

Telephone: 020 7066 9346

Email: enquiries@fs-cp.org.uk

Consumer and Competition Policy Directorate
Department for Business, Energy & Industrial Strategy
1st Floor
1 Victoria Street
London, SW1H 0ET

4 July 2018

By email: ConsumerGreenPaper@beis.gov.uk

Dear Sir / Madam,

Modernising Consumer Markets: Consumer Green Paper

The Financial Services Consumer Panel is an independent statutory body. We represent the interests of individual and small business consumers in the development of policy and regulation of financial services in the UK. We welcome the opportunity to respond to the Government's Consumer Green Paper.

Summary and Recommendations

The Panel supports much of the analysis in the Green Paper about the potential limitations of consumer-driven competition and the challenges associated with making it more effective. Our experience in retail financial services is consistent with the Green Paper's analysis that in regulated markets the benefits of competition are not felt by all consumers.

The Panel has published three documents that inform our response:

- [Consumers and Competition](#)
- [How consumers consent to share their data](#)
- [A Duty of Care for Financial Services Providers](#)

Our key points are:

- Government and others need to accept that there are limitations on how far outcomes can be improved by consumers switching providers, and this limits the effectiveness of interventions aimed at informing and encouraging more consumers to switch. Robust supply-side regulation is required to ensure minimum standards for products and services, and to ensure firms do not exploit consumers' behavioural biases. In particular, regulators should do more to ensure that loyal customers who choose not to search for and switch to new deals are not penalised, and that those who are less able to find or access better deals are protected.
- In retail financial services, many of the constraints on competition, including the differences of treatment often seen between existing loyal customers and switchers, could be addressed by a general duty of care on firms. This would force them to put their customers' interests first in designing and delivering products and services.
- A number of conditions must be met before new tools for searching and switching based on the use of consumers' personal data can be expected to improve outcomes. These include: an overhaul of terms and conditions (Ts&Cs) so that consent to share data is properly informed; protection from the use of 'Big Data' to market expensive and unnecessary add-on products and services; regulation of third party providers of comparison and other services to ensure they present information fairly and in a way that

helps consumers find a good deal, do not distort markets, and are transparent about commission.

- The Green Paper is silent about the experience of small businesses, particularly self-employed people and other micro-businesses, as consumers. In financial services, small businesses often behave in the same way as individual consumers, prone to similar behavioural biases, and subject to the same power imbalance in their dealings with providers. Yet in many markets, they have restricted choices and fewer protections, and have to rely on the courts to get redress. The Government should recognise that small businesses require the best outcomes from regulated suppliers if they are to maximise their economic contribution.

We therefore recommend:

- More supply-side remedies to address competition issues.
- The Government should support a general duty of care on financial services firms.
- Competition authorities should not rely on data portability as a competition tool (as in Open Banking) until the benefits and risks are properly understood, and effective protections put in place.
- The Government should ensure that the right to withhold personal data without discrimination is enforced.
- The Government should lead a comprehensive review of data sharing and privacy Ts&Cs so that they inform consumers rather than protect firms. Developing an alternative to lengthy and complex Ts&Cs for specifying contracts in a technology-driven era should be a priority. This must facilitate consumers' genuine, informed consent, and take account of behavioural biases.
- Competition authorities should measure how well competition improves consumer outcomes in different markets and use these measures to inform interventions. Measures should differentiate between different groups of consumers. Consumers are not a homogeneous group, and the impact of interventions needs to be evaluated accordingly.
- The Government should bring forward an amendment to the Data Protection Act 2018 to allow representative bodies to bring collective action on behalf of consumers affected by a data breach.
- The Government should establish a Data Ombudsman.
- The Consumer Forum should include consumer representatives, and include a remit to specify how consumers can best be represented in policy making in the short-run and in the post-Brexit world.
- Competition and consumer policy should explicitly recognise that smaller businesses need the same protections as individual consumers if they are to fulfil their potential as agents of economic growth, innovation and increased productivity.
- The Strategic Steer to the CMA should include the interests of small businesses, and expand the definition of vulnerable consumers.

Consultation Questions

1. In which regulated markets does consumer data portability have most potential to improve consumer outcomes, and for what reasons?

In financial services, data portability could improve the efficiency of applications for insurance, mortgages and other products. It could also make financial advice cheaper, through the use of portable "fact-finds", which could capture information about clients' circumstances, objectives and risk appetite. Being able to input this information once and then "port" it to different providers could reduce the cost of searching and switching. Data portability could also benefit debt advice, by allowing debt advisers to connect

directly with creditors to more quickly and securely access creditor documentation (credit agreement, payments outstanding etc.) and share a client's overall financial situation¹.

The data portability rights in GDPR and the Data Protection Act are reflected in the second Payment Services Directive (PSD2). This Directive is the basis for banking competition remedies ("Open Banking") under which firms are required to share customer data with other banks and third party service providers (TPPs) at the customer's request. We welcome the work of the UK authorities in the European Banking Authority to ensure that detailed guidelines allow customers to exercise their rights without sharing their banking credentials.

There are risks to consumers alongside the potential benefits in new products and services. These include fraud and cybercrime, weak regulation of TPPs, uninformed consent to data sharing, unclear accountability when things go wrong, and anti-competitive behaviour by incumbents discouraging consumers from using alternative services.

We strongly urge competition authorities and other sector regulators to be cautious about using data portability as a competition tool in other markets until its effectiveness and safety in banking has been demonstrated.

2. **How can we ensure that the vulnerable and disengaged benefit from data portability?**

Any financial services consumer can be vulnerable, due to the large information asymmetries between providers and consumers, the exploitative business models of many financial firms, and the opacity and complexity of many products and contracts. This structural imbalance of power between providers and consumers is a strong argument for a general duty of care on financial services firms, forcing them to act in their customers' interests. Such a duty would necessarily include the interests of all vulnerable groups.

It is nevertheless the case that it is often the same groups that do not benefit from competition, characterised by age, low income, by physical or mental disability or ill-health, or by lower educational attainment. For example, the recent FCA consultation on overdrafts highlighted that the majority of unarranged overdraft charges are paid by only 1.5% of customers, who pay around £450 per year in fees and charges. Consumers in more deprived areas are 70% more likely to use an unarranged overdraft than other consumers. These consumers tend to have lower incomes, to be from Black, Asian and minority ethnic (BAME) communities, and have a higher probability of being vulnerable due to poor health or a disability.²

Any financial services consumer can be particularly vulnerable at certain points in their life, for example, due to ill health or bereavement. Some people – e.g. those with young children – are just too busy or distracted to get to grips with a complex and incomprehensible marketplace.

The measures in our answer to Q6 below could help protect the vulnerable and disengaged. But we also recommend (see our answer to Q21 below) that the Government's Strategic Steer to the CMA should include specific reference to analysing the experience of vulnerable and disengaged groups and using interventions that will improve outcomes for them.

¹ *Open Banking – a consumer perspective*, Faith Reynolds, (January 2017), available at <https://www.home.barclays/content/dam/barclayspublic/docs/Citizenship/Research/Open%20Banking%20A%20Consumer%20Perspective%20Faith%20Reynolds%20January%202017.pdf>

² <https://www.fca.org.uk/publication/consultation/cp18-13.pdf>

3. How can we ensure that these new services develop in a way which encourages new entrants rather than advantaging incumbent suppliers?

Competition authorities should pay particular attention to the acquisition by incumbents of firms that develop new technologies and applications, and also look at collaborations and informal tie-ups between services. It is in the interests of incumbents to acquire control over services that would otherwise disrupt their business models, and in the interests of new entrants to accept generous prices for their products. The consumer interest might not be so well served.

Vertical integration increases the likelihood that consumers will be offered “bundles” of goods and services where different elements of the bundle are subject to different regulatory regimes, for example, double glazing combined with finance, or car purchases that come with “free” insurance. If something goes wrong it can be difficult for the consumer to work out how to enforce their rights and which authorities to turn to.

Requiring APIs to enable data portability would help both consumers and firms to use standardised ways of sharing data. APIs make it easier for new firms to access the data of incumbent firms in a standardised way, rather than requiring a new firm to build individual approaches for each firm. APIs also help consumers, by offering more secure approaches to authentication (the process by which someone verifies they are who they say they are).

It is important that individual providers have mechanisms (e.g. directories, like that provided by Open Banking) for enabling trusted exchanges of data³. This facilitates portability in a safe and secure way as providers can have confidence they are dealing with a bona fide company.

Setting up clear liability regimes could also help to foster innovation and expansion. This is as important for consumers, who experience liability regimes, as it is for firms’ risk management.

These risks and issues could be specifically mentioned in the Government’s Strategic Steer to the CMA.

4. What is the best way to publish performance data so that it incentivises firms to improve and can be used by consumers when taking decisions? Should firms also offer discounts or compensation for poor performance?

Based on our research on consumers as drivers of competition, the Panel has suggested the following supply-side metrics to measure consumer outcomes and incentivise firms to behave in ways that support competition:

- **Price discrimination** – Firms could be required to publish the average price for:
 - A representative existing customer and identical new customer;
 - Groups of customers of specified types;
 - Groups representative of firms’ actual customer base.

This would alert customers to the different treatment of similar customers in different groups and act as an incentive for firms to reduce price discrimination.

- **Reputation measures** – Composite indices of the reputation of firms, including for example, frequency of complaints as a ratio of customer base and

³ The Open Banking Directory provides a “whitelist” of participants able to operate in the Open Banking Ecosystem, as required by the CMA Order. The Read/Write Directory also provides identity and access management services to provide identity information in order to participate in payment initiation and account information transactions through APIs.

incidence and amount of fines. At a firm level, this would alert customers to firms that do not prioritise customer service and create an incentive for firms to improve. At the market level, it would serve as an indicator of quality.

- **Product benchmark** - A measure of whether products, as a minimum, match a set of core features. This measure could:
 - Indicate to consumers that their basic needs will be met by this product;
 - Incentivise firms to meet this threshold and avoid 'hollowing out'; and
 - Help regulators and consumers see through spurious product differentiation.

Such measures should be made available to consumers and to market commentators who can help inform consumers' overall view of a market. The measures could be used by commercial Digital Comparison Tools (DCTs) or aggregators, alongside prices. However, there is little commercial incentive to do this, and it is likely an impartial public body (e.g. the Money Advice Service or in future the Single Financial Guidance Body) would need to step in.

Although these measures are designed with financial services in mind, they are transferable to other regulated markets.

It would be particularly helpful to develop separate measures for products and services supplied to small businesses.

In many markets, including financial services, consumers do not have enough power to change firm behaviour, so measures like the ones we suggest should be complemented with direct supply-side action by regulators to improve the functioning of markets.

It is hard to see how discounts could work in many financial services markets. Compensation, however, is a crucial regulatory tool. Because the performance of financial products and services is often not visible for some time, compensation needs to work in a different way to, say, rail or energy services. This is vital to make good consumer losses and incentivise firms to avoid mis-selling and poor conduct. The Panel believes the FCA should do more to improve the speed and coverage of firm-specific and market-wide compensation arrangements. Too often, consumers are left to fend for themselves and struggle through a lengthy complaints procedure.

5. Is there a need to change current consumer advocacy arrangements in the telecoms sector? Is so, what arrangements would be most effective in delivering consumer benefits, including for those who are most vulnerable?

No comment.

6. How can Government support consumers and businesses to fully realise the benefits of data portability across the digital economy?

To build a digital economy that works in the interests of consumers, data portability needs to be supported by the following measures. These will ensure it genuinely empowers consumers and doesn't increase provider power:

- An overhaul of Ts&Cs such that they inform consumers' consent to data sharing rather than protect providers. Ts&Cs are not currently effective tools for consent, meaning they are unlikely to comply with GDPR or to treat consumers fairly⁴. Technology can help, e.g. via real-time alerts telling people which of their data are being shared, with whom and why, and offering the chance to opt-out. This would push back on the current "take it or leave it" approach where consumers must agree to all Ts&Cs or forgo the whole service.

⁴ In our research 45% of consumers said they didn't read them, 42% skimmed them, over half said they were too long.

- Adequate resourcing of the Information Commissioner's Office (ICO) to ensure it can effectively enforce the standards in the GDPR and Data Protection Act, so that consumers' general faith that there is regulation protecting their data is matched by reality.
- Prompt establishment of the new Centre for Data Ethics and Innovation, with strong consumer representation on the Board.
- Regulation of all providers using consumers' data to: protect consumers from exploitation of their behavioural biases and 'monopolistic competition' where products, prices and information are complex and sometimes misleading; introduce tougher measures to make sure that 'loyal' customers are not penalised. If providers fail to use data which is released in order to prompt greater competition, or are unfairly selective in what they use or how they present it, a public body (e.g. the Money Advice Service or in future the Single Financial Guidance Body) should step in.
- Action now from competition authorities and regulators to make sure the new generation of shopping around and switching services do not simply repeat the problems of the past and further weaken rather than strengthen consumers' position in the market (e.g. exposure to unwanted add-on sales enabled by data sharing).
- Regulation of TPPs, including DCTs, to ensure fairness in how information is presented; to tackle 'hollowing out' of products, hidden additional charges, and transparency about commission.
- Mechanisms for trusted data exchange (e.g. directories, like the one provided by Open Banking) to ensure that providers can have confidence they are dealing with a legitimate company when requesting and providing data.
- Clear liability regimes, especially where there are several providers providing one service.
- A Data Ombudsman Service, so that people can get help and redress without being required to go through the courts, which is costly and stressful.
- Ways to connect data to a specific use, so that data can only be used for the purpose for which the consumer gave consent.
- Common digital standards for the provision of information to consumers providing transparency about whom they have shared their data with and for what purpose.
- A facility for consumers to block sharing with new or unintended third parties in real time.

It is important that the framework set out here is designed and where necessary adapted to safeguard the rights of small business consumers in the digital economy, and improve their outcomes.

7. As technology continues to develop, how do we maintain the right balance between supporting innovation in data use in consumer markets while also preserving strong privacy rights?

An essential requirement is a legal framework that protects privacy. GDPR and the new Data Protection Act are steps forward, but the rights they give people are complicated and the regime cannot rely on informed individuals exercising these rights. To help bridge this gap, we called for the Data Protection Act 2018 to include provision for independent consumer organisations acting in the public interest to bring collective action on behalf of consumers affected by a data breach. We renew this call now. An effective system also requires adequately resourced regulators to enforce consumers' rights against firms and others through standard setting, monitoring and enforcement. We are concerned that, despite the recent addition of around 200 new posts, the ICO lacks the resources to safeguard consumers in the new data-driven world, a concern that has been echoed by the Information Commissioner herself.⁵

⁵ <https://www.ft.com/content/01641ac6-9081-11e7-a9e6-11d2f0ebb7f0>

Measures are also required to prevent people's legal rights from being over-ridden by unfair and opaque contractual terms such as most current Ts&Cs and privacy policies, which also exploit behavioural biases and preferences to support providers' interests.

Innovation in consumer markets may also have other negative consequences for some consumers. We are concerned that in future people unwilling to share their data may be denied access to certain products and services, exacerbating financial exclusion. The Government should ensure the right to withhold personal data without discrimination is enforced, and Government should tackle this in its response to the Consumer Green Paper.

In addition, once consumers have allowed access to their data by a third party, they will no longer be in control of where it is passed, or how it is used. It is imperative that we find ways to help identify all providers involved in the exchanges of data and, where possible, put in place RegTech⁶ to enable traceability. This will help in the case of data breaches.

Consumers may be unaware that firms are using personal data gained from social media and other sources to make decisions about the price and availability of financial products, and even selling it to third parties. This could lead to firms 'red lining' consumers on the basis of factors unrelated to risk, with a lack of clarity about how decisions are reached. Sector and competition regulators must monitor and enforce against such discriminatory conduct, and consider rules to ensure transparency.

8. What challenges do digital markets pose for effective competition enforcement and what can be done to address them?

We agree that the Government needs to ensure that it has the right tools to promote effective competition in digital markets. Its guiding principle should be to facilitate competition and innovation that delivers better outcomes for consumers.

The increasing reliance on digital markets poses a number of challenges for competition enforcement. In particular, it raises questions about how regulators can stay on top of digital markets which may be subject to rapid technological change. The Government needs to consider whether regulators possess the appropriate tools, and have staff with sufficient expertise, to enable them to monitor the market actively, and to take action where competition may be curtailed to the detriment of consumers.

The Green Paper acknowledges that the use of AI and machine learning could facilitate collusion and undermine the benefits of competition. Faced with this challenge, regulators must keep abreast of new technology and embrace the opportunities it offers to detect collusion. We are encouraged that the CMA is establishing a new specialist digital, data and technology team to tackle the challenges from big data. The FCA is also actively considering this area as part of Project Innovate.

In addition, the very nature of a market which is increasingly reliant on the analysis and manipulation of large amounts of data may pose competition concerns. In such circumstances, it may become harder for smaller companies or new entrants to break into the market as data and knowledge may be concentrated in the hands of only a few firms (through ownership or exclusive licensing) and difficult for new entrants to replicate. We encourage the Government to address such concerns.

Intermediaries such as price comparison websites can distort markets, through, for example:

- Ownership or control by companies they list;
- Opaque commissions that influence listings; and

⁶ RegTech is the adoption of new technologies to facilitate the delivery of regulatory requirements – see <https://www.fca.org.uk/firms/regtech> for more information about this and the FCA's approach to RegTech.

- Pricing and features that improve the headline position, with other costs hidden in “extras”, or products that are ‘hollowed out’ to reduce the headline price⁷.

Competition authorities need to be alert to these risks, and include safeguards when relying on intermediaries in remedy packages.

It is also important that Government considers other oversight issues which arise from increasing reliance on data. It should consider whether the interaction between the roles and responsibilities of regulators are clear and no gaps exist. For example, in financial services the FCA has responsibility for authorising firms offering services under PSD2 based upon consumers sharing their data. Yet it is the ICO that is responsible for supervising and enforcing the GDPR, which is the primary vehicle for protecting consumers from the risks of data sharing. The Government should focus on eliminating regulatory gaps, ensuring that each organisation is clear on its role in delivering good customer outcomes, and is adequately resourced.

9. Is the legal framework that covers consumer-to-consumer transactions appropriate to promote consumer confidence?

The Green Paper quotes peer-to-peer lending as an example of consumer-to-consumer transactions. In practice, however, these arrangements are rarely between one borrower and one lender. The platforms that match borrowers to lenders often put together mixed portfolios of borrowers and offer these to groups of lenders. Even on platforms where lenders choose the individuals they will lend to, they would not generally lend all the funds they have on the platform with only one borrower.

Platforms undertake credit scoring for borrowers on behalf of lenders, and provide lenders with details of borrowers who match their risk appetite. The regulations restrict consumers to putting no more than 10 per cent of their investible funds on to peer-to-peer platforms, although this is impossible to enforce effectively. Peer-to-peer lending is not covered by the Financial Services Compensation Scheme.

The Panel has two main areas of concern about peer-to-peer lending. Both could be addressed within the current legal framework. The first is that, instead of facilitating lending between individuals, platforms are increasingly interested in moving into drawing in wholesale funding, portfolio lending, maturity transformation and securitisation. At some point this becomes indistinguishable from banking, and such platforms should be regulated as banks, including compliance with capital rules, as already happens in some EU countries

The second is that peer-to-peer lending has not yet been through a complete economic cycle, so default rates have hitherto been low. This is unlikely to persist indefinitely and it is likely that in future some lenders will lose money. So-called provision funds may not be adequate to meet all losses, and as they operate on a first-come-first-served basis they will be exhausted by defaults by the most risky borrowers. This means that the lenders attracted by the higher returns available on the higher risk borrowers will potentially gain at the expense of more cautious lenders. The existence and marketing by platforms of provision funds offer lenders an unjustified sense of security. We have made this point to the FCA as part of its post-implementation review of peer-to-peer lending, and hope it will be reflected in its proposed new rules.

In payments, many purchase scams originate on platforms which involve consumer to consumer transactions (e.g. eBay, Gumtree) where people think they're dealing with a legitimate person, who then persuades them to go off-platform to make a payment – i.e. paying someone directly from their bank account using Faster Payments (instead of

⁷ See Fairer Finance’s report ‘Misbuying Insurance’ (February 2018) for further information, available at <https://www.fairerfinance.com/assets/uploads/documents/Fairer-Finance-Misbuying-Insurance-Research-Report.pdf>

Paypal, or other card-based payments where there is protection). The introduction of new payment types via Payment Initiation Service Providers is likely to usher in a substantial increase in the use of Faster Payments for e-commerce and online transactions. However, payments made over Faster Payments are not protected and, unlike card payments, consumers bear the full risk if a company goes bust, the product is not as specified, or it is an illegal scam. The industry will soon consult on a Code of Conduct which sets out the liability a consumer takes and the circumstances under which providers will reimburse consumers in the event of authorised push payment fraud⁸. This Code must ensure that in circumstances where a consumer is expected to bear the risk, they both understand the risk and are capable of bearing it. Providers (banks) must also be incentivised to improve their fraud data analytics and to reduce the risk of opening accounts used to receive fraudulent payments.

10. In what circumstances are personalised prices and search results being used? In which circumstances should it not be permitted? What evidence is there on harm to consumers?

This is a complex area which requires careful consideration. It would be an appropriate early priority for the proposed Centre for Data Ethics.

Big data offers insurers opportunities for increasingly individualised risk assessments, which could have a significant impact on risk pooling and individual premiums. This potential demutualisation of risk will affect different segments of the market in different ways. The use of individualised risk assessments means that some people are likely to be excluded completely. Others will pay much higher premiums. Conversely of course, some consumers should pay lower premiums because their individual risk, or the average risk in their pool, is lower.

The same logic applies to credit products. While the use of personal data may help some people with 'thin' credit files get access to credit, others will be excluded, or offered credit only at exorbitant prices. If these riskier consumers are to get access to 'affordable' loans, the loans will need to be subsidised.

This demutualisation of risk is a public policy issue. The Government recognised this in setting up Flood Re and there may be other products where a socially desirable degree of mutualisation and affordable access to essential financial services may only be achievable if high risk individuals are subsidised. We urge the Government take steps to address how technology and use of Big Data can contribute to financial exclusion.

We are also concerned about the reliance on algorithms to reach decisions about whether a firm offers a customer access to a product, and the terms on which it does so. This can give the impression that a decision has been reached based upon robust analysis of relevant data, which may not be the case. It can also mean firms exploit non-relevant information about a consumer (e.g. their online search history) to identify their propensity to pay an inflated price. At present the customer is not given information about the basis on which a decision has been reached. Algorithms should be transparent, and firms must explain to consumers in clear and simple language how they reach a decision.

The widespread use of 'customer optimised pricing' in general insurance discriminates against loyal customers, who cross subsidise those who are willing and able to shop around.

⁸ <https://www.psr.org.uk/psr-publications/policy-statements/Outcome-of-CRM-consultation>

11. Should terms and conditions in some sectors be required to reach a given level of comprehension, such as measured by online testing?

The Panel's research has shown a clear need to overhaul lengthy and legalistic Ts&Cs, which typically require tertiary education-level reading skills to understand them. Contracts that consumers have little realistic chance of reading or understanding are unfair and not GDPR-compliant.

Firms should re-think how they communicate this complex but important information to their customers, using new technology to assist, such as video summaries and real-time alerts. But this will not be enough. Ts&Cs are designed to protect the firm, not inform the consumer. They also exploit the high value consumers place on speed and convenience. In our research, most people did not read Ts&Cs because they had already made up their mind to use the service (e.g. account aggregation), and had a vague feeling that they were protected by the law.

Moreover, even consumers who read and understand Ts&Cs are disadvantaged by having to accept them as a whole in order to access services. A thorough review is required if the digital economy is to deliver for consumers, taking account of the defensive nature of Ts&Cs, and consumers' behavioural biases. As an immediate priority, Government should work with stakeholders to find an alternative to lengthy and complex Ts&Cs for specifying contracts in a technology-driven era. This must facilitate consumers' genuine, informed consent. The development of an alternative should also properly take account of consumers' behavioural biases, and overcome the current defensive nature of terms and conditions.

12. How can we improve consumer awareness and take-up of alternative dispute resolution?

The 'FCA Mission: Our Future Approach to Consumers' document highlighted that lack of clarity about complaints processes discourages consumers from complaining⁹. This is something that Government should take into account when considering how to improve awareness and take-up. In addition, the FCA has researched how different methods and framing of information can be used to encourage consumers to claim redress¹⁰ which may provide useful background.

13. What model of alternative dispute resolution provision would deliver the best experience for consumers?

In financial services, the Financial Ombudsman Service (FOS) is available to individual consumers, and to 5½ million microbusinesses. Its decisions are binding on firms. The FCA has proposed to extend access to 160,000 additional businesses with fewer than 50 employees, annual turnover below £6.5 million and an annual balance sheet (i.e. gross assets) below £5 million. The needs of small business customers might be a consideration in the design of ADRs in other sectors.

Across most of financial services there is a longstanding rule that firms have 8 weeks to deal with complaints before consumers have the right to take their case to ADR (the FOS). In crucial payment services this period has recently been set much shorter, at 15 days. This is welcome. These requirements sit alongside rules governing firms' complaint handling, including how data are reported to the FCA. A consideration for ADR schemes in other sectors is the incentives on firms to resolve complaints and the rights of consumers to escalate promptly to an independent adjudicator.

⁹ <https://www.fca.org.uk/publication/corporate/our-future-approach-consumers.pdf>

¹⁰ FCA, Occasional Paper No.2, Encouraging consumers to claim redress: evidence from a field trial, April 2013
www.fca.org.uk/publication/occasional-papers/occasional-paper-2.pdf

The lessons we draw from experience of the FOS are that ADR should be compulsory and its decisions binding on firms. It should be free for consumers. A single Ombudsman covers most of financial services. There is a separate Pensions Ombudsman, which we have argued should be part of the FOS to avoid consumer confusion. Allowing firms to choose an ADR provider also risks confusing consumers, as well as a 'race to the bottom'. Multiple ADR providers in any sector should at least be subject to strict standards, including transparency and reporting.

We also suggest that the Government sets up a Data Ombudsman Service to improve consumers' access to individual redress, and to ensure that there are no gaps or inconsistencies in protection that might arise from a sectoral approach to complaint resolution.

14. How could we incentivise more businesses to participate in alternative dispute resolution?

Participation is mandatory for regulated financial services firms. This gives consumers clarity and confidence. We believe it is the right approach.

15. Should there be an automatic right for consumers to access alternative dispute resolution in sectors with the highest levels of consumer harm?

Based on experience with the FOS, yes.

16. What changes are needed to ensure local and national enforcers work together within an effective framework for protecting consumers?

No comment.

17. Do you agree with the initial areas of focus for the Consumer Forum?

There is certainly a need to ensure policy on consumer issues in the digital age is coherent. Currently HMT, BEIS and DCMS, along with their subordinate regulators and agencies, are not dealing with tensions between innovation, consumer protection, privacy and online safety. With appropriate terms of reference, the proposed Forum can play a useful role.

If the Forum is to focus on vulnerability, it must be clear that vulnerability is not merely about segments of consumers with distinguishing economic, social, demographic or health characteristics. Where consumers suffer information asymmetries and a power imbalance at the hands of providers, vulnerability can arise from, and be exacerbated by, firm conduct and product design. This is the lens through which the Forum should look.

It is important that there is an effective consumer voice in regulatory discussions about consumer interests, and the Government should include sectoral consumer experts in the Forum.

There is a more general issue about consumer representation and Brexit which the Green Paper does not cover. Consumers and consumer representatives have not been engaged fully in the Brexit negotiations. We are concerned that, post-Brexit, consumers' interests will be subordinated to considerations of business competitiveness, growing digital and related sectors, and international trade. It is vital that suitable arrangements are made to scrutinise future UK legislation and trade deals to preserve consumer rights and protections. The Green Paper does not provide enough detail on the Government-Regulator Forum to judge if it is the appropriate home for this work.

18. Have the 2014 reforms to the competition regime helped to deliver competition in the UK economy for the benefit of consumers?

In financial services, the FCA has a duty to ensure that competition works in the interest of consumers and has had a wide range of tools since the 2014 reforms to act against anti-competitive behaviour. It also conducts market studies to address competition

concerns. The FCA Mission re-stated this aim, making clear that the FCA's long-term goal is to help solve issues about the way competition works to provide better consumer choice in financial services.

So far, the FCA has opened two competition enforcement cases, and is currently investigating anti-competitive agreements and concerted practices in the asset management sector. It has also referred the supply and acquisition of investment consultancy services and fiduciary management services to the CMA for a market investigation.

However, competition enforcement and market studies are typically lengthy. Taking into consideration the complexity of financial products, and behavioural traits which result in consumers sticking to their provider, we repeat our view that demand-side remedies are normally inadequate, at least partly because consumers do not know whether they are switching to something better. The Panel believes that consumers would sometimes benefit more from more effective use of the FCA's other powers to prevent or react in a timely manner to harm, e.g. product intervention.

19. Does the competition regime provide the CMA and regulators the tools they currently need to tackle anti-competitive behaviour and promote competition?

The competition regime supplements regulators' sectoral powers. However, as noted by the NAO in its 2016 report "The UK competition regime"¹¹ there have been few enforcement decisions against anti-competitive behaviour and there is low awareness of competition law among businesses, which risks patchy compliance. Successful enforcement is needed to raise awareness of competition law and to act as a deterrent to anti-competitive behaviour but this is a challenging and lengthy processes.

Market studies are also protracted, involving rounds of consultations and discussions papers before action is taken. In financial services, competition interventions have tended to focus on disclosure remedies to prompt consumer engagement. These don't work effectively, so regulators need to look more to supply side remedies, such as automatically switching consumers to a better product or rate.

20. Is the competition regime sufficiently equipped to manage emerging challenges, including the growth of fast-moving digital markets?

Technological developments in financial markets suggest that monitoring markets and detecting anti-competitive behaviour will become more complex. For example, the use of algorithms could facilitate collusion which may be difficult to detect. The use of consumers' data, and the potential for new barriers to entry to emerge from owning or having access to large data sets, could also present new challenges for regulators when assessing potential anti-competitive behaviour.

Yet technological advances also offer regulators the ability to enhance their scrutiny of markets and firms' behaviour. The FCA regulates 56,000 firms, it cannot supervise every one, so must look for patterns of poor conduct in smaller firms. RegTech could allow regulators to monitor all firms within certain sectors proactively, rather than only sampling a proportion. Regulators must keep pace with technological advances so they understand the potential opportunities they offer (e.g. enhancing competition) while reducing or mitigating the associated harms.

21. Do you agree with the approach set out in the draft Strategic Steer to the CMA? Are there any other areas you think should be included?

We understand the Government's intention to keep the Strategic Steer at a high level, and not to impinge on regulatory independence, but we are nonetheless disappointed

¹¹ <https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf>

that it does not pick up the risks and challenges to effective competition that are raised elsewhere in the Green Paper.

Our observation on the current impact of competition policy (which is inevitably based on cases relating to financial services) is that:

- It too often notes that a minority of consumers are not served well by markets without exploring whether proposed remedies will make a difference for those specific groups.
- It too often relies on information-based remedies, when supply side measures are required to counteract provider power.
- Demand-side remedies based on data are not accompanied by measures to safeguard consumers from unintended consequences like extending digital exclusion.
- It over-emphasises consumer action, particularly searching and switching activity in markets where there is a broad selection of providers to choose from. By contrast, our research finds that such active consumers are too small in number to exert meaningful power, and that competition is impeded by supply-side problems like firms' exploitation of consumers' behavioural biases and 'monopolistic competition' where products, prices and information are overly complex and sometimes misleading.
- The CMA most often looks at competition in horizontal markets and rarely at vertical arrangements, even though these might be anti-competitive (e.g. ownership of price comparison websites by insurance companies).
- It takes too long.

We would urge that the Strategic Steer goes beyond "building consumer trust in digital markets" and guides the CMA to ensuring that technology supports and protects consumers' rights and does not confer more power on providers. There is a risk that remedies like those imposed on banks under Open Banking could fail to deliver the stated improvements if:

- consent to use of personal data is not given, or later regretted and withdrawn.
- the disruptive power of new entrants and third party providers is blunted by new relationships with incumbent providers, or business models which rely on selling or sharing consumer data in ways that can give rise to risk or detriment.

It is too soon to know whether Open Banking will deliver the benefits claimed for it. Before similar approaches are applied in other markets, several issues need to be addressed: the risks surrounding data consent, the behaviour of comparison tools and other third party providers, and potentially detrimental business models and relationships.

While we welcome the explicit reference to vulnerable consumers, this must be defined widely, to recognise that *all* consumers are vulnerable to poor supplier conduct and market power. The EU definition of vulnerability¹² expresses this well. The Steer should also include the risk of increasing the vulnerability of some groups by using tools that require data sharing and other decisions that some consumers find problematic. The emphasis on vulnerability should lead to stronger distributional and segment analysis in competition investigations, and remedies which deliver for segments whose characteristics mean they are less likely to benefit from information-based, demand-side measures¹³.

While initiatives on future digital access and skills are welcome, policy based on digital innovation needs to consider how those without digital skills or access will be improved.

¹² http://ec.europa.eu/consumers/consumer_evidence/market_studies/vulnerability/index_en.htm

¹³ The Competition Commission's evaluation of its home credit remedy package in 2013 showed that information disclosure (in the form of on-demand statements for borrowers) was ineffective. Also, there was low consumer use of its LendersCompared website that was designed to make it easier for consumers to compare personal loan offers including from credit unions. (The CC rather optimistically argued that an increase in price sensitivity among even a relatively small group of customers might be expected to prompt a reaction from lenders - but there's not much evidence of that). Overall the CC concluded that the various measures "have not had quite as much impact on competition as the CC would have liked"

The Strategic Steer could usefully remind the CMA that limits to skills and access will remain part of the backdrop for the period it covers.

Finally, under "champion consumers" we would welcome a reference in the Steer to making markets work for small business consumers, who exhibit many of the same behavioural biases as individual consumers. They cannot maximise their economic contribution in terms of innovation, employment and productivity if they face unfair terms, restricted choices and higher prices through having these biases exploited, while enjoying limited access to redress and compensation.

Yours faithfully,

Sue Lewis
Chair, Financial Services Consumer Panel