerable amount of change in terms of regulatory and technological developments and in terms of entry and expansion".*[3] Even during the relatively short duration of its Phase 2 investigation the CMA "*became aware of the entry and expansion of third parties, including Credit Karma's agreement to acquire Noddle".*[4]

---

[2] Remedies Notice, paragraph 8 (emphasis added). Throughout this document, underlining in quotations connotes emphasis added.

[3] PFs, Executive Summary, paragraph 13.

[4] PFs, Executive Summary, paragraph 12.

2.6 Experian's economic advisers have replicated the CMA's growth forecast analysis (set out at paragraph 10.129 of the PFs). The CMA estimated that the Parties' combined total share of free CCT users will be 50-60% by the end of 2021, whilst Noddle and MSM were forecast to hold [✂] and [✂], respectively. Whilst the CMA's methodology is somewhat unclear, we have used the CMA's assumptions to replicate the estimates and also forecasted the Parties' share of new CCT user acquisitions over the same time period. The analysis finds that [✂]. This metric is far more relevant than the share of the total user base used by the CMA, as it more directly shows how competition will play out in the near future by revealing how many users each player will be able to attract and divert from its competitors.

2.7 In the context of this rapidly evolving, dynamic market, there is no logical explanation or justification for the CMA's view that prohibition would be the only appropriate remedy in this case. As is explained further below, it is evident that the CMA's proposed remedy falls far short of the standards of reasonableness and proportionality which the CMA must satisfy as a matter of public law, and in accordance with its own Remedies Guidelines.[5]

The CMA has discretion to determine whether any action should be taken to remedy an SLC

2.8 The CMA has a statutory discretionary power to determine whether it should take any action to remedy an SLC or any adverse effects resulting from it and, if so, what remedy is required:

(a) Section 36(2)(a) of the Act states that the CMA "*shall […] decide […] whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition"*.

(b) Section 41(2) states that the CMA *"shall take such action […] as it considers to be reasonable and practicable — (a) to remedy, mitigate or prevent the substantial lessening of competition concerned; and (b) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition"*.

(c) Section 36(2)(c) of the Act states that the CMA *"shall […] decide […] in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented"*.

2.9 In making such a determination in respect of anticipated mergers, section 36(3) of the Act provides a mandatory relevancy to which the CMA is to have regard: the CMA shall *"have regard to the need to achieve as comprehensive a solution as is reasonable and practicable*

[5] Merger Remedies: Competition Commission Guidelines, November 2008, as adopted by the CMA Board (the ***Remedies Guidelines***) and as revised on 13 December 2018. Throughout this document paragraph references refer to the November 2008 version.

to the substantial lessening of competition and any adverse effects resulting from it". There is no statutory duty to achieve this need, but rather a statutory duty to have regard to it (i.e. to take it into account).

2.10 The statutory relevancy is itself qualified, to reflect the discretion and judgment which the CMA has: the CMA shall *"have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it"*.

2.11 Parliament had specifically in mind that there would be cases in which the CMA could and would, in an appropriate case, need to conclude that the nature of an SLC which it thought it had identified did not nevertheless call for action. It also had in mind that the CMA could properly conclude that action, including comprehensive action, would not be reasonable in all the circumstances. This is also confirmed in the Remedies Guidelines.[6]

2.12 The CMA therefore needs to ask itself whether prohibition (or indeed any remedy) is truly justifiable in light of the supposed harm. This is an 'in the round' assessment which calls for re-evaluation of, amongst other factors, the materiality of the harm; its nature and scale viewed in an informed overall context; any countervailing considerations pointing the other way; the strength of the thesis on which the supposed harm is based; the appropriateness of exercising the discretionary power to insist on action; and the nature, degree and implications of the action being envisaged.

2.13 In particular, it is noted that in this case:

(a) *First,* the PFs accept the Parties' submissions on a number of important countervailing factors, not least the finding that fact that lenders have sufficient alternatives in the CCP channel (with or without CCTs). Lenders' main objective is to ensure that CCPs generate the highest possible volume of successful leads. This aim ensures that CCPs are constantly incentivised to increase the number of users, and to achieve this growth the Parties simply must continue to invest in innovation to attract new users on the consumer-facing side of the market.

(b) *Second,* the CMA has not produced any empirical evidence to support its innovation theory of harm. The CMA has failed to carry out a cost/benefit analysis or any other analysis of the Parties' incentives to innovate post-Merger. Moreover, there is no suggestion within the evidence relied on by the CMA, i.e. the Parties' internal documents, of any planned post-Merger reduction of any specific

[6] Remedies Guidelines, paragraph 1.13.

innovation pipeline plans or projects, nor of any intention to reduce Experian's overall investment in innovation.[7] To the contrary, Experian's post-Merger commercial strategy is based [✂]. The commitment to this target is evident from the fact that Experian has already planned to invest [✂] in innovation [✂] and the [✂]. The strength of the CMA's thesis on which the supposed harm is based is therefore entirely speculative.

(c) *Third*, the nature of the industry, viewed in its overall context, dictates that any reduction of innovation would be short-lived. Contrary to other merger cases in which innovation concerns have been identified (e.g. *Dow/DuPont*[8]), the FPLG market is not characterised by heavy and expensive R&D investment, other barriers to entry in innovation, innovation to replace (rather than improve) the products, or long pipeline periods required to bring innovation to the market. This is most obvious from the fact that ClearScore itself has only been active in the market since 2016; a very brief period compared to the average time it takes for a molecule or active ingredient to go through all three phases of clinical trials in, say, the pharmaceuticals industry (which can take up to 15 years).

(d) *Fourth*, the PFs conclude that entry and expansion in the CCT market is timely and not improbable. It must therefore be the case that any innovation slowdown in the user-facing aspects of the Parties' CCPs, including their free CCTs, and any hypothetical harm arising from it, would be short-lived. A number of incumbent players are already engaging with CCTs and these players, and other new entrants, are standing in the wings. This is further highlighted by the growth forecast analysis undertaken by Experian's economic advisors, based on the CMA's own model, which estimates that the share of new CCT user acquisitions of each of [✂].

(e) *Fifth,* the materiality of any alleged innovation harm has not been quantified by the CMA at all. Economic theory does not support a presumption that a horizontal merger will automatically lead to reduced innovation incentives. In fact, innovation could well become more attractive for the Parties post-Merger. For example, the costs of innovating may be lower if the merged firm is putting together complementary assets (e.g. better data from Experian and quicker management processes from ClearScore, as the Parties have consistently submitted), which would enable it to innovate across a greater range of projects overall. This is indeed one of the benefits of the Merger, as the Parties have submitted to the CMA on numerous occasions (and the contrary statements in the PFs

---

[7] This in contrast to Commission Decision, COMP M.7932 *Dow/DuPont*, of 27 March 2017. In this case, the Commission's innovation theory of harm was based on direct evidence the Commission found in the merging parties' internal documents that quantified the cost synergies that would be generated from a reduction of R&D spend, including in (i) agriculture, (ii) material science and (iii) speciality products.

[8] Commission Decision, COMP M.7932 *Dow/DuPont*, of 27 March 2017.

are incorrect). The PFs make no reference to any empirical evidence to support a view that there would be material (or, indeed, any) harm as a result of any changed innovation incentives post-Merger.

2.14 In light of the above, it follows that a prohibition remedy would be unreasonable and disproportionate to address any short-term innovation concern the CMA may have identified, fails to strike a fair balance, and is based on faulty, incomplete analysis.

The CMA has a duty to consider, in detail, any alternative remedy proposal

2.15 Given the wide-reaching and intrusive nature of the proposed prohibition remedy, the CMA, in accordance with *Tesco v Commission,* should have conducted a "*more detailed or deeper"*[9] investigation of the relevant factor(s) in question. As will be explained in the response to the PFs, such an investigation has evidently not been done in the context of whether an SLC should have been identified in the first place: the CMA has failed to conduct a sufficient inquiry and has committed a range of material errors of assessment in this regard. In particular, the CMA has not undertaken any cost/benefit analysis to seek to quantify any alleged negative impact on innovation incentives or a reduced pressure to innovate post-Merger.

2.16 Experian is now concerned that such a *"more detailed or deeper"* investigation will also not be done in the context of any remedy discussions, where the Parties observe the CMA's views that:

(a) *"the only effective remedy is prohibition";*[10]

(b) *"no other structural or behavioural remedy is likely to be an effective remedy";*

(c) *"[p]roduct development and innovation in CCTs and CCPs is central to the whole of ClearScore's business (...) innovation in product development [is] therefore not something that can be separately safeguarded ...";* and

(d) *"[a]s the exact nature of product development and innovation is not predictable it does not appear possible to design a behavioural remedy that would effectively address all potential product developments and innovations by the Parties over the lifetime of the SLC".*[11]

---

[9] *Tesco plc v Competition Commission* [2009] CAT 6, paragraph 139.

[10] Remedies Notice, paragraph 12.

[11] Remedies Notice, paragraph 13.

2.17 These statements would appear to indicate that the CMA's 'mind is already made up'. They are highly prejudicial to the outcome of any remedies discussions, including market testing of the Remedy Proposal. The CMA is obliged to keep an open mind and ensure that appearances support that position; not to fetter its discretion; and to take into account all relevant considerations. The Parties are particularly troubled by the CMA's supposition that innovation concerns by their nature cannot be adequately addressed through a comprehensive set of behavioural remedies.[12]

Conclusion

2.18 In light of the above, prohibition would be a wholly disproportionate remedy to the SLC provisionally identified. As will be clear from Sections 3 and 4 below, the position is all the stronger when it is seen that the Remedy Proposal is an effective, reasonable and proportionate solution. There is therefore an alternative proposal for the CMA to consider and consult on publicly, if the CMA were to find that it can justify the conclusion that there truly is a significant concern which calls for action.

3. Description of the Remedy Proposal

3.1 The Remedy Proposal includes the following key features:

(a) an undertaking not to reduce the level and quality of any features currently offered as part of the Experian and ClearScore free CCTs;

(b) an undertaking that the Experian and ClearScore free CCTs, including all of their current and future features, will remain available free of charge to UK consumers;

(c) an undertaking to implement each of the product improvements to Experian's free CCT and CreditExpert as set out in the Experian FY19 innovation roadmap at, at least, the rate of product development already planned for by Experian;

(d) an undertaking to implement each of the product improvements to ClearScore's free CCT as currently planned for by ClearScore (and to prepare a ClearScore FY19 innovation roadmap setting out those improvements) at, at least, the rate of product development already planned for by ClearScore;

[12] Remedies Notice, paragraph 13 (c).

(e) an undertaking not to increase the price of CreditExpert for the duration of the undertakings, whilst improving the overall quality of the offering by delivering on the improvements and innovations referred to in point (c) above;

(f) an undertaking that Experian will maintain a guaranteed overall level of funding for product improvement and technological innovation for the Experian and ClearScore free CCTs which is *at least equivalent* to the current combined levels of investment, which was [✂] of Experian Consumer Services' and ClearScore's combined revenues for the most recent financial year;

(g) an undertaking to maintain a guaranteed overall level of variable marketing spend for the Experian and ClearScore free CCTs at a level which is *at least equivalent* to the current combined levels of variable marketing spend, which was [✂] of Experian Consumer Services' and ClearScore's combined revenues for the most recent financial year;

(h) an undertaking to maintain sufficient resources dedicated to product improvement and innovation to ensure that resourcing is adjusted as appropriate throughout the duration of the Remedy Proposal to guarantee the effective delivery of each of the undertakings;

(i) an undertaking to change the long-term management incentive scheme of the Experian Consumer Services management team to ensure a focus on the innovation and growth of the Experian and ClearScore free CCTs, by removing any incentives relating specifically to the performance of Experian's subscription business;

(j) an undertaking to appoint a separate individual to carry out the function of managing director of CreditExpert and to implement an incentive scheme that ensures that his or her commercial incentives are solely aligned with the day-to-day responsibilities for maintaining the performance of that division (to remove any CMA concern regarding any potential conflict of interest in respect of CreditExpert and the free CCT business);

(k) the establishment of additional internal governance structures, monitoring and reporting, including the establishment of a new Board Committee, the Innovation Undertakings Committee, which will report directly to the board of Experian Limited (the ***Board***) and will be constitutionally entrusted with oversight and monitoring of the compliance of the undertakings (as set out in its Terms of Reference). Experian will designate a member of the Innovation Undertakings Committee who will have general responsibility for ensuring compliance with these undertakings and for preparing quarterly reports for the Board and the Monitoring Trustee; and

(l) additional independent, external monitoring and reporting by an independent third-party Monitoring Trustee who will prepare and submit detailed compliance reports to the CMA on a quarterly basis (or such other frequency as agreed with the CMA).

3.2 Experian submits that the Remedy Proposal addresses the CMA's innovation concerns comprehensively and effectively. An initial draft of the undertakings to give effect to the Remedy Proposal is provided at **Annex I**.

3.3 Section 4 below explains further how the Remedy Proposal solves the concerns identified in the PFs but, in short, the Remedy Proposal guarantees the delivery of Experian's and ClearScore's respective product improvement and innovation pipelines and establishes objectively measurable innovation funding, marketing spend, and resourcing obligations, to ensure continued product improvement and innovation for as long as the Remedy Proposal is in place. The Remedy Proposal is subject to robust internal and external monitoring and enforcement.

4. The Remedy Proposal is a reasonable, proportionate and effective remedy to the SLC

4.1 As stated in Section 2 above, the CMA has a duty to act in a manner that is reasonable and proportionate. However, the Parties are also entitled to expect that the CMA will follow its own Remedies Guidelines and therefore select the Remedy Proposal as the most *"reasonable"* and *"proportionate"* solution of effective remedy options available to it.[13]

Behavioural remedies are reasonable and proportionate in this case

4.2 Paragraph 2.16 of the Remedies Guidelines states that the CMA will accept behavioural remedies as the primary remedy where structural remedies are not feasible, or where the SLC is expected to have a short duration, or where behavioural measures will preserve substantial relevant customer benefits that would be largely removed by structural measures.

4.3 Experian submits that on the facts and circumstances of this case, behavioural remedies are clearly the most reasonable and proportionate solution should any remedial action be required and, indeed, that in these circumstances the CMA's decisional practice supports a behavioural solution.[14]

(a) *First,* unlike in other cases or industries where innovation concerns have been identified, the Parties do not own large R&D facilities or long-term product pipelines. A structural solution involving specific innovation pipelines or dedicated R&D facilities is therefore neither feasible, nor appropriate to address the CMA's innovation theory of harm in this case.

---

[13] Remedies Guidelines, paragraph 1.9: *"Having considered the effectiveness of remedy options, the CC will then consider the costs of those remedies that it expects would be effective in addressing the SLC and resulting adverse effects. In order to be reasonable and proportionate the CC will seek to select the least costly remedy, or package of remedies, that it considers will be effective. If the CC is choosing between two remedies which it considers will be equally effective, it will select the remedy that imposes the least cost or that is least restrictive. The CC will seek to ensure, as outlined in paragraph 1.12, that no remedy is disproportionate in relation to the SLC and its adverse effects."*

[14] Remedies Guidelines, paragraph 2.16.

(b) *Second,* the FPLG market is highly dynamic and undergoing significant change. A behavioural solution is therefore the most effective and proportionate means of addressing an SLC which, if it were found to exist at all, would be short-lived (i.e. no longer than two to three years on the basis of our replication of the CMA's growth forecast analysis). This approach is supported by the CMA's remedies case study research and its decisional practice.[15]

(c) *Third,* the Remedy Proposal guarantees the delivery of substantial relevant customer benefits. The proposed undertakings enable consumers to benefit from product and quality improvements across the range of free and paid-for CCTs offered by the Parties in the coming years at no additional cost. Moreover, and as explained further in the response to the PFs, the Merger will lead to reductions in the cost of innovation, which will enable Experian and ClearScore to extend their product improvements to a wider set of consumers and bring additional innovations to the market more quickly than would otherwise be feasible.

(d) *Fourth*, Experian's continued public commitment to innovation through these undertakings is expected to have a positive spill-over effect on innovation across the FPLG sector – rival CCTs and CCPs will be strongly motivated to innovate as a result of Experian's product improvement and innovation in the years to come.

The Remedy Proposal is effective and does not give rise to material implementation risks

4.4 As explained below, the Remedy Proposal meets the CMA's own criteria for an effective remedy (i.e. impact on SLC and resulting adverse effects, appropriate duration and timing, practicality and acceptable risk profile)[16] and gives rise to no material implementation risks.

Impact on SLC and resulting adverse effects

4.5 The SLC in this case is highly unusual and short-term in nature. The CMA is concerned that there could be a slowdown in the rate of product development of the free CCTs provided by the combined entity. Given that the growth forecast analysis carried out by Experian's

---

[15] See, for example, CMA, *Understanding Past Remedies, Report on case study research*, 6 April 2017, paragraph 57 and the Final Undertakings accepted by the Competition Commission in *Nufarm Crop Products UK Limited (Nufarm) of AH Marks Holdings Limited (AH Marks),* 10 February 2009. The CMA's Digital Comparison Tools (***DCT***) Market Study, Final Report, 26 September 2017, also finds that "*it will be transparent from compliance reports whether any of the relevant providers are not complying*" and that behavioural remedies are therefore "*capable of effective implementation, monitoring and enforcement"* (paragraphs 19.45-19.46). Likewise, Alasdair Smith, CMA Inquiry Chair, said in a recent speech on Open Banking delivered at the BBA Retail Banking Conference on 30 June 2017 that "*the FCA has an established and admired expertise in the behavioural testing of remedies*".

[16] Remedies Guidelines, paragraph 1.8.

economic advisers (based on the CMA's own model) shows that Credit Karma's and MSM's share of new CCT user acquisitions will be similar to that of the Parties by the end of 2021, the CMA's concern can only be short-term in nature. In addition, the CMA has a specific concern regarding a potential negative impact on the price or quality of Experian's paid-for product, CreditExpert.

4.6 The Remedy Proposal aligns with the identified SLC by delivering against each area of concern identified by the CMA in the PFs:

(a) the delivery of each Party's FY19 product improvement and innovation pipelines, and subsequent annual product improvement and innovation plans, as reviewed and approved by the Innovation Undertakings Committee, guarantees that the Parties will continue to improve and innovate on the consumer-facing aspects of their CCPs and in particular their free CCTs (addressing the concerns identified in paragraphs 10.47, 10.134 and 10.137 of the PFs);

(b) the delivery of each Party's FY19 product improvement and innovation pipelines and the subsequent annual product improvement and innovation plans furthermore guarantees that each of the free CCT products/services will be improved at, at least, the same rate of innovation as would have been the case absent the Merger (addressing the concern identified in paragraph 11.66 and 11.69 of the PFs);

(c) the guaranteed minimum levels of innovation funding and marketing spend, and the commitment to provide sufficient resourcing for the technology and product development teams, guarantee that the merged entity will continue to invest in, and dedicate significant resources to, the improvement and innovation of each of the Experian and Clearscore free CCTs (addressing the concerns identified in paragraphs 11.67-11.68 of the PFs around potential conflicts of interest leading to reduced incentives to invest in each of ClearScore and Experian's free CCTs in favour of CreditExpert);

(d) the standalone undertakings regarding CreditExpert pricing, the delivery of Experian's FY19 CreditExpert product improvement and innovation pipeline, and the subsequent annual product improvement and innovation plans, guarantee the continued improvement of CreditExpert at no additional cost to customers, and are further bolstered by removing any objectives relating specifically to the performance of the Experian subscription business from the long-term incentive scheme of the Experian Consumer Services' management team and the appointment of a separate managing director of CreditExpert (addressing the concern identified in paragraph 11.69 of the PFs around reduced incentives regarding CreditExpert pricing and/or quality improvement); and

(e) the establishment of an independent Innovation Undertakings Committee, which reports to the Board and will assist the independent Monitoring Trustee, ensures robust review, monitoring and reporting (including, as appropriate, self-reporting on compliance by Experian to the UK Financial Conduct Authority (***FCA***)) of these undertakings.

4.7 The Remedy Proposal thus removes the CMA's concerns "*at the source"*, restores the *status quo ante*, and is subject to robust internal and external monitoring, reporting and enforcement.

Appropriate duration and timing

4.8 Paragraph 1.8(b) of the Remedies Guidelines states that remedies *"that act quickly in addressing competitive concerns are preferable"*. The Remedy Proposal will address the SLC immediately upon completion of the Merger.

4.9 As explained above, the Remedy Proposal addresses the provisional SLC effectively throughout its likely duration which, if it materialises at all, is expected to be short (i.e. no longer than two to three years), based on Experian's economic advisors' growth forecast analysis which estimates that **[✂]**.

4.10 The Parties submit that, in an industry in which many of the leading players have only entered the market in the last few years (including, of course, ClearScore itself), and given the CMA's recognition of the dynamic nature of the market, it is appropriate in these circumstances for the CMA to conduct its first review of the Remedy Proposal after a two year period.

4.11 The initial period strikes, in the Parties' view, a proportionate balance of duration and CMA oversight. The provisions for CMA review are designed to ensure that the CMA retains full control (acting reasonably and having regard to any material change in circumstances, such as, e.g., further entry expansion) in determining the period of time it ultimately considers necessary for the Remedy Proposal to remain in place to address the SLC identified.

Practicality

4.12 The Remedies Guidelines make clear that remedies must be practical, i.e. they must be capable of "*effective implementation, monitoring and enforcement*".

4.13 In preparing the Remedy Proposal, Experian's management has offered to commit to minimum funding, marketing spend, and sufficient resourcing undertakings to give the CMA certainty that the product improvement and innovation undertakings are protected over the lifetime of any SLC, including in areas that may not yet, in the CMA's view[17], be fully predictable.

[17] Remedies Notice, paragraph 13(c).

4.14 The establishment of the Innovation Undertakings Committee ensures that the undertakings are effectively self-monitored and enforced by Experian.

4.15 As regards self-monitoring and enforcement, the CMA should also take note of the fact that Experian Limited, the entity giving the undertakings, is an FCA-authorised firm. Accordingly, Experian Limited is required to pro-actively self-report on any compliance matters arising in connection with the monitoring and/or delivery of the Remedy Proposal as part of ensuring its ongoing compliance with the regulatory obligations under the FCA's Principles for Businesses (***PRIN***) (in particular Principle 11 – *Relations with regulators*).

4.16 A remedy with clearly defined financial budgets and measurable KPIs, that includes robust internal governance, monitoring and reporting structures, with a further layer of independent monitoring and oversight by a Monitoring Trustee, as well as through mandatory reporting obligations to a UK sector regulator, constitutes a practical means of addressing the short-term innovation concerns identified by the CMA.

Acceptable risk profile

4.17 Paragraph 4.2 of the Remedies Guidelines identifies four particular forms of risk associated with behavioural remedies (i.e. specification risk, circumvention risk, distortion risk and monitoring and enforcement risk). The Remedy Proposal has been designed to protect against each of these risks.

4.18 To address any concerns regarding specification risk and circumvention, Experian undertakes to provide detailed FY19 innovation roadmaps for each of Experian Consumer Services and ClearScore, and subsequent annual product improvement and innovation plans, which will include appropriate KPIs, responsible lead persons, and budget proposals for delivery of each item/feature, which will be subject to review, challenge, and approval by the Innovation Undertakings Committee, which in turn reports to the Board and the Monitoring Trustee. An example of the detailed product improvement and innovation roadmap for Experian's free CCT and CreditExpert product, is provided for illustrative purposes at **Annex II**.

4.19 Experian has taken great care to ensure that the funding and resourcing undertakings are each clearly defined, measurable, and objectively verifiable. The mechanisms for annually adjusting these commitments further ensure that Experian continues to commit sufficient funding and resources for as long as the Remedy Proposal is in place.

4.20 Due to the robust internal and external governance, monitoring and reporting structures, the Remedy Proposal has a high degree of certainty of achieving its intended effect, producing significant customer benefits in the form of additional product improvements and higher quality propositions, with the guarantee that the services will remain free of charge or at the current price point, as the case may be.

5. Conclusion

5.1 The Parties consider that the CMA should conclude that no SLC is liable to arise as a result of the Merger and that a remedy is unwarranted. However, if the CMA concludes that it can reach an SLC finding, Experian submits that the Remedy Proposal is the most effective, proportionate and reasonable form of remedial action for the CMA to impose to fully address the innovation concerns identified in the PFs.

*****

ANNEX I

PROPOSED UNDERTAKINGS GIVEN TO THE COMPETITION AND MARKETS AUTHORITY BY EXPERIAN LIMITED PURSUANT TO SECTION 82 OF THE ENTERPRISE ACT 2002

[✂]

Annex II

Illustrative Example of Detailed Experian Innovation Roadmap FY19

[✂]