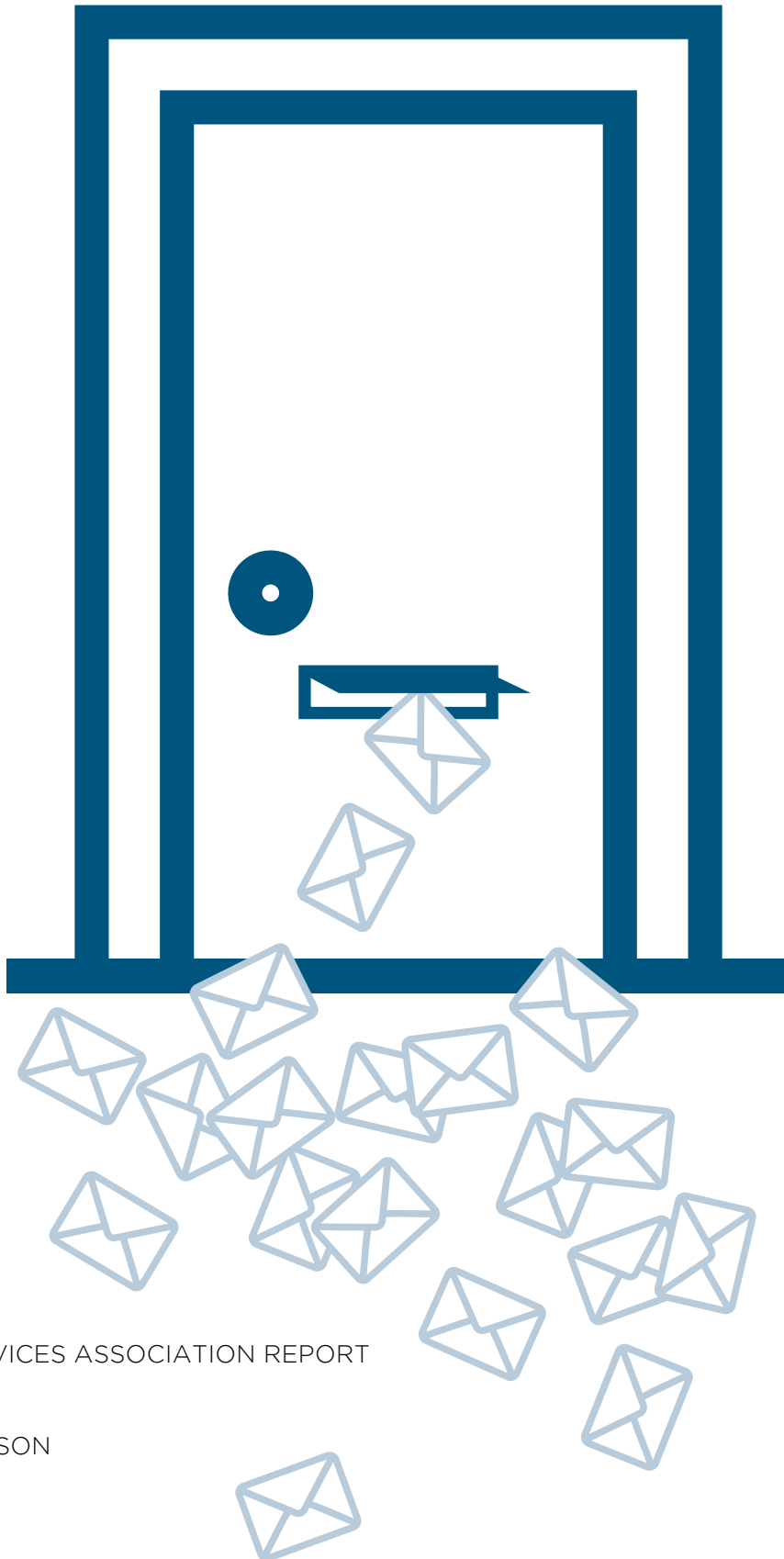
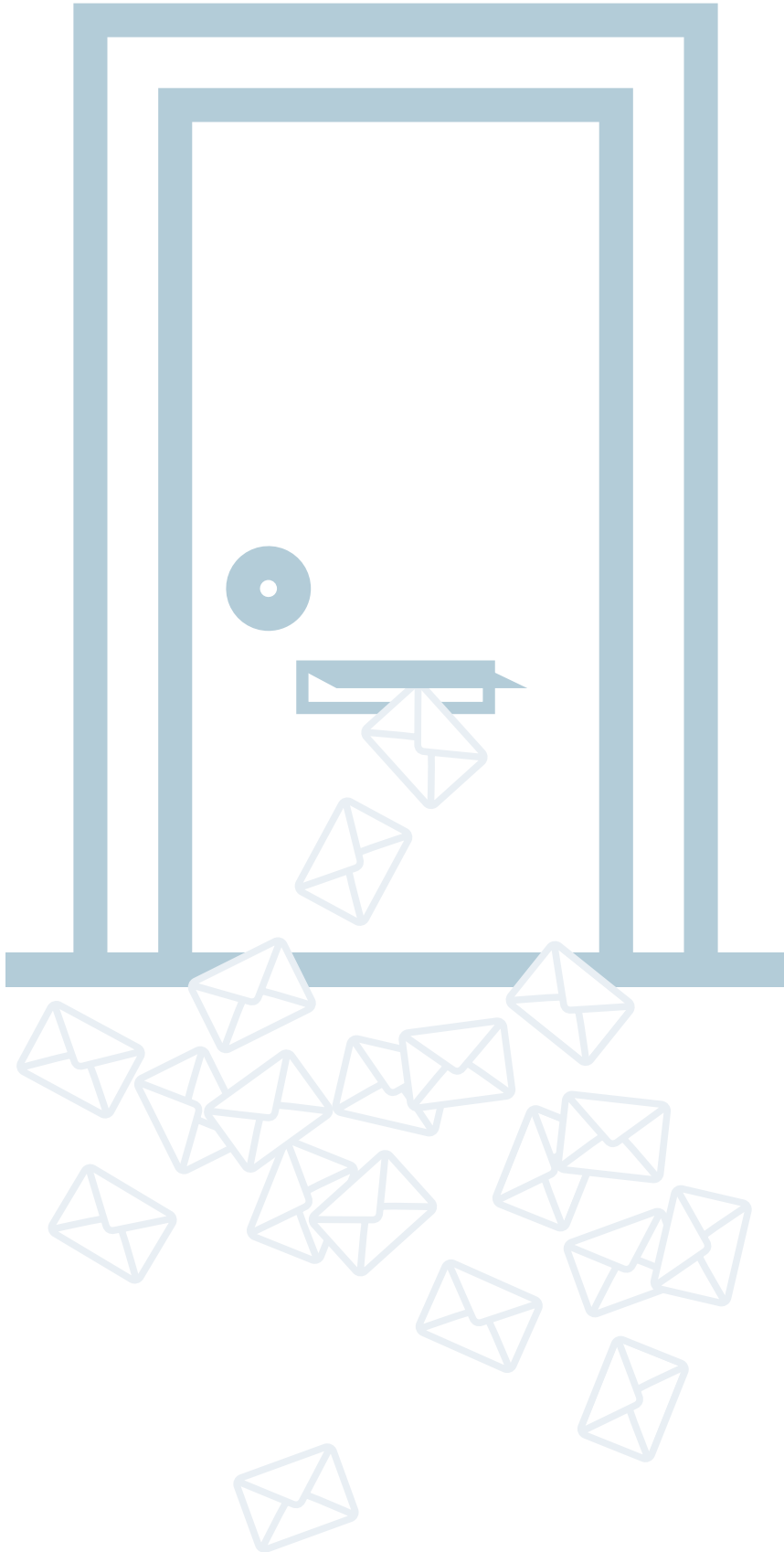


MODERNISING CONSUMER PROTECTION:

THE CASE FOR REFORMING & UPDATING THE CONSUMER CREDIT ACT



A CREDIT SERVICES ASSOCIATION REPORT
JULY 2022
HENRY AITCHISON



DISCLAIMER

Whilst we have tried to ensure that the information contained in this report is correct, we do not provide any warranty or guarantee as to the accuracy, timeliness, completeness or suitability of the information for any particular purpose. The information is current as at the date of publication. We accept no responsibility for any loss which may arise from using or placing reliance on the report or the information included in the report. Your use of the report or information included in the report is entirely at your own risk.

COPYRIGHT

This report and the information included in the report are ©Credit Services Association Limited 2022.

Any redistribution or reproduction of part or all of the report in any form is prohibited other than the following:

- You may print or download to a local hard disk extracts for your personal and non-commercial use only or for the personal and non-commercial use of anyone in your organisation.
- You may copy the content to individual third parties for their personal use, but only if you prominently acknowledge Credit Services Association Limited as the source of the material and inform the third party that these terms apply.

You may not, except with our express prior written permission, distribute or commercially exploit the report or its content. Nor may you transmit it or store it in any website or other form of electronic retrieval system.

CONTENTS

Section A Executive summary **4**

Section B Background **8**

1 An evolving regulatory landscape **10**

2 Consumer Duty **12**

3 The case for change **13**

4 What are some of the problems and what can be done? **16**

5 Communicating effectively with customers **17**

6 'Gone aways' and individual voluntary arrangements (IVAs) **19**

7 Sanctions **21**

8 Wider considerations **23**

9 What needs to happen **24**

10 Where next? **25**

A. EXECUTIVE SUMMARY

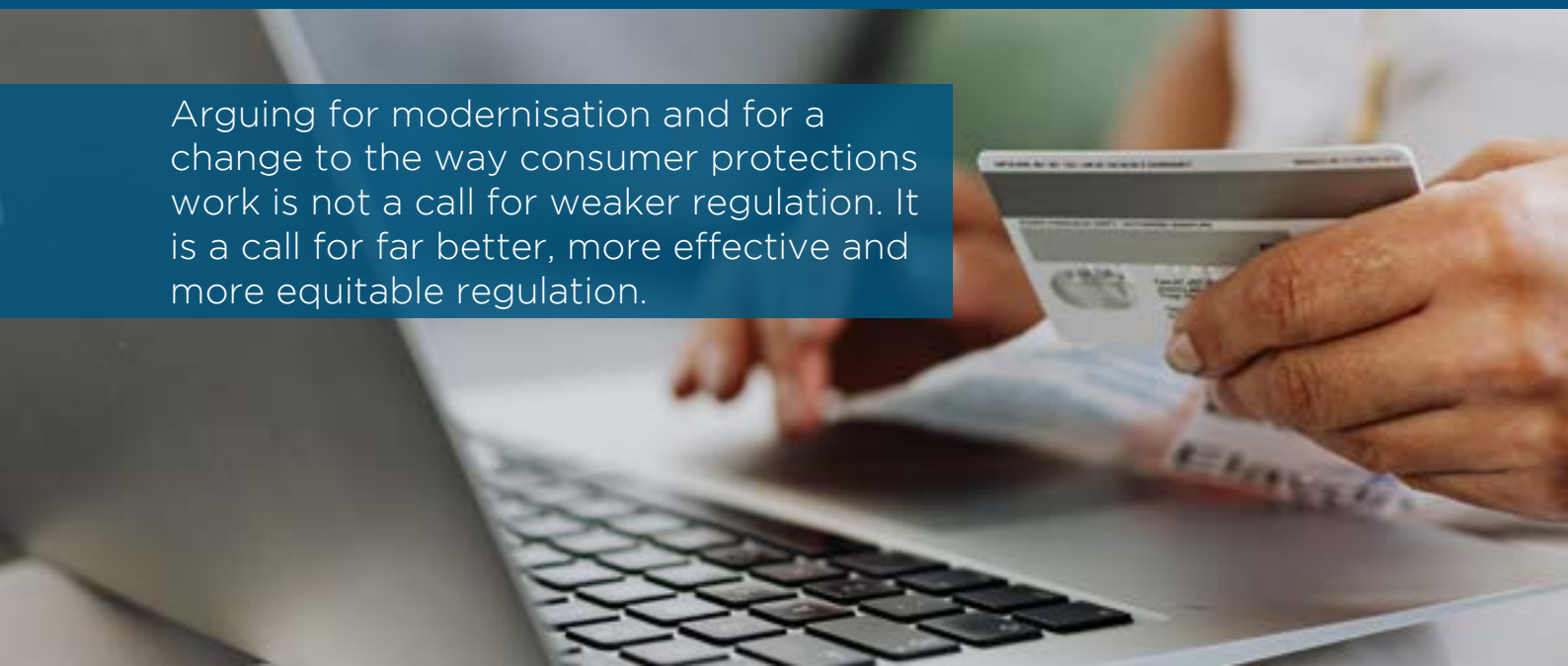
- i** The Consumer Credit Act 1974 is now almost 50 years old. In that time, consumer needs, business practices and regulatory structures have changed out of all proportion to the world that gave rise to this legislation. The Financial Ombudsman Service, the compensation scheme, the Financial Conduct Authority's activist style of regulation and extensive tool kit were not even a gleam in someone's eye.
- ii** So, do the various rationales for the Consumer Credit Act's protections hold true anymore, or has the legislation outlived its usefulness and is its very inflexibility now a cause of harm and inequity to consumers and business, rather than a source of protection and good conduct? Arguably, the passage of time and the evolution of businesses, consumers and markets has not so much caught up with the legislation, but has left it looking anachronistic and out of place, and it is welcome that HM Treasury not only acknowledges this but has signalled an intention to reform the Act.
- iii** The call to modernise does not have to be synonymous with deregulation. Rather, modernisation can be an opportunity to make older, less flexible, less fair, and less functional requirements fit for a world that the framers of the Consumer Credit Act could not have contemplated: webchat, more mobile consumers, new product types and habits, new technologies and, with them, new challenges.
- iv** The Financial Conduct Authority's 'Consumer Duty' is shortly to come into force though it seems likely that the form will differ little from what has been consulted on. What is clear is that regulators expect firms to communicate in a way that is most useful to the recipient, not as one size fits all. And there the conflict with the antiquated requirements of the Consumer Credit Act come into focus. A firm can comply with the letter of the old legislation, or with the spirit of the new. It cannot do both and still succeed in treating its customers as well as it might like.
- v** It is not only the practicalities of that conflict that should weigh on policymakers' minds. Costs to firms inevitably circle back to their customers. Poorly framed requirements that do little more than add cost and complexity but no longer meaningfully 'protect' or inform, harm customers further.

- vi** The discussion paper recommends:
- a. HM Treasury set out a consultation timetable for reform of the Consumer Credit Act 1974's requirements so that changes are introduced before the end of 2023. Almost a decade since the transfer of responsibility for consumer credit to the FCA is too long to wait for reform. While the Government's recent announcement that it will begin work is welcome, it must ensure that it genuinely does so.
 - b. The introduction of the Consumer Duty offers an opportunity to; inject a common-sense concept of reasonableness into regulation, harmonise with the wider outcomes-based approach and move further away from 'box-ticking'. Government must also act swiftly to avoid implementation of the Consumer Duty being undermined by antiquated legislation.
 - c. Post contractual information requirements, such as Notices of Sums in Arrears, should be replaced with the ability to devise more tailored communications which contain necessary information, but which reflect the needs of the target audience. Consumers have a variety of situations and needs, and the current approach treats them all identically.
 - d. Firms should not be forced to send communications in situations where it is clearly inappropriate or where it puts the customers information at risk, such as where it is known the consumer is no longer there, is wasteful and nonsensical and should stop. Punishing a creditor for not sending a document in such cases is absurd.
 - e. The time has come to move decisively away from the old regulatory regime that relies more on tripping up creditors unwittingly in error rather than actively unearthing deliberately exploitative or unfair practices. Government should remove the draconian sanctions for non-compliance and align with the more flexible and fairer mechanisms at the FCA's disposal.
 - f. Policymakers should, as a matter of course, have regard to the environmental consequences of their requirements. Having to send millions of pieces of paper correspondence unnecessarily, and sometimes repeatedly, regardless need or of the environmental cost is wasteful and destructive.

WHY THIS MATTERS

- 1** Nearly a decade after the transfer of regulatory responsibility for consumer credit was passed to the Financial Conduct Authority (FCA), the original statutory framework still largely remains undisturbed. With such a fundamental change in regulatory structure, powers, markets and philosophy over the years, can the antiquated Consumer Credit Act of 1974 (CCA) still be regarded as fit for purpose?
- 2** Consumer credit and related activities account for a huge volume of transactions and customer interactions every year. One way or another, the sector touches almost every household in the country, often multiple times, so it is vital that it results in the right sort of outcome for both customers and businesses and is fit for purpose.
- 3** Nearly 50 years after its introduction and nearly 20 years after the last major overhaul, the Consumer Credit Act 1974 is looking increasingly anachronistic. Progressively unhelpful to consumers, increasingly burdensome to business and barely compatible with current regulatory structures and ethos, it is overdue for significant reform.
- 4** With the FCA's 'consumer duty' expected to be implemented later in 2022, the problem of elderly legislation being incompatible with contemporary regulatory expectations will only come into sharper focus.
- 5** If the goal, as the FCA said in paragraph 1.11 of its 2019 review¹ of the retained provisions, is '*an effective and proportionate regulatory regime which ensures appropriate protections for consumers*' then there is a self-evident need for genuine and urgent reform. Many provisions are no longer effective, proportionate to use or ensure adequate levels of protection. Indeed, some may well be actively contributing harm to consumers.

- 6 Fundamental and holistic overhaul of the CCA's function and place in the regulatory landscape is enormously overdue. Doing so is, however, a significant undertaking. This short paper considers primarily the post-contractual challenges (that is to say, issues arising after a financial services agreement has been reached between a customer and vendor, rather than issues regarding the sale of a product to a potential customer) as, in our view, these present some of the most pressing arguments for urgent change.
- 7 The additional challenge is in calibrating the case for change with the protective purpose that the existing provisions actually serve. Put more simply, it is more important to focus on what information is being provided and how accessible it is, rather than the secondary question of sanctions for not doing so: what you are trying to achieve, rather than whether you have ticked a box.
- 8 Arguing for modernisation and for a change to the way consumer protections work is not a call for weaker regulation. It is a call for far better, more effective and more equitable regulation. As the wider regulatory framework continues to evolve and reflect a changing landscape, hanging on to outdated and ineffective requirements increasingly looks less like wisdom and more unwise and out of step with the wider evolution of markets and society.

A close-up photograph showing a person's hands holding a credit card over a laptop keyboard. The background is blurred, showing a person's arm and a pen on a desk. The text is overlaid on a dark blue rectangular box on the left side of the image.

Arguing for modernisation and for a change to the way consumer protections work is not a call for weaker regulation. It is a call for far better, more effective and more equitable regulation.

B. BACKGROUND

- 9** In many respects, the CCA was well ahead of its time. It sought to regulate both the transaction and those deemed fit to enter the market and balance these aspects to create a relatively low-cost regulatory system which nevertheless still had meaningful and effective protections in spite of the lack of active regulatory intervention.
- 10** A relatively low-cost gatekeeper in the form of the Office of Fair Trading (OFT) meant that there were few barriers to entering and remaining in the market beyond the conduct and competence of either the firm seeking permission, or of those involved in it. But ‘low cost’ and ‘self-funding’ are not easy bedfellows when it comes to taking the most appropriate action to tackle poor practice, especially given the tools available and especially if modifying the costs of the licensing regime rested with Parliament. The OFT did a good job² with the resources and tools available, but as a regulatory structure for an increasingly complex market, it was decidedly limited.
- 11** To balance the lightness and, presumably unintentionally, the weakness of the ‘gatekeeper’ regime applicable to firms entering and remaining in the market, the CCA itself contained significant requirements to be met in relation to each transaction. Critically, these applied whether the firm was licensed or not. Extensive and prescriptive requirements on everything from advertising and pre-contract information to agreements, post-contract information, settlement, default and termination. The CCA had a prescriptive set of requirements for most situations whether timing, form, content or level of detail.
- 12** With those requirements came some robust sanctions for non-compliance, often targeting the creditor’s ability to recover their money. The concept of ‘unenforceability’ provided a defence that a debtor could raise to halt enforcement of a debt. Unenforceability didn’t change the fact that the debt was owing, merely what the creditor could do about non-payment. It might be that the creditor could remedy the problem themselves – for example by issuing corrected paperwork – or might require the permission of a court or the OFT, which could then consider the prejudice that the debtor suffered because of non-compliance.

- 13** Since the regulator could not intervene in every transaction and could not order redress where a consumer had been prejudiced or harmed, the CCA applied the sanction automatically to balance the respective positions. If key information was not provided, the creditor was prevented from enforcing their own rights until it had been. But this was always a blunt tool and creditors' rights could be easily undermined by the most trifling of administrative errors. Consumers could benefit, perversely having suffered no harm or prejudice at all.
- 14** The last major reforms³ before the transfer of consumer credit regulation to the FCA were set out in the 2006 Consumer Credit Act⁴. However, this legislation added further detailed requirements for the provision of post contractual information, particularly in arrears situations, and an enhanced sanction for non-compliance.
- 15** Clearly, in many respects the CCA was designed to be self-enforcing, balancing a relatively light touch, and lightly funded, regulatory regime. In essence, the strength of the protective measures were proportional to the weaknesses present in the level of oversight and powers for intervention. That, however, changed significantly in 2014 with responsibility for consumer credit being transferred to the Financial Conduct Authority (FCA) in the era following the global financial crisis.
- 16** The transfer itself was a rushed affair with many of the CCA requirements retained with Government undertaking to review them and reform them at a later date. The FCA was charged with conducting a review of the retained provisions and it duly reported in 2019⁵. Thus far, unfortunately, the Government has done little to move matters forward beyond it's recent announcement.

³ There were reforms to implement the EU Consumer Credit Directive but pre-existing sophistication of the UK's approach to regulation relative to other EU jurisdictions meant that many of the changes were 'technical' rather than fundamental.

⁴ [Consumer Credit Act 2006](#).

⁵ [Review of retained provisions of the Consumer Credit Act: Final Report](#) - Financial Conduct Authority [March 2019].

1. AN EVOLVING REGULATORY LANDSCAPE

- 17** The reason for inertia in Government in respect of CCA reform lies perhaps in the approach taken by the FCA's review. Although the FCA lays claim to a balanced and proportionate regulatory system, in its review it conspicuously failed to grasp that the world it regulated, and the way it regulated, was very different to the one that gave rise to the design of and need for the CCA's protections.
- 18** The world the CCA was originally designed for did not have access to an independent dispute resolution service in the form of the Financial Ombudsman. It did not have the minimum standard that a firm should 'Treat its customers fairly'. It most certainly did not envisage the incoming Consumer Duty and the profound changes that this will bring. In a variety of different ways, the CCA was designed to compensate for a world where the FCA, its powers and its rule book emphatically did not exist.
- 19** Which begs the question: does the rationale for robust automatic protections still hold true when the regulatory system is no longer weak and under resourced? The FCA's review drew out many of the operational challenges that the CCA gives rise to, but crucially it failed to consider whether the underlying policy rationale remained valid, whether the risks remained the same in an FCA environment or whether it was in possession of tools that could address these concerns. Was it still the case that the new regime was balanced and proportionate? Was it fair and equitable for all participants, as well as the consumer?
- 20** To give an example, the FCA suggested that *'the 'self-policing' nature of the sanctions of unenforceability and disentitlement to interest and default sums contributes significantly to ensuring key customer information needs are met'*⁶ but it offered little evidence to support this assertion. Although it acknowledged that there could be an element of disproportionality in retaining the requirements, there was little attempt to consider whether there might be unintended consequences for the consumer or whether there were other mechanisms in operation in its wider regime that could result in the same outcome in a more appropriate way.

- 21** Even in 2019, parts of the FCA’s analysis seemed somewhat superficial. It read less as a review of the retained provisions, and their continuing appropriateness and proportionality, than it did a survey of whether CCA provisions could be replicated in the handbook. The review spent little time considering what the purpose of a provision might be, whether it was effective in its CCA form, what unintended consequences there were and how those requirements fitted into its own wider architecture. The regulatory equivalent of a hoarder saving bits of string purely ‘in case they came in handy’ and irrespective of whether that could ever be the case.
- 22** The FCA’s initial reaction was to focus on the post contractual elements of the CCA as being the most suitable for early reform. In that respect, we did agree and still do. Even without considering the deeper issues of ensuring appropriate and proportionate regulation, the post contractual requirements are amongst some of the least well designed and the most prone to unintended customer and business harm of all the aspects of the CCA. They are also amongst the provisions that can be most easily reformed and integrated into the FCA’s rule book.
- 23** Arguing for modernisation is not a call for weaker regulation. It is a call for better regulation that fits more easily with society, the need for protection, what that protection should be and the architecture within which it operates. The CCA might well have been far ahead of its time when originally drafted, but time and a changing world has inevitably caught up and overtaken it.

2. CONSUMER DUTY

- 24** In July 2022, the FCA is expected to publish the final rules on its 'Consumer Duty'. The FCA is hoping that the package of measures that it has designed will drive firms to put customers interests at the forefront of everything firms do. The new Principle 12 will eclipse the older and more entrenched Principle 6 (Treating Customers Fairly) by burrowing into everything from product design and monitoring to communication, fair value and so on.
- 25** The introduction of the Consumer Duty will be a profound change. It might not necessarily have an impact on exactly what a firm is doing, but it will change how firms think about what is being done, how and why it is being done, and whether that is in the interests of their customer throughout the lifecycle of the relationship. In that, firms have already identified that the CCA is not wholly compatible with the FCA's objectives or the principle itself.
- 26** The post contractual requirements are a particular challenge both to firms and to consumers. If Government, and indeed Parliament, is serious about improving the experience of customers then it is necessary to genuinely understand what the problems are.

The introduction of the Consumer Duty will be a profound change. It might not necessarily have an impact on exactly what a firm is doing, but **it will change how firms think about what is being done, how and why it is being done, and whether that is in the interests of their customer** throughout the lifecycle of the relationship.

3. THE CASE FOR CHANGE

- 28** One key benefit of the move to the FCA regime is a greater degree of introspection. Firms actively want to understand why one thing works and another doesn't, and what could be done better next time.
- 29** To draw on that trend to introspection and to get a better understanding of some of the issues with the post contractual requirements of the CCA in real terms, the CSA conducted a small survey of members in April/May 2022. While the relatively small sample is indicative rather than definitive, the results were nevertheless surprising.
- 30** Every single respondent identified one, or more, post contractual provisions generating problems. It was open to respondents to skip the question if they did not consider that there were any challenges with post contractual requirements, though none did so. Similarly, no respondent chose to identify an 'Other' concern.

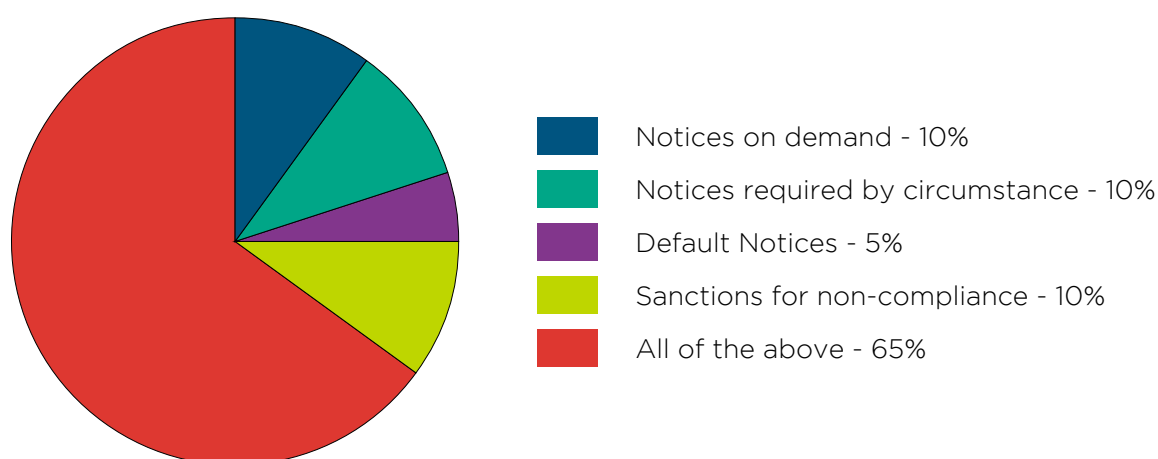


Fig 1: Firm perception of issues with post contractual CCA requirements.

The largest proportion, some 65%, considered that all of the options available gave rise to problems, with three of the remaining four choices garnering only 10% of responses. The fourth, Default Notices, was viewed as the primary issue in only 5% of responses⁷.

⁷ It does not appear that the relatively recent changes to the form and content of default notices had much, if any, influence over the perception of default notices.

- 31** Although the sample is not large enough to be definitive, it was nevertheless striking that no respondent considered that the post contractual requirements were problem free. Indeed, the overwhelming majority appeared to consider that the existing provisions suffered from a multiplicity of problems. Given that responses were strongly informed by interactions with customers, the reaction was surprising.
- 32** A supplementary question probing to understand the nature of the perceived issue produced similarly surprising responses.

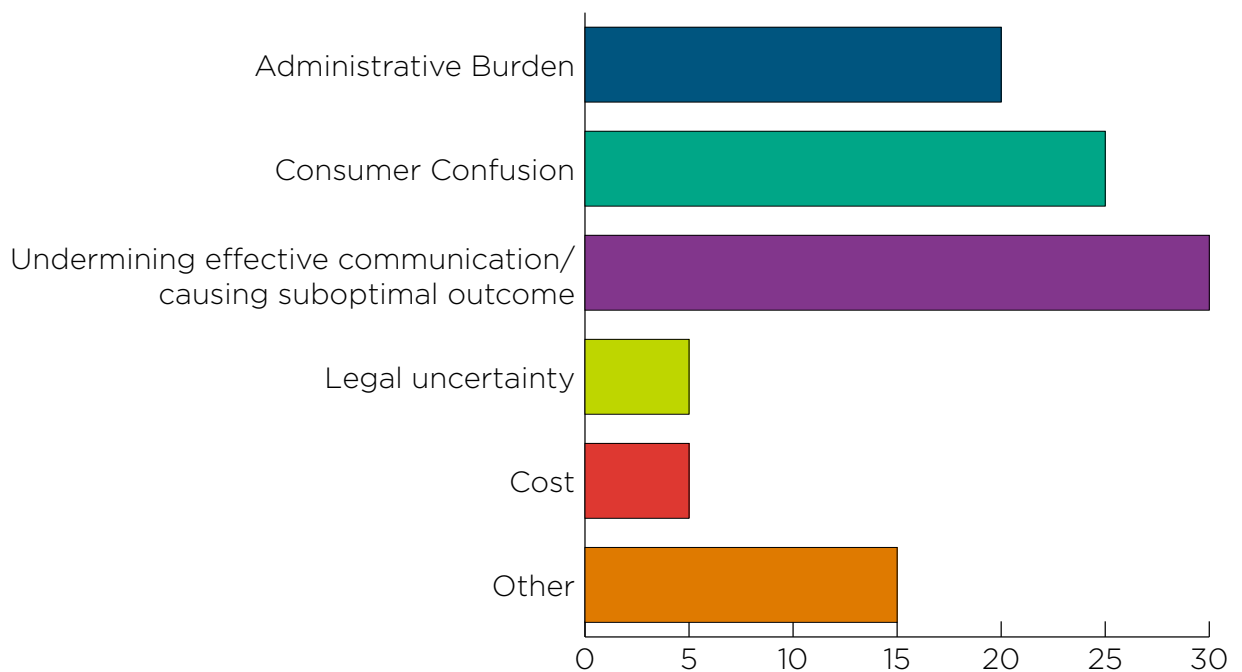



Fig 2: Drivers for harms to customers and/or firms (%).

- 33** Despite the conventional wisdom that cost and legal uncertainty were the principal problems with post contract requirements, the responses strongly indicate that the impact on consumers is, in the experience of respondents, a far more significant issue. Amongst responding debt collectors and debt purchasers, it was the negative effects on the customers (those in debt) that was of greater concern, followed in third place by the administrative burden.

- 34** Again, this is an indicative rather than definitive result. However, it is based not on theory or speculation but rather in the interaction of firms with their customers. Many of the post contractual provisions of the CCA are designed to provide information and enable better decision-making on the part of the consumer but the results would suggest that the reverse is true.
- 35** Determining the scale of the problem is inherently difficult, not only when assessed against a survey sample but also taking into consideration the sheer diversity of our members' activities and business models. While we did ask for indications of prevalence, sensitivities such as the nature of the regulated agreements handled by individual firms and the scale of individual businesses produced wide variations, from single digits to 100%. The average incidence of an issue which could be linked back to the statutory requirements stood at 35% though, as indicated, that figure should be treated with caution.
- 36** Different sectors or firms with different relationships to their customers might have differing perspectives, and it would be instructive to compare attitudes with other trade associations. However, it is worth noting that CSA members deal with many millions of accounts at any given time. Vastly more than the insight of regulators, policy makers or consumer lobby groups – combined. And even the insight of CSA members would be eclipsed by those of creditors themselves in terms of scale.
- 37** While individual figures should rightly be treated with caution here, it is nevertheless obvious that the retained post contractual provisions present considerably more of a problem than is currently recognised by policymakers or the regulator. Moreover, that negative effect is felt by both firms **and their customers**. It is perhaps time that the pace of reform is increased somewhat.

4. WHAT ARE SOME OF THE PROBLEMS AND WHAT CAN BE DONE?

- 38** It is impossible to comprehensively work through all of the issues with the retained provisions of the CCA, and its secondary legislation in a handful of pages. The point of this paper is to draw attention to the importance of modernising the CCA and to emphasise the harmful effects that the current – and somewhat longstanding – lack of urgency has on both consumer and firm.
- 39** However, it is possible to draw out some of the issues in a thematic sense and to try restarting the debate, particularly with the Consumer Duty shortly to become a firm fixture of the regulatory landscape.
- 40** It is vital that consumers are properly protected and are given the right information in the best way at the appropriate time so that they can make informed decisions about their financial lives. It is also appropriate that there are sanctions for non-compliance that are proportionate, appropriate and dissuasive. But a significant part of the current problem is that the existing regime does not tick any of these boxes.



It is vital that consumers are properly protected and are given the right information in the best way at the appropriate time so that they can make informed decisions about their financial lives.

5. COMMUNICATING EFFECTIVELY WITH CUSTOMERS

- 41 As the FCA has rightly noted both in its forthcoming Consumer Duty framework and has previously in work it has done on smarter communications, information and delivery are most effective when they can be tailored to the intended recipient, and the intended channel.
- 42 It is important that the customer receives the right information, presented in the most accessible way to them and at the right time. Key information should not be lost or buried in documentation, warnings should stand out, and the recipient should be able to make an informed decision or to fully understand the position that they are in.
- 43 It is also important to recognise that different customers have different needs. Although this is true of vulnerable customers, it is also true more widely. Different groups of customers using different types of products have different needs, and those needs change depending on the point in time. The world does not work on 'one-size-fits-all'.
- 44 But the problem with the CCA is that it does take a 'one-size-fits-all' approach. It requires the same information and often presented in a largely uniform way and irrespective of the situation. The FCA, and the OFT before it, has suggested that the mismatch can be resolved by 'layering' – sending a covering note that clarifies the confusion the prescribed documents cause – but long experience by firms shows this does not work but actually adds to the confusion.

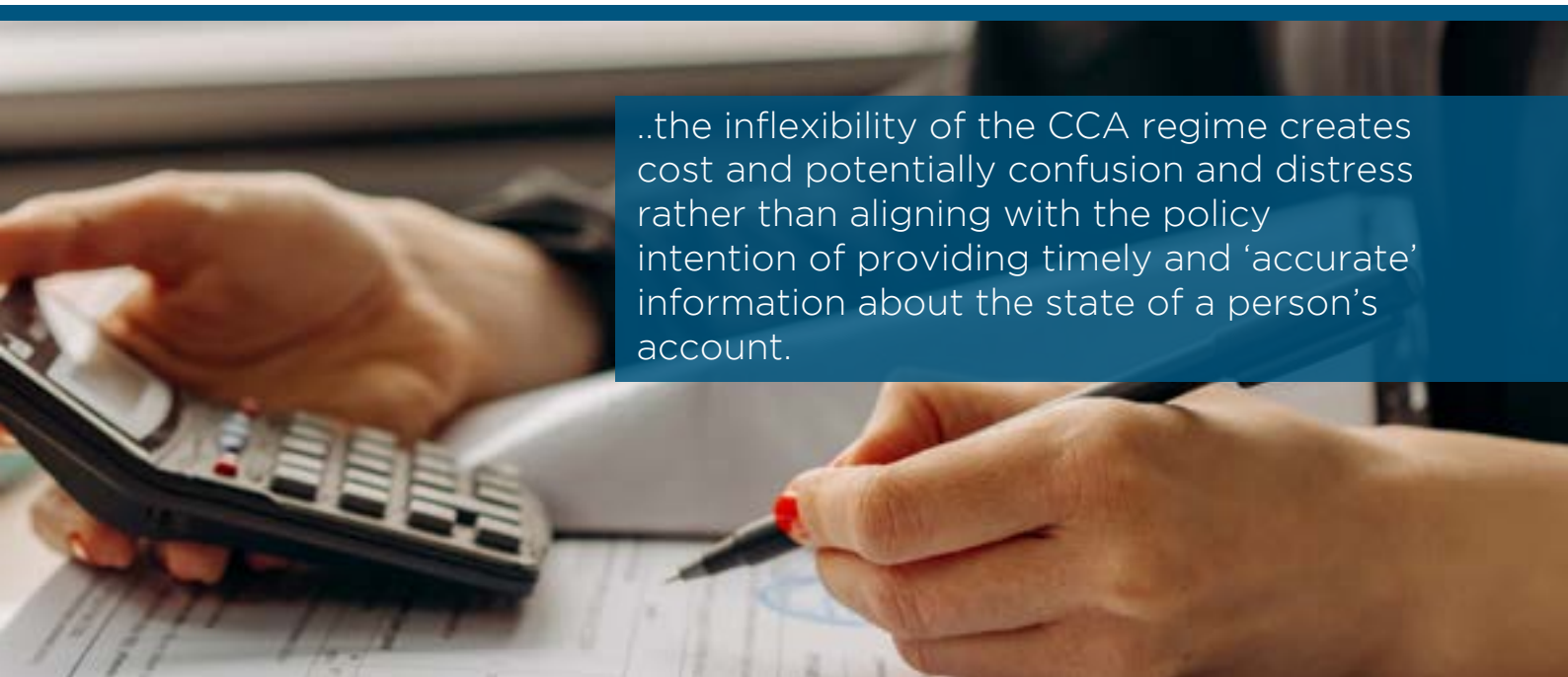
Different groups of customers using **different types of products** have **different needs**, and those needs change depending on the point in time. The world does not work on 'one-size-fits-all'.

- 45** To give an example, a Notice of Sums in Arrears is sent where the customer pays less than the contracted amount. The intention is that the customer is aware that they have fallen behind and of any additional charges or costs. Providing this information is certainly appropriate but sending such a notice where the 'arrears' are expected because the customer is already in a repayment arrangement for a debt simply causes confusion. For the customer, there is the uncertainty and potential distress in receiving a notice even if there is an appropriate explanation.
- 46** For the firm, there is the cost of preparing and sending both notice and covering explanation (and the costs of designing, testing and redesigning the covering note) and then often of dealing with the distressed customer who may have noticed the explanation but focused on the more formal statutory notice.
- 47** It is entirely right that customers should be provided with information on how their account is behaving and where they are financially so that they can make informed decisions. However, it would be better to have a single document that contains prescribed information, but which can be tailored to the circumstances. Relying on firms to resolve the deficiencies of statutory requirements is not reasonable or appropriate, and putting customers and firms to cost and inconvenience and, in the case of some customers, causing distress unnecessarily is antithetical to the vision of the Consumer Duty.

6. 'GONE AWAYS' AND INDIVIDUAL VOLUNTARY ARRANGEMENTS (IVAS)

- 48** Another peculiarity of the CCA is that it requires firms to send information where they know that the customer is not at the address to receive communications or where the information will, in practical terms, be wrong. These are not new issues and, indeed, were identified shortly after the requirements were first introduced many years ago.
- 49** The CCA is prescriptive. Notices must be sent when the legislation says they are required and if they are not sent there is an automatic penalty for the firm. At minimum this can be that the document is temporarily unenforceable, depriving the creditor of their rights, but in some cases, this can also result in the creditor being deprived of interest. They must also contain information which might be 'technically right' in the context of a credit agreement, but in reality 'wrong' in the circumstances.
- 50** A 'gone away' is a person who is known to have left the last recorded address associated with them but has not yet been relocated. In such circumstances, the firm must send any required documents to that last known address. Obviously, the firm has an invidious choice – they can issue the notice knowing that the person is not there (incurring a cost unnecessarily) and that there is the potential for that person's information to be seen by a third party⁸ **or** they can choose not to send the documentation and incur automatic sanctions in the form of unenforceability and, potentially, loss of interest.
- 51** A person on an IVA presents a slightly different problem. Repayments will be determined by the structure of the IVA but while the IVA is in place, the firm is still required to send statutory notices or, as with 'gone-aways', incur automatic sanctions. The problem here is that the statutory notices will show missed payments as far as the credit agreement is concerned, but as with informally agreed repayment plans, this will be perfectly reasonable. While the customer will still need information on the state of repayments, it will be information from the IVA's trustee that will correctly show the position, not statutory documents required by the CCA.

- 52** Again, the inflexibility of the CCA regime creates cost and potentially confusion and distress rather than aligning with the policy intention of providing timely and 'accurate' information about the state of a person's account. In both cases the creditor can decide not to send the notice, but that comes at the cost of possibly undermining the creditor's quite legitimate rights for no good reason. Or in the alternative, the customer is provided with information that is far from helpful or has the security of their information unnecessarily risked.
- 53** In both cases, the 'stock' answer to the need for CCA reform is that firms themselves can either bear the cost or see their rights eroded if they try to do the most appropriate thing for the customer. Clearly, this is not a reasonable stance for policymakers to take, particularly when the path of regulation is increasingly leaning to more nuanced and more flexible communications.



..the inflexibility of the CCA regime creates cost and potentially confusion and distress rather than aligning with the policy intention of providing timely and 'accurate' information about the state of a person's account.

7. SANCTIONS

- 54** This paper earlier touched on the balance and proportionality of unenforceability and interest disentitlement as a sanction for non-compliance. As has already been shown, non-compliance can arise for reasons that are in the customer's interest not merely because of a failure or deliberate misconduct of a firm.
- 55** In the original CCA regime, before access to the Financial Ombudsman and before the transfer of consumer credit to a more intrusive regulator with much stronger powers to intervene, there was a certain amount of logic to unenforceability as a consumer protection. The regulatory framework would not be able to intervene so it was important that the consumer's position was strengthened in as much as they could, in theory, point to a failure by the firm and raise unenforceability as a defence until the firm fixed the problem.
- 56** The additional interest disentitlement provision, where it applied, has been widely regarded as draconian, in almost a literal sense, since the start. While unenforceability would temporarily suspend a firm's rights until a mistake was corrected, interest disentitlement would punish a firm for even the smallest unintentional transgression. Bizarrely, the punishment is not determined by the scale of harm or potential prejudice to the customer, but rather by how long a failing persisted for.
- 57** The sheer absurdity of this mechanism as a consumer protection should have been drilled home for regulators and policymakers shortly before the FCA took over consumer credit regulation where several major lenders announced extensive and expensive remediation exercises for, in several cases, technical breaches resulting in what appeared to be minimal (if any) prejudice to the customer.
- 58** The FCA has previously suggested that the existing sanctions contribute to compliance but there is little evidence to support this claim. The reality is that many examples of non-compliance tend to show that it was in error rather than deliberate. Moreover, over-emphasising the theoretical deterrent value risks losing sight of the negative effects for the customer.
- 59** As a general proposition, costs to firms inevitably circle back to their customers. So excessive or disproportionate sanctions will ultimately harm consumers in the long term as much as firms in the shorter term. While it might inappropriately (and in the absence of harm or prejudice, arguably unjustly) enrich the minority of customers affected, the majority will face the opposite in higher costs and the like.

- 60** But there is also a less obvious potential consequence for the individual customer in some circumstances which is less than desirable and does arise in cases of recovery. Unenforceability is a temporary effect which can generally be cured by the creditor⁸ meaning that once the failure has been cured, the creditor can continue to enforce the agreement. Imagine the customer that has gone through the process of default and recovery, and then on to enforcement through the courts before a failure is identified at the 11th hour. The firm must withdraw the process before the courts, go through the process of unpicking and remedying the error before putting the customer through the whole process **again**. This would not seem to be an ideal customer journey but unfortunately one that a firm would have little choice over.
- 61** There is also a less obvious, albeit less compelling, issue for the markets. Debt sale and purchase is far more common than when the CCA was originally framed, or indeed when it was last substantively amended. One of the key challenges is in ensuring a complete picture of what has happened to an individual agreement which, regardless of proper due diligence, can leave a purchaser responsible for resolving an error that it had no part in. In a sense, there must necessarily be an acceptance of commercial risk in buying anything, but the current approach does have the undeniable potential to leave purchasers being penalised for something they were unaware of and could not influence to a degree that is often disproportionate to any harm experienced by the customer.

Imagine the customer that has gone through the process of default and recovery, and then on to enforcement through the courts before a **failure is identified at the 11th hour**. The firm must withdraw the process... ..before **putting the customer through the whole process again**.

8. WIDER CONSIDERATIONS

- 62** With governments now grasping the importance of climate change, it is unsurprising that firms of all description are looking closely at environmental and social considerations not merely from their own operations but which are imposed on them by regulation. Without prejudice to the importance of consumers having access to key information or having their communication channel of choice respected, it seems oddly anachronistic that the default approach in the consumer credit space is to produce vast quantities of information in a paper format.
- 63** A trawl of the internet can yield a wide range of estimates for the environmental cost of paper. One, that of Kyocera Document Solutions¹⁰, estimates that every 100,000 sheets of paper has a carbon footprint of 6,000kg, consumes 8 trees and 2,000kWh of energy. With responses to our survey suggesting that the number of notices (some of which will have multiple pages) ranges from the thousands and tens of thousands to the millions **each year**, it does not take much effort to realise the environmental impact.
- 64** The figures from our survey are higher, but assuming seven million notices of various types are sent each year and each notice consists of 3 sheets of paper, then on the basis of that above estimate, that would equate to some 1,260,000kg of carbon footprint each year. This estimate alone should at least give some sense of how regulation – not just the regulated – needs to be alert to environmental considerations. Add postage and potentially needing to produce multiple copies of the same documents and the challenge becomes somewhat obvious.
- 65** Although this is perhaps not the most profound consideration in the case for change, it is nevertheless something that should be seriously incorporated into any modernised framework: what may have been necessary and relevant in the context of 1974 is now unnecessarily costly, wasteful and environmentally damaging nearly fifty years later.

9. WHAT NEEDS TO HAPPEN

- 66** In a sense, the first step is in policymakers accepting that modernisation is not a 'nice to have' but a matter of urgency for consumers, firms and markets. Change needs to happen, but it is change that reflects the reality rather than rhetoric of consumer protection, and which does not simply jam conflicting regulatory approaches together and hope for the best. What might have been true in 1974, or even in 2006, does not necessarily hold true today.
- 67** It is entirely right that consumers are furnished with key information at relevant touchpoints throughout the potential lifecycle of an agreement, but the FCA is undeniably right that that information needs to be presented in a way that is functionally useful for the recipient. The current approach of policymakers mandating what information they think is useful or how they think it should be presented does not work.
- 68** Flexibility is key if customers are to take on absorb and, where appropriate, act on information provided. Firms understand their customers better than policymakers or non-industry lobby groups so should be able to tailor the presentation of that information to best fit. Doing so would also have the benefit of actually being in line with the expectations that the Consumer Duty has for firms.
- 69** Inappropriate and unnecessary prescription can hurt consumers particularly. Bearing in mind the post contractual requirements are, in the main, dealing with situations involving later or non-payment, adding distress under the guise of 'protection' is no protection. Were a firm to consciously do so in relation to its own customers, that would rightly be regarded as misconduct.
- 70** Sanctions need to be appropriate, proportionate and dissuasive. They should not be onerous, unjust and/or unfair. There is no evidence to support the contention that the historic approach results in higher levels of compliance or is even a meaningful component in achieving compliance at all given all of the other levers. Even if that were the case, the FCA's regime has ample levers to achieve the desired effect without the CCA's sanctions.
- 71** If there is a seriousness in Government and the wider regulatory framework that the FCA's Consumer Duty should be more than words on a page, then it is incumbent on them to facilitate a climate where an ethical and equitable approach to customers and the conduct of business can flourish.
- 72** It is not ethical to expect those being regulated to resolve the deficiencies of that regulatory structure and still less so to be expecting that result over a decade after problems were identified. If something does not work, fix it.

10. WHERE NEXT?

- 73** Although the focus here is on the post contractual requirements of the CCA and the need for change, it is simply not possible to meaningfully work through all of the potential problems and permutations in a short paper.
- 74** That is a far bigger task and one that will need to be undertaken to ensure that policymakers actually understand the nature of the challenges – to consumer and to business – what needs to change, and why.
- 75** The FCA’s Consumer Duty does have the potential to result in what might be termed a paradigm shift – a fundamental change in approach – but only if it is not held back from the start by antiquated anchors holding onto the ‘wisdom’ of the past.
- 76** A failure to act soon, simply means that more customers and more businesses will experience more poor outcomes, and bear more costs, that they didn’t need to.
- 77** While industry might have become adept at mitigating policy and legislative failures, it cannot fix them. In this case it requires an act of political will and leadership especially given the wider economic climate. People have confidence in markets that actually function properly.

AUTHOR

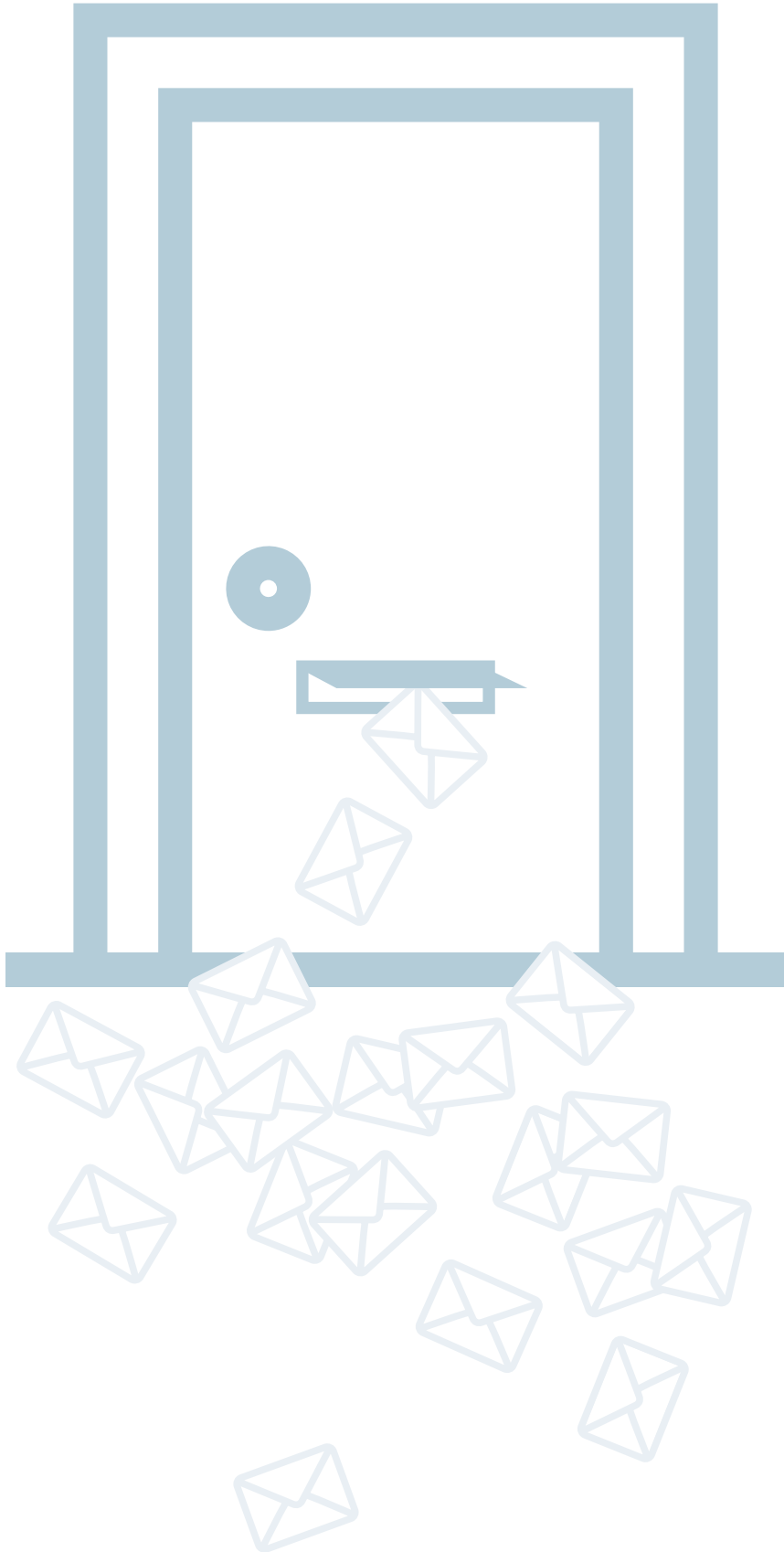
HENRY AITCHISON
CSA HEAD OF POLICY

henry.aitchison@csa-uk.com

ABOUT THE CSA

The Credit Services Association (CSA) is the only National Trade Association in the UK for organisations active in the debt collection and debt purchase industry. The Association, which has a history dating back to 1906, has over 300 member companies which represent 90% of the industry, and employ approximately 11,000 people. At any one time its members hold up to £67 billion for collection, returning nearly £4 billion in collections to the UK economy per annum. As the voice of the collections industry, our vision is to build confidence in debt collection by making the entire process clear, easy to understand and less stressful for all those involved.







www.csa-uk.com



[credit-services-association](https://www.linkedin.com/company/credit-services-association)



[@CreditServicesA](https://twitter.com/CreditServicesA)



[@CreditServicesA](https://www.facebook.com/CreditServicesA)



[Credit Services Association](https://www.youtube.com/CreditServicesAssociation)

The introduction of the Consumer Duty offers an opportunity to; inject a common-sense concept of reasonableness into regulation, harmonise with the wider outcomes-based approach and move further away from ‘box-ticking’. Government must also act swiftly to avoid implementation of the Consumer Duty being undermined by antiquated legislation.