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Consultation response: Reforming Competition and Consumer Policy

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Reforming Competition and Consumer Policy: Driving growth and delivering competitive markets that work for consumers

Introduction

Experian is a one of the world's largest information services businesses, providing data and analytics services direct to consumers and to businesses across a number of sectors. We provide credit reference data services to lenders and operate in the price comparison website market.

Experian plc is listed on the London Stock Exchange (EXPN) and is a constituent of the FTSE 100 index. 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.

Experian Limited is one of three main UK consumer credit reference agencies whose regulated activities are governed by the FCA. In the rest of this document, references to "Experian" are the Experian Limited.

As part of our core business, Experian helps people, businesses and organisations to:

- **Lend and borrow responsibly:** by gathering information on past and present credit commitments, such as loans, mortgages and credit cards, Experian helps lenders to understand whether people and businesses can manage their debt repayments affordably, so they can borrow and lend responsibly.
- **Treat people and business fairly:** because Experian helps organisations make decisions on data, they can treat people and businesses fairly and consistently, which in turn helps people to access credit.
- **Access vital information more easily:** easily available and understandable information allows people and businesses to prove their financial track record to organisations, so they can get the best deals.
- **Make better, more efficient decisions to create better business outcomes:** by gathering and analysing information supplied by people and businesses, organisations can make quicker decisions, now taking seconds and minutes instead of days. Organisations need to make fewer manual checks which means less administration and fewer bad debts. This means the cost of extending credit is lower.

Alongside these core services, Experian has wider capabilities in smart insights, intelligent decisions, advanced analytics, and trusted identity. Through our advanced data analysis, research and development, we put our over 30 years of experience to good use. Experian's data and analytics help people, businesses and organisations protect, manage and make the most their data, creating better business and consumer outcomes and building stronger customer relationships.

Through our services we are:

- **Supporting business growth**: Through identifying economic trends, providing credit market insights and portfolio benchmarking to help drive future opportunities.
- **Improving decision making**: Through providing real-time access to data and decision-making tools, utilising innovative data and analytics tools, alongside the application of artificial intelligence and machine learning meaning businesses can implement the most predictive models and insight to inform business strategies.
- **Creating unique insight**: Creating intelligent analytical environment and modelling tools – including the application of artificial intelligence and machine learning – to let businesses test the impact of scenarios before rolling them out alongside combining business and external data with Experian data to co-create unique, business-changing insight.
- **Preventing against fraud:** Through allowing validation and verification of a customer's personal information quickly using multiple capabilities all through one platform, connecting devices, mobile, bank account and email addresses to validate and authenticate a person; without inconveniencing customers and using machine learning to understand the behaviour of customers. Credit reference agencies (CRAs) play an important role in not only providing insightful data, but also enabling socio-economic change through financial inclusion, access to goods and services and supporting the vulnerable when needed.

The evolution in the services Experian provides has come as a direct result of the ability for businesses like Experian to operate in a competitive and innovative manner. In the UK, we seek to constantly evolve, bringing in new data sources that provide more insight and understanding. Our activity is controlled not only by a data protection framework governed by the ICO but many activities are also FCA regulated to ensure that activities are consumer centric, fair and transparent. There is also an element of self-regulation, for example, where credit data is shared on a reciprocal basis under industry agreed rules. By creating this competitive environment, the UK has been at the forefront of stimulating highly predictive credit scoring activities, helping consumers to build credit files and attain access to more goods and services.

General Experian Comment

Experian welcomes the Government's proposals to reform Competition and Consumer Policy in the UK and their commitment to ensuring that the UK remains internationally competitive as a place to build and own a business. The need to remain internationally competitive has never been greater, as we seek to capitalise on our departure from the European Union and repair the damage done to our economy by the Covid-19 pandemic.

The Government now has a unique opportunity to refresh its thinking and react to some of the problems we have seen in this area in past years. Notably, we have seen a lack of clear distinction between policy and its implementation and management between Government and regulators. Too often, the reality is that regulators are making policy and impacting economic growth and the wider economy rather than working within the remit of the law determined by Government and passed by the legislature. We hope that through its proposed strategic steer, Government can address this issue and assert its rightful dominance as the primary policy maker in the UK.

The UK must also turn away from measuring the success of a regulator by the amount they fine or the number of enforcement actions that they have taken. In Experian's view, increased enforcement activity by any regulator is evidence that it is not driving change in the market it regulates. Regulation and

intervention should be a last resort and the Government should look first at ways to clarify and simplify regulation itself before considering Court processes and enforcement regimes.

We strongly urge the Department for Business, Energy and Industrial Strategy (BEIS) to consider more broadly the recent thinking on regulatory policy, including Professor Chris Hodges of the University of Oxford (recently awarded an OBE for his work in this field). He has researched and written extensively and, based on evidence, developed the idea of ethical business regulation which draws upon the findings of behavioural psychology, shared ethical values, and economic and cultural incentives. In November 2015, BEIS commissioned him to summarise[1] his substantive book on the subject and we urge the Department to look at this afresh. Prof. Hodges has found little that supports enforcement practices based on deterrence or a theory that people make decisions based on economic calculations in most situations. In addition, he observes that "*behavioural psychology does not support the idea that future compliance (deterrence) is increased by imposing a stronger penalty*".

Real and meaningful engagement with the business community is vital, whatever role the CMA plays in the future, as without it, they will simply fail properly to understand the businesses and sectors that they seek to regulate, many of which change and move faster than is often realised. It is likely to be more cost effective to influence business through engagement rather than enforcement.

The engagement model followed by the Financial Conduct Authority, which engages directly with business, both through its practitioner panel and more broadly is the model we would encourage them to follow. Without this engagement, business will simply not be able to engage effectively without fear of repercussions.

If the CMA fails to effectively and meaningfully engage with those it regulates, this will damage the UK's attractiveness as an international destination for business, as a regulator that does not engage, will be seen as hostile and damage the country's international competitiveness, particularly when compared competing jurisdictions such as Singapore.

Measuring success of a regulator through enforcement is the wrong incentive and fails, completely, to give a sense of the health of competition in the market. Enforcement is likely to be most effective when used to respond to the most egregious situations and so increased enforcement action is likely to indicate that the CMA is failing to effectively influence those it seeks to regulate. To extend its influencing powers, it needs to become more collaborative and be prepared to give advice upon which business can rely.

The competition regulator should address consumer harm where harm really exists, rather than perception-based harm and through encouraging businesses to do the right thing rather than opening wider the floodgates to further encourage an increasingly litigious culture in the UK. It is important to remember that taking enforcement action of any sort is likely to expose businesses to follow-on class actions claims, the exorbitant cost of dealing with these is something that the regulator must take into account when considering fines.

The competition regulator must have a coordinated approach that looks at matters with an appropriate sectoral lens, rather than a broad brush, a catch-all approach will not be suitable or appropriate for all

[1] "Ethical Business Regulation: Understanding the Evidence" - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497539/16-113-ethical-business-regulation.pdf

sectors. Understanding the role that existing legislation and consumer protection play in each sector is key to ensuring there is no cross-over or conflict in the activity of the CMA in its regulating role.

The competition regulator needs to adopt a real-life approach to understanding particular markets and their consumer needs, using consumer voices rather than pure economic analysis (which is unlikely to give an accurate view of that sector).

There is much in the consultation about strengthening sanctions and increasing the information seeking powers of the CMA with one of the intentions being to enable the CMA to act with greater swiftness. The practical consequence is that businesses are going to have no choice but to engage with external lawyers sooner and this just pushes up the "cost of business" in the UK. Increasing personal liabilities similarly makes the UK a less attractive country in which to invest and grow.

Looking in more depth at the Consultation, our view is that we are not in a position to provide an informed response to all 75 questions. However, in addition to our comments above, we set out specific further points against specific questions.

Chapter 1: Competition

Question responses

Q2: Should the CMA have a power to obtain evidence specifically for the purpose of advising government on the state of competition in the UK?

To the extent that the Government intends to give greater powers to the CMA for this specific purpose, we urge the Government to make those powers as narrow as possible. Responding to CMA statutory information requests is a demanding obligation (particularly when backed up by draconian sanctions).

For example:

- we cannot see why the CMA would have a need for information more than a year old nor should businesses have to create anything that this not already in their possession;
- the CMA ought not be able to make more than one request a year to an organisation or a business group;
- the standard required for a business to respond should not be of such a high standard that it effectively requires external legal support and an "eDiscovery" exercise on the part of the business in question.

We would suggest that one of the obvious ways that the CMA could be better placed to understand competition without requiring any additional powers to obtain evidence would be to focus on engaging in regular and meaningful dialogue with business, rather than remaining an ivory-tower regulator.

Q3. Should government provide more detailed and regular strategic steers to the CMA?

Given that the Government is not only ultimately responsible for the UK's competition policy and but also answerable both to the Houses of Parliament and the public, we would support the view that there ought to be able at least an annual detailed strategic steer from Government to the CMA.

The ability to provide this strategic steer is being mirrored in the consultation on the UK's reforms to the Data Protection Act 2018 'Data: a new direction' which details the intention for the Secretary of State to

prepare a statement of strategic priorities. This is a power that should be replicated for the Secretary of State for Business, Energy and Industrial Strategy.

Government is also best placed to reflect the balancing act that must be managed to provide an open, thriving economy, whilst balancing the needs and wishes of consumers, something which the regulator is not always able to do, given the depth and breadth of stakeholders that with which the Government engages daily.

Q4. Should the CMA be empowered to impose certain remedies at the end of a market study process? and
Q5. Alternatively, should the existing market study and market investigation system be replaced with a new single stage market inquiry tool?

We ask the Government to consider the power to conduct market studies from a broader perspective and note the complicated position in the UK that allows the CMA and other regulators, such as the FCA, to conduct market studies. We would also ask that a more consultative approach be adopted rather than a process which begins and ends assuming that there is a market failure and that the regulator must intervene by imposing remedies to be effective.

Q6. Should government enable the CMA to impose interim measures from the beginning of a market inquiry? and
Q7. Should government enable the CMA to accept binding commitments at any stage in the market inquiry process?

We believe that unless the CMA is given a strong pro-growth steer, it is likely to adopt a restrictive and outdated approach and so there is considerable jeopardy in allowing the CMA to impose interim measures at the start of an investigation since these are likely to be driven by its own agenda rather than evidence.

However, it is perfectly possible that a connected and responsive competition regulator that really understands the market will have to the ability to influence parties early on in a market study through dialogue. In such a position, an ability to accept commitments at any stage may help businesses get certainty early. However, unless the CMA consider commitments in the context of true understanding and through engagement with a wide range of businesses, it is likely that such an approach could create more harm in the longer run. The key will be the extent to which the CMA does actually seek to genuinely engage with business stakeholders.

Q9. What other reforms would help deliver more efficient, flexible, and proportionate market inquiries?

We consider that the following statutory obligations upon the CMA would help deliver more efficient, flexible and proportionate market inquires:

- engage in meaningful dialogue with those it regulates
- an obligation to promote economic growth and ensure that remedies that it seeks to impose do not cost business more than the harm sought to be addressed
- an obligation upon the CMA to only use its enforcement powers when it has tried to educate, influence and advise first but those attempts have failed
- an obligation to measure its effectiveness by reference to the success of that education, influencing and advisory work.

Q11. Are there additional or alternative reforms to the current jurisdictional tests for the CMA's merger control investigations that government should be considering?

We believe that the CMA shows a lack of real, practical understanding of some aspects of the market, for example FinTechs or SMEs (particularly those backed by venture capital). Most fintech and start-up business owners have the vision to take risks to develop, innovate and recoup a reward by selling their business to another market participant (usually an established player) once the value of the innovation has been demonstrated as soon as possible, then move on to their next entrepreneurial project (and if they have had to get venture capital investment, as many do, this is what those investors also seek).

Rarely do those business owners intend to create and operate their business as a long-term operation. Restricting the ability for start-ups to sell to bigger organisations would fundamentally interfere the normal operation of business. The knock-on impact of this is that investors and funders will see that funding/buying UK FinTechs and start-ups as being less unattractive area of consideration.

Q17. Will the reforms being considered by government improve the effectiveness of the CMA's tools for identifying and prioritising investigation? In particular will providing holders of full immunity in the public enforcement process, with additional immunity from liability for damages caused by the cartel help incentivise leniency applications?

The UK has taken a very dangerous step in allowing follow-on class action in the competition space and the few cases progressing demonstrate that the real drivers here are fees for lawyers and investment returns for litigation funders.

Such litigation lasts for years and, based on evidence and our group's experience elsewhere in the world, is unlikely to benefit materially more than a small number of individual consumers.

Despite that, the cases do demonstrate that follow-on actions can claim eye-wateringly large sums[2], in which we predict that the greater amount will end up in the hands of lawyers & funders and will take the effect of a follow-on fine in practice.

Accordingly, it might well be the case that immunity from civil damages might incentivise leniency applications.

Of course, the issue here (and consistent with our comments throughout), is that seeking to tackle problems through enforcement (or encouraging leniency applications, which are a precursor to enforcement) means that the problem has already happened.

It would be much more effective, in our view, for the regulator to focus a greater part of its efforts on working with business to reduce the nature and scope of issues arising in the first place.

[2] In the *Merricks -v- Mastercard* case, the amount claims is more than £14 billion for the class as a whole.

Q20. Will government's proposals for the use of Early Resolution Agreements help to bring complex Chapter II cases to a close more efficiently? Do government's proposals provide the right balance of incentives between early resolution and deterrence?

Yes, the government's proposals for the use of Early Resolution Agreements will help to bring complex Chapter II cases to a close more efficiently for the simple reason that business organisations will be keen to obtain certainty sooner and move on.

We reiterate our comments earlier about our concern about the continued and regular use of the concept of deterrence when there is little evidence that supports the idea that it is an effective way to influence behaviour. Obtaining an early resolution agreement is much more likely to be the influencing factor.

Q21. Will government's proposals to protect documents prepared by a business in order to seek approval for, and operate, a voluntary redress scheme from disclosure in civil litigation encourage the use of these redress schemes?

Obviously, yes. There are advantages to a business offering a voluntary redress scheme including the scope for avoiding litigation (in which a considerable "mark-up" on redress amounts has to be paid to lawyers and their third-party insurers/funders).

Any business will, at least for good governance, need to carry a reasonable amount of consideration of options, costs and resource implications and these can often only be considered properly when documented. There may need to be extensive financial modelling and internal discussion, most of which nowadays will be in an electronic format.

The risk of litigation and disclosure of such documents is very likely, in our view, to discourage the active consideration and exploration of implementing such a scheme.

We urge the Government to ensure that such documents are protected from disclosure in civil proceedings and that, for the avoidance of doubt, legal advice relating to such schemes or litigation that a business might obtain. We urge the Government to consider a wide exemption here to include, for example, allowing a business' internal or external audit function to assess any scheme (or variation) being considered, proposed or even implement.

Q22. Will government's proposed reforms help to speed up the CMA's access to file process and by extension the conclusion of the CMA's investigations?

We generally agree with the concept of a statutory framework for confidentiality rings that removes or reduces the need for negotiation of terms. We agree that extending to non-legal advisors (such as economists) makes good sense.

Businesses are frequently used to dealing with and understand the nature of confidentially obligations and generally we think that the Government should seek to decriminalise where possible. Bearing in mind our view on the limited value in pushing deterrence, we are concerned about further expansion of sanctions. We believe it would be more appropriate, for example, for the Government to consider whether existing legislation (such as the Data Protection Act) will provide the basis for criminal sanctions in the most serious cases and, if so, seek to decriminalise here.

Q24. What is the appropriate level of judicial scrutiny for decisions by the CMA in Competition Act investigations?

If a fear of appeals is leading the CMA to "gold-plate" its investigations, this suggests that the problem lies with the CMA not the Court system. We suspect that a lack of proper engagement with those regulated is a significant contributing factor here.

However, the very nature of competition law and the specific nature of individual markets will inevitably mean that any appeal is likely to be complicated.

There is no mechanism for or willingness on the part of the CMA for an open discussion, the only channel for interaction is the formal process. This adds to the view of the CMA being a regulator disconnected from those it regulates.

The process for appealing the CMA's views is limited and inherently unattractive and, as such, in our view only reluctantly progressed by any business. There is a case to support the widening of the ability to appeal to include a substantive appeal process rather than the current quasi-judicial review appeal which exists currently.

Q23. Government would welcome views on whether these proposed statutory maximum penalties are set at the right level.

As we have said, we do not believe that there is an evidential basis for suggesting that bigger fines are likely to drive greater compliance. We also think that the CMA is fundamentally failing if it has to resort to this sort of enforcement, accepting of course that enforcement can be appropriate for the most egregious of cases.

The UK is no long part of the EU, and we see no reason from that alone to seek to increase our fining levels to match those of EU regulators.

To the extent that the Government is minded to increase the fines, we suggest that they be limited to the turnover of the entity in question rather than the worldwide turnover of the group in question.

Q27. Will the new investigative powers proposed help the CMA to conclude its investigations more quickly? Are the proposed penalty caps set at the right level? Are there other reforms to the CMA's evidence gathering powers which government should be considering?

Expanding the sanctions regime for voluntary requests outside of the CMA's formal investigations would seem a counter-productive step that is likely to drive down business engagement, not drive it up.

Responding to a CMA information request is a substantial undertaking for any business, including one that has in-house legal and compliance teams. Almost all businesses are going to need input from specialist competition lawyers. The nature and wording of requests is formal in nature and, we would imagine, be extremely concerning for an average businessperson to receive. Requests are often overly broad in nature, cover wide time periods and often require considerable management and operational staff resourcing to answer. If the CMA imposes even shorter time periods, even a willing and cooperative business may struggle even further to respond within the specified period, and only then with large numbers of staff members working nights/weekends and at the cost of diverting resources from normal

business activities. Proposing more sanctions or increasing the penalty caps is not going to drive up compliance and, in our view, likely to be counterproductive.

The practical and human cost of responding to CMA request should not be overlooked, particularly at a time when there are well-publicised staffing challenges across all skill sets.

The CMA ought to be working to foster relationships with industry such that it can be in a position to seek information from willing market participants.

Chapter 2: Consumer Rights

General comments

The remit of the CMA is extremely wide ranging, which can be a positive thing. However, without a clear steer on applicability, there is a risk that existing consumer rights are eroded by the introduction of wide-ranging high-level requirements which have not been tested against existing regimes.

Specifically, in relation to consumer rights, Experian is concerned that there is a lack of clarity around the role of the various regulators. For example, firms regulated by the Financial Conduct Authority already have an established and understood detailed regime for protecting consumers which sets out to avoid consumer harm. The FCA is currently looking at extending that duty and have recently consulted on "A new Consumer Duty" (CP21/13). Anything which undermines or duplicates this regime or any other is likely to cause confusion and inconsistent outcomes and adds cost and uncertainty for business.

More generally, where subscription services provide a supportive or preventative control for consumers, there is considerable risk of introducing excessive barriers to recurring payments, automatic cancellation or overly persistent inducements to cancel. Customers need to provide clear instructions for such services to be stopped, just as much as they do for them to start, especially where there is risk of prejudice from services being suspended (e.g. identity protection or notification in relation to financial decisions) which could cause customer loss (such as failure to be notified of a potential identity fraud, inconvenience or missing out on preferential rates for financial services or failing to prepare sufficiently for mortgage applications).

Question responses

Q30. Do you agree with the description of a subscription contract set out in Figure 8 of this consultation? How could this description be improved?

No. The description of subscription, as it currently stands, is missing key elements; "payment" at "regular" or "recurring intervals". It is also not clear whether the description as detailed in Figure 8 is intended to cover free products, albeit later in the consultation it covers free introductory offers. As per our general comments, there is a very strong argument that any description should not cover subscriptions which are part of financial services products which are already regulated.

Q31. How would the proposals of clarifying the pre-contract information requirements for subscription contracts impact traders?

Where products are already regulated, the supply of pre-contract information as set out in para 2.16 and 2.17, in our view is no different from what is already required under the FCA requirements to be "clear,

fair and not misleading". As such, we would be concerned that any additional proposals create duplication and/or confusion and regulatory jeopardy.

In addition, the idea that customers should have to make a secondary active choice to opt for a recurring payment, rather than a one-off payment as set out in para 2.18 suggests the creation of an additional sign-up step in the journey. Where a provider already has an explicit and clear existing journey, this has the potential to create unnecessary customer confusion alongside the more concerning risk that customers are not covered by (for example) protective or beneficial services which they had signed up for.

Whilst we support the need to make it clear what customers are signing up for, we do not agree that firms should be required to offer non-recurring payment schemes for products which are designed to be kept for longer periods.

Q36. Should traders be required, a reasonable period before the end of a free trial or low-cost introductory offer to (a) provide consumers with a reminder that a "full or higher price" ongoing contract is about to begin or (b) obtain the consumer's explicit consent to continuing the subscription after the free trial or low cost introductory offer period ends?

We agree that a reminder may be appropriate but only where a significant period has elapsed between signing up and then move to a paid subscription. We agree that explicit consent should be sought at this point (either for the subscription to continue or lapse), particularly for products which offer consumer protection since customers may inadvertently fail to keep the service operating.

Q37. What would be the impact of proposals regarding long-term inactive subscriptions have on traders' business models?

We would support the proposal to require providers to serve notice on customers who have been inactive for extended periods, and specifically where there is a significant likelihood that the inactivity is caused by the customer passing away. We note that services could also be required to check their customer lists against mortality databases[3], and would highlight that some Banks are already being more proactive in allowing customers to manage subscriptions. It should also be noted that Payment Providers can and do cancel subscriptions for a variety of reasons including non-payment, card expiry (non-payment) etc.

However, in other circumstances, we do not think a subscription service should be cancelled without the express consent of the consumer.

Q38. What do you consider would be a reasonable timeframe of inactivity to give notice of suspension?

We consider that 2 years of no activity (including not opening and responding to emails, accessing websites or receiving physical goods or services). However, there may be some subscriptions where given the nature of product, cost, charging frequency, etc., a longer or shorter period of inactivity would be considered reasonable.

[3] A direction from Government to the ICO about this being a lawful legitimate interest in data processing would make sense to ensure there are no regulatory concerns with this approach

Q39. Do you agree that the process to enter a subscription contract can be quicker and more straightforward than the process to cancel the contract (in particular after any initial 14 day withdrawal period, where appropriate, has passed)?

In relation to regulated financial services products we do not agree. There are existing requirements to ensure there are no barriers to cancellation. The FCA Consultation CP21/13 "A New Consumer Duty" further reinforced this by looking to eliminate any "sludge practices that discourage exit".

We would note however, that customers can very often be poor judges of relative effort. Signing up may be streamlined but typically involves entering lots of data such as payment card details and personal information. However, customers may find cancelling a service 'harder' simply because they are less motivated at the stage that they are cancelling, than when they were signing up. This is an asymmetry in motivation not process which traders cannot resolve.

Q40. Would the easy exiting proposal, to provide a mechanism for consumers that is straightforward, cost-effective, and timely, be appropriate and proportionate to address the problem described?

Cancellation should be straight-forward and simple. Put simply, there should be no barrier to cancellation. This is in line with the existing FCA regulatory requirements and the FCA Consultation CP21/13 "A New Consumer Duty" proposals.

Q41. Are there certain contract types or types of goods, services, or digital content that should be exempt from the rules proposed and why?

Yes - services which provide the customers with long-term protection or other benefits by being continuously in place, such as legal cover, product warranties, fraud or ID theft protection tools, monitoring services for elderly infirm patients, trade union memberships, membership of professional bodies, regular lottery entries, should not be de-activated without the express consent of the user. It also makes sense to consider this rule for any service where the customer cannot effectively reactivate without any loss of benefit such as life assurance/ health insurance.

Chapter 3: Consumer Law Enforcement

General comments

As detailed above, Experian has an overarching concern around the applicability of the CMA's proposals for FCA regulated products, in particular. Specifically, in relation to consumer law enforcement, it is unclear how any direct enforcement by the CMA will sit alongside the additional protections' consumers (as individuals) already have access to. If the CMA has its own enforcement powers which do not follow a Court model, how this interacts with other regulators and bodies such as the Financial Ombudsman Service will need to be very carefully managed.

From a business perspective, it is often said that the threat of potential enforcement (either through legal action or direct enforcement) would incentivise firms to change their culture and improve their standards of conduct, leading to improved consumer outcomes and better competition practices.

However, this has been shown to be incorrect, the threat of any enforcement action by regulators is likely to make firms more risk averse. Rather than proactively solving any drivers of harm and providing

innovative solutions to overcome harm, they will simply look to provide more anodyne, less risky products which will have the unintended consequence of reducing competition and innovation.

Q55. Do you agree with government's proposal to empower the CMA to enforce consumer protection law directly rather than through the civil courts?

Irrespective of the proposals, we would re-iterate that a system which provides both businesses and consumers with certainty and speed is crucial, whatever form this may take. There is a concern that the proposals could provide the CMA with both rulemaking and far-reaching enforcement powers which without a change of behaviour in the way they interact with the businesses they regulate, they could with minimal interaction unfairly target sectors or disrupt markets in a way inconsistent with public or government policy. If there is to be additional enforcement powers, they must come with the added responsibility of having open dialogue with businesses.

In addition, if the government does reform the CMA's enforcement powers, there needs to be sufficient recourse for businesses to challenge the fairness and proportionality of these powers. We are pleased to see specific reference to a right to appeal (3.24- 3.28).

Q57. What processes and procedures should the CMA follow in its administrative decision-making to ensure fair and proportionate administrative decisions?

As detailed above, our view is that the CMA's decision-making process and procedures could be significantly enhanced by a more proactive engagement with the businesses it regulates. By properly understanding the businesses and markets, engaging in on-going dialogue with businesses and being open to a collaborative way of working. These would all be positive steps to ensure fair and proportionate decisions.

Whatever mechanisms are used in decision-making there needs to be the ability to demonstrate that the process and outcomes are both fair and proportionate.

Q58. What scope and powers of judicial scrutiny should apply in relation to decisions by the CMA in consumer enforcement investigations under an administrative model?

We see no reason why the various scope and powers listed within 3.29 should not apply to the appeal body. We would also suggest that the appeal body should be able to consider if the decision is fair and proportionate and that the CMA have followed due process.

It is important that business has the right to a substantive appeal on law and facts. A judicial review standard for appeal does not provide this and is not an effective remedy for a business where the CMA exercises poor decision making and may cause the CMA to focus on bureaucracy of process.

Q59. Should appeals of administrative CMA decisions be heard by a generalist court or a specialist tribunal? What would be the main benefits of your preferred option?

Understanding the market and issues are key to ensuring the appeals process is as robust as possible. Given this, our preference would be for a specialised consumer tribunal should be used. This should provide a process which is sufficiently adaptable to deal with the wide range of potential cases, allowing for cross disciplinary expertise to be called on when appropriate. Our view is that a specialist tribunal

would also be able to provide a swifter response and we would expect it to be less costly than proceedings in the High Court, which would be beneficial both to businesses, consumers and the wider economy.

Q60. Should sector regulators' civil consumer enforcement powers under Part 8 of the EA 02 be reformed to allow for enforcement through an administrative model? What specific deficiencies do you expect this to address?

We repeat our previous concerns about ensuring that regulators do not set policy and operate within the remit of that set by Government and Parliament. Again, we suggest that regulators need a statutory obligation to establish open dialogues with those they regulate, that enforcement should be a last resort and that taking enforcement action must be done in a fair and proportionate manner with a right of appeal.

Q61. Would the proposed fines for non-compliance with information gathering powers incentivise compliance? What would be the main benefits, costs and drawbacks from having an option to impose monetary penalties for non-compliance with information gathering powers?

As we set out in our response to Q23 and our general comments, we do not believe that there is an evidential basis for suggesting that fines are likely to drive greater compliance. We also think that the CMA is fundamentally failing if it has to resort to this sort of enforcement, accepting of course that enforcement can be appropriate for the most egregious of cases.

We would also reiterate our suggestion that fines should be proportionate and limited to the turnover of the entity in question rather than the worldwide turnover of the group in question, particularly for administrative matters such as this where there is no market or consumer harm.

Q62. What enforcement powers (or combination of powers) should be available where there is a breach of a consumer protection undertaking to best incentivise compliance?

Option 2 – Making undertakings enforceable looks to be the most straight forward option providing clarity to all parties involved and will ensure that businesses sign up to these undertakings having fully considered the implications of not complying. It would also solve BEIS's concern that current the system requires the cost of compliance to be lower than the cost of non-compliance.

Q63. Should there be a formal process for agreeing undertakings that include an admission of liability by the trader for consumer protection enforcement?

In order for this process to work, there needs to be further work undertaken to determine whether there is the commercial incentive for businesses to admit liability as part of an undertaking or whether firms may be reluctant to accept liability for fear of any consumer court action based on the admission. However, in the context of follow-on litigation actions, we think there is unlikely to be much uptake of agreed undertakings if there is a requirement for an admission of liability.

In particular, if the private right of action under the Consumer Duty (included with the FCA's consultation CP21/13 "A New Consumer Duty" went ahead, firms regulated by the FCA may be reluctant to admit liability.

Bear in mind also, that an assessment of liability is likely to be an exercise that will require additional spend by a business on legal advisors.

Q67. What changes could be made to the role of the 'Competent Authority' to improve overall ADR standards and provide sufficient oversight of ADR bodies?

and

Q68. What further changes could government make to ADR Regulations to raise consumer and business confidence in ADR providers?

We refer to the work of Prof. Hodges in the value of ADR in the context of consumer disputes.

Q72. To what extent do you consider it necessary to open up further routes to collective consumer redress in the UK to help consumers resolve disputes?

Any move to focus on a litigation model, in comparison with other redress mechanisms available, is inappropriate. It carries with it significant and real risks of further stirring up a US-style litigation culture that flies directly in the face of the Government's aim to support the UK in creating a world-leading data economy[4]. Empirical legal research has established that alternative dispute resolution (ADR), in its myriad forms, score higher than litigation on criteria for effective redress[5]. Even the existing Civil Procedure Rules impose a duty on the Court in managing cases to encourage the use of ADR[6]. Litigation is a poor mechanism for the resolution of consumer disputes, and this has been known for a long time, and particularly when compared to the effectiveness of numerous tired and tested out-of-court systems in the UK and across the EU for resolving mass consumer disputes[7]. We recommend that the Government review the views of one of the world's leading thinkers in the field of consumer dispute resolution, based here in the UK, Prof. Christopher Hodges, of the University of Oxford[8].

As we have said earlier and the evidence shows, collective consumer redress through litigation primarily benefits lawyers and litigation funders, not consumers.

Q73. What impact would allowing private organisations and consumer organisations to bring collective redress cases in addition to public enforcers have on (a) consumers, and b) businesses?

Experience in other jurisdictions shows one of the biggest concerns is that that the threat of class-action litigation is such that many organisations may feel that, irrespective of the merits, they have little practical option but to settle the action when threatened. It is not hard to see how such "blackmail" settlements might arise given the significant cost and disruption of defending even an unfounded claim. If such a provision were introduced, the logical consultation is that it would generate new demands on all and any organisation impacted by it. Claimant organisations and lawyers will seek out new cases and we would expect to see a significant increase in data subject access requests (as a pre-cursor to litigation) which will, in itself, be a significant compliance cost for business, particularly for SMEs.

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[4] See "About the National Data Strategy" from https://www.gov.uk/guidance/national-data-strategy

[5] Such as consumer advice; identification of infringement & harm; access; low cost; short duration; positive outcomes and feedback loops for regulators

[6] CPR 1.4(e)

[7] C. Hodges and S. Voet, Delivering Collective Redress in Markets: New Technologies (Foundation for Law Justice & Society, 2017)

[8] See for example, Better Regulation Delivery Office publication - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497539/16-113-ethical-business-regulation.pdf

"Class action" litigation is complex, costly, lengthy and open to abuse; even where existing procedures exist within the UK (such as in the Competition Appeal Tribunal), it has not been shown to actually deliver positive outcomes for consumers whose claims are distributed usually only after the achievement of the investment return for the third-party litigation funders and profit for the lawyers[9]. Ultimately, it drives up the cost of doing business for all businesses with the resulting detrimental impact on investment in innovation or pricing.

At the moment, it is part of the UK's attractiveness as a country that we do not have extensive class action mechanisms, particularly in the light of the Representative Actions Directive[10] in the EU and the well-known problems with class actions in the USA and Australia.

Further Comment

In light of the above, Experian would welcome the opportunity to discuss the following connected issues further.

Experian

1 October 2021

[9] For example, the claim by Walter Merricks against Mastercard began in 2016 (backed by a third party litigation funder that seeks substantial reward for its backing) has been mired in procedure and appeals since the outset and the outcome of a hearing before Supreme Court in May 2020 is pending: https://www.catribunal.org.uk/cases/12667716-walter-hugh-merricks-cbe

[10] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC